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Law and Coloniality of Empire: Colonial Encounter and Normative Orderings in the Indian Sub-Continent

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ABSTRACT

This paper argues that colonialism not only affected the legal frameworks that are largely in place in the Indian sub-continent today, but laid the foundation for contemporary struggles of the socio-legal sphere in the region. As slightly distinct from the general scholarship on post-colonialism and colonial continuation, this paper presents two main arguments. First, it suggests a move towards the idea of Coloniality to highlight the essence of the colonial (legal and epistemological) project, rather than focussing on the historical episode of colonialism. Second, linked with this, is the argument that the colonial encounter not only led to transformation of existent legal systems, but also radically altered the logics and rationalities that lay at their foundation. By focussing on the concept of Coloniality, its link with law and its place within Empire, the paper presents a way to understand the contestations between Islamic political ideals and state-authored legal systems in the Indian sub-continent, particularly in the context of Pakistan.

1 INTRODUCTION

*'Our desire is your law if you govern in our name, even before that desire has been articulated as a law to be obeyed.'*¹

There is a curious link between colonialism's use of the instrumentality of law, and the studies of law in the postcolonial contexts. That the colonial enterprise employed and transformed law in its various manifestations for the purposes of appropriation and control has certainly become a truism, owing to a varied corpus of legal, cultural, anthropological, political and theoretical discourses on this subject.² Colonialism's use of the instrumentality of law, its effect on the

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¹ Gayatri Chakravorty Spivak, *A Critique of Postcolonial Reason: Toward a History of the Vanishing Present* (Harvard University Press, Cambridge, MA 1999) 216-217. Spivak provides an intriguing account of the colonial master as a Freudian (Paranoid-Schizophrenic) Super Ego, where law and desire coincide.

² See, for instance Sally Engle Merry, 'Law and Colonialism' (1991) 25 *Law & Society Review* 890; Nicholas B. Dirks, 'Introduction: Colonialism and Culture' in Nicholas B. Dirks (ed), *Colonialism and Culture* (University of Michigan Press, Ann Arbor, Michigan 1992).

norms and cultures of local populations, and the consequent issues of postcolonial continuation have been widely discussed by a multitude of accounts. One may be tempted to consider it trite to reassert that colonialism impacted law and, arguably, continues to do so.

But, along with the assertions of colonialism's indelible mark on law in numerous societies, law has a penchant for appearing independent, removed and devoid of context. It calls to be treated on its own terms; to be understood as self-constituted. We are asked to look at law as a system of rules and procedures, as a union of norms, as a self-referential structure or as a command, foundational norm or sovereign will. Whichever position one might adopt, or however many perspectives one might be able to reconcile, it is taken to define *the law* which then acts as the key to understand all contexts across geographical and temporal divides. The varied engagements with public, private, constitutional, criminal, civil or international spheres granted, *the law* remains the same – independent, removed and devoid of context.

The studies of postcolonial societies are caught within these paradoxical notions. On the one hand are the constant reminders of the hierarchical, racial, ethnocentric and epistemological differentiations by the colonial project(s), which utilized and transformed the structures and substance of law. On the other hand are calls to understand law's functions, as well as its many failings, without much reference to that which surrounds it. State failures, insurgencies, extremism, disempowerment and violations of human rights are, we are reminded, to be considered as recent anomalies in need of explanations in the language of the law and the state. Deficiencies of implementation, issues of legitimacy, lack of development and the inherent violence within certain local or religious normative orderings are the answers that these questions often generate. Law in postcolonial societies asserts itself to be removed from context; studies of law, generally, acknowledge this claim. This is the reason why colonialism's instrumentality of law and the studies of law in the postcolonial contexts present an intriguing link.

This paper approaches the issue differently. It maintains that colonialism not just influenced legal and normative orderings in the colonies, but laid the very terrain in which law and normative systems function. The examination of law in these contexts, therefore, cannot escape the re-articulation of the shared history of law and colonialism. The colonial encounter in the Indian sub-continent was not just a conflict for resources between clashing Empires; it was also a clash between competing epistemologies, opposing logics of governance and conflicting normative orderings. On the one hand there were the Enlightenment promises of reason, fraternity and freedom, albeit coupled with colonial logic based on appropriation, classification, reification and domination; on the other side, a plethora of local normative systems based on historical traditions, religious diversity and pluralism, but carrying with them problems of patriarchy, communitarianism and intolerance. The encounter between these different *nomoi*,³ encompassing a heterogeneous array of orderings and perspectives within

³ The term *nomos* (plural *nomoi*) is used here in the sense of 'normative universes' in which we exist, and which are an intersection of the normative world and the physical-material world that surrounds us. See, Robert M. Cover, 'The Supreme Court, 1982 Term - Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 4.

them, presents us with a starting point from which we can judge the problems of the current legal and political state of affairs in the region.

This paper argues that, while colonialism affected the legal frameworks that are largely in place in the region today, more importantly, it marked the foundation in which the struggles of the socio-legal sphere in the sub-continent are now panning out. As distinct from the general scholarship on post-colonialism and colonial continuation, this paper makes two main arguments. First, it suggests a move towards the idea of Coloniality to highlight the essence of the colonial (legal) project, rather than the historical episode of colonialism. Second, linked with this, is the argument that the colonial encounter not only led to transformation of existent legal systems, but also radically altered the logics and rationalities that lay at their foundation. It is suggested that Islamic legal tradition in the Indian sub-continent was not isolated from this encounter but was one of the normative systems, amongst many, which was left tainted and transformed through this struggle. By focussing on the concept of Coloniality, its link with law and its place within Empire, the paper presents a way to understand the contestations between Islamic political ideals and state-authored legal systems in the Indian sub-continent, particularly in the context of Pakistan. It is important to state at the outset that the task here is not to address the multiplicity present within Islamic jurisprudence, but the associated manifestations of legality and political projects which emerged through the colonial encounter and are largely in place today in the Indian sub-continent. A more nuanced understanding of the clash between these manifestations and the conventional approaches of state law in the region is an important theme which the paper will address through the lens of law and colonialism

The following section discusses the importance of addressing the colonial legacy to understand the context of law in the sub-continent. Sections 3 and 4 develop the idea of Coloniality as a means to further the discussion on colonialism and discuss its engagement with the traditional and religious normative orderings, focussing primarily on indigenous tribunals and religious (particularly Islamic) law in the sub-continent. Through this examination, the paper will then present a different perspective on the conflict between religious ideology (in its current manifestation) and state law in Pakistan as a contestation of two rival perspectives, both carrying the same totalitarian rationality within them. This will be followed by a concluding section which will also highlight the issue of future directions.

2 COLONIALISM AND THE SOCIO-LEGAL TERRAIN OF THE INDIAN SUB-CONTINENT

A glance at the socio-legal situation of the Indian sub-continent today reveals a complex architecture of a multitude of legal and normative structures, emerging from the interplay of common law, international law, colonial law, as well as religious and indigenous normative systems. Various studies focussing on India, Pakistan and Bangladesh, among other countries, highlight the engagement and struggle, harmony and conflict between these diverse yet

overlapping normative orderings.⁴ Disparate as these may appear to be, a thread that runs through these manifestations of legality and normativity is their shared colonial history; what binds them together is their common past, even origin, based on the colonial encounter of the Indian sub-continent.

The fact that remnants of the colonial legal system still exist within the formal legal systems of the region's post-independence states has been extensively discussed and examined in the literature on this subject. The commercial and mercantile laws, codes of civil and criminal procedures and even the penal codes in force in Pakistan, India and Bangladesh today are largely a reformulation of the laws that the British Indian government implemented in the sub-continent.⁵ Although these laws have gone through significant changes in the post-independence period – for instance, in the case of Pakistan the most prominent transformation was associated with the 'Islamisation of Laws' campaign during the Zia regime⁶ – the basic foundation of the laws and legal institutions laid during the colonial era is unmistakably evident. It has been widely acknowledged that even the controversial blasphemy laws of the region reveal a religious (and majoritarian) modification of the provisions laid out in the penal code inherited at the time of independence.⁷

In some instances the continued legacy of colonial law is even more apparent, as is the case with the (legal) framework that governs the Tribal Areas of Pakistan. Born from the British colonial state's need to safeguard its Indian Empire from the *Pushtun* tribes in the North West as well as the Russian Empire, these laws were mainly instituted to implement the 'threefold Frontier' policy to keep the colonies protected and the tribes in control.⁸ The principle that was adopted at the time – that is, to *legally* create a territory where the executive authority and the

⁴ For accounts of legal pluralism within South Asia, see generally, Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge University Press, Cambridge 2006); Fauzia Shariff, 'Power Relations and Legal Pluralism: 'Strategies of Struggles' Amongst the Santal Adivasi of India and Bangladesh' (2008) 57 *Journal of Legal Pluralism and Unofficial Law* 1; Nasira Iqbal, 'Legal Pluralism in Pakistan and its implications on Women's Rights' in Jennifer Bennett (ed), *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007).

⁵ Martin Lau, 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract' in Eugene Cotran and Chibli Mallat (eds), *Yearbook of Islamic and Middle Eastern Law*, vol 1 (Kluwer Law International, London 1994) 6.

⁶ See, generally, Charles H. Kennedy, 'Islamization and Legal Reform in Pakistan, 1979-1989' (1990) 63 *Pacific Affairs* 62; Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Martinus Nijhoff Publishers, Leiden 2006); Rubya Mehdi, *The Islamization of the Law in Pakistan* (Nordic Institute of Asian Studies Monograph Series No 60, Curzon Press, Richmond, Surrey 1994).

⁷ Raza Saeed, 'Metamorphosis of the Ideals and the Actuals: Blasphemy Laws in Pakistan and the Transplantation of Justice in British India' (2013) 7 *Pólemos: Journal of Law, Literature and Culture* 235; Osama Siddique and Zahra Hayat, 'Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan - Controversial Origins, Design Defects, and Free Speech Implications' (2008) 17 *Minnesota Journal of International Law* 303.

⁸ In 1907, Lord Curzon (who had been the Viceroy of India from 1899 to 1905) apprised the audience in a lecture at Oxford about the result of the pact that resulted in the creation of the Durand line:

'The result in the case of the Indian Empire is probably without precedent, for it gives to Great Britain not a single or double but a threefold Frontier, (1) the administrative border of British India, (2) the Durand Line, or Frontier of active protection, (3) the Afghan border, which is the outer or advanced strategical (sic.) Frontier.'

George Nathaniel Curzon, 'Lord Curzon of Kedleston (Viceroy of India 1898-1905): 1907 Romanes Lecture on the subject of Frontiers' (Oxford, 1907).

criminal sanctions of the State may reach, but not the rights and guarantees that may be afforded to its subjects – was considered a novel and successful experiment (from the vantage point of the Empire).⁹ Through this unique mechanism, the tribal groups were forced to exist in a ‘relation of exception’¹⁰ with the Empire: they were not considered ‘subjects’ of either the British Empire or the Afghan Amir, although they were subject to coercion and criminal legal penalties from both sovereigns.¹¹ The British colonial state’s need was to institute the Frontier as a barrier against the expanding Russian Empire, for which it created an ‘Imperial reasoning that included conceptions of subject, frontier, “their country”, and British dominion.’¹² The fact that this legal framework has continued to exist in the post-independence State demonstrates that it is not only the legal formulations of colonialism that the region inherited, but also the logics and principles that provided the very foundation for such rules.¹³

But while the effects of colonial encounter may be more evident in relation to constitutional and common law systems as well as the remnants of colonial regulations, even religious laws and indigenous structures of the region have not been immune to this influence.¹⁴ The codification of the religious legal codes, coupled with the differentiation and application of ‘personal laws’ for Muslims and Hindus, were the main facets through which the colonial legal architecture attempted to govern the local population.¹⁵ Colonial law also created rudimentary forms of parallel justice systems, not just through the separation of Muslim and Hindu laws, but also by delimiting the substantive areas where indigenous and religious laws could be applicable. Some of the most evident rifts and tensions within the legal terrain today can be traced back to what transpired in the region before the countries themselves were born.

The influence of colonialism, therefore, runs much deeper than the mentioned instances of prevalent laws. It not only provided the legal frameworks that are by and large in place in the Indian sub-continent today but it laid the foundation on which the socio-legal architecture stands and the normative struggles take place. This terrain, fashioned by the colonial administrators and marked by the categorisation of people, the classification of cultures, and

⁹ Ibid.

¹⁰ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Stanford University Press, Stanford, Calif. 1998) 18.

¹¹ Robert Nichols, *Settling the Frontier: Land, Law, and Society in the Peshawar Valley, 1500-1900* (Oxford University Press, Oxford 2001); Bijan Omrani, 'The Durand Line: History And Problems Of The Afghan-Pakistan Border' (2009) 40 *Asian Affairs* 177, 187-188.

¹² Nichols, *Settling the Frontier: Land, Law, and Society in the Peshawar Valley, 1500-1900* 174.

¹³ The legal framework governing the region revolves around The Frontier Crimes Regulation, 1901 (Regulation No. III of 1901 as amended August 2011), Pakistan. Also, see, Shaheen Sardar Ali and Javaid Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* (Curzon, Richmond 2001) 47.

¹⁴ For a brief account on the emergence of Muslim Personal Law, see Scott Alan Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35 *Modern Asian Studies* 257; Lau, 'Introduction to the Pakistani Legal System, with special reference to the Law of Contract' 3. For an introduction to Anglo-Hindu Law, see Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 239. For an introduction to indigenous and local courts in South Asia, particularly Pakistan, see Ali and Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* 93-94.

¹⁵ H. W. C. Carnduff, 'Legislation and Justice' in Herbert Risley and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol IV*, vol 4 (Clarendon Press, Oxford 1909) 127.

the appropriation of norms charted the course that the legal and normative orders have taken since then. It is not possible to discuss the religious orthodoxies and militancy in the region without reference to this past; it is impractical to consider the persistent challenges to the state orderings without acknowledging the history. It was the colonial history that set such events in motion and, in this era of ‘terror’¹⁶ and militancy, it is important to be ‘vigilant of the colonial legacy’ and the radical transformation of cultural and normative orderings.¹⁷

3 FROM COLONIALISM TO COLONIALITY

Ebrahim Moosa, one of the most prominent contemporary Muslim scholars, writes that the European encounter with the colonies was marked by acculturation and transculturation. Acculturation refers to the ‘acquisition of culture in a one-directional manner and a linear arrangement of power: from the powerful to the powerless.’¹⁸ He argues that it was this acquisition and dislocation of cultures that characterised the colonial encounter. The void created by this displacement of local norms and cultures was filled by transculturation – the emergence of a new cultural and normative system through a process that was ‘non-linear and unpredictable’.¹⁹ Borrowing from Edward Said, he writes that this process of transculturation was based on contrapuntal developments and resulted in an intermeshing of dominant and non-dominant cultural systems.²⁰ The nomos that emerged from this encounter was therefore neither a cultural imposition nor the untainted normative system that previously governed the domain. One consequence of this contrapuntal development, Moosa suggests, is that the colonial regime had to ‘accommodate’ Muslim law of the sub-continent, albeit in the form of ‘Anglo-Muhammadan Law’.²¹ The various facets of judicial and administrative systems, including courts, judges and texts, had to be adapted so as to include translations, religious scholars as court officers and the legal precepts and codes of religious orders.

But while the conceptual framework of acculturation and transculturation certainly holds credence, employing the terminology of ‘accommodation’ to address the engagement between local normative orders and colonial legal regimes implies that this co-optation was either intentional, incidental or governed solely by the necessities of colonial governance. Some other accounts go even further to make similar arguments and link the employment of local legal, normative and cultural systems by the colonial regime as means to breach the

¹⁶ For a classification of ‘War of Terror’ and ‘War on Terror’ presented by Baxi, see Upendra Baxi, *Human Rights in a Posthuman World: Critical Essays* (Oxford University Press, New Delhi 2009) 156.

¹⁷ Ebrahim Moosa, ‘Colonialism and Islamic Law’ in Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinessen (eds), *Islam and Modernity: Key Issues and Debates* (Edinburgh University Press, Edinburgh 2009) 160.

¹⁸ *Ibid* 158-159.

¹⁹ *Ibid*.

²⁰ For Said’s discussion on ‘counterpoints’ and contrapuntal readings, see generally Edward W. Said, *Culture and Imperialism* (Vintage Books-Random House, New York 1993); May Telmissany and Stephanie Tara Schwartz (eds), *Counterpoints: Edward Said’s Legacy* (Cambridge Scholars Publishing, Newcastle upon Tyne 2010).

²¹ Moosa, ‘Colonialism and Islamic Law’ 158-159. ‘Anglo-Hindu’ law emerged from the same engagement; see Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* 239.

language barriers, improve administration or fulfil the needs of governance.²² Others, still, go as far as to emphasize the respect that the colonial administrators had for local normative and cultural orderings. William H. Morley, a British jurist of the time with considerable knowledge of colonial administrative policies, for instance, wrote in 1858:

Warren Hastings [the first Governor General of British India], in pursuance of that enlightened and liberal policy which so eminently distinguished his government in India in all that regarded the conciliation and welfare of its native inhabitants, was... the first to recommend and adopt the preservation of their [natives'] laws.²³

However, considering the appropriation of local normative orders as acts of preservation and accommodation ignores the 'cognitive model'²⁴ that was inherent in the colonial enterprise. It disregards the fact that it was the *knowledge* of the local and the indigenous that 'both enabled colonial conquest and was [in turn] produced by it.'²⁵ In its desire to understand, define and control the *other* it had encountered, the colonial enterprise had to establish classifications of religions, cultures and castes, which became reified with the passage of time. As Dirks argues, 'representation in the colonial context was violent; classification a totalising form of control.'²⁶ Randeria similarly writes that despite the assertions of modernity, nationalism and homogenisation in the metropolis, the colonies were marked by differentiation and enumeration.²⁷ The impact of this 'production of difference' continued after independence, so that religious groups and ethnic communities in the Indian sub-continent 'as we know them today are very much a product of enumeration, classification and categorisation by the colonial state.'²⁸ Dirks suggests that while it was imperfect and partial, 'colonial knowledge was both facilitated and certified by colonial power,'²⁹ and it in turn supplemented the governance regime. We know, since Foucault,³⁰ of the intricate nexus between power and knowledge, and nowhere is this nexus more evident than the conquest and governance of colonies.

²² Scott Kugle outlines some of these arguments in his insightful exposition of the development of Anglo-Muhammadan Law. See, Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia', 258, 269. Tirthankar Roy, in a similar note, presents a detailed account of the transformation of agriculture, manufacturing and market integration in the Indian sub-continent in the context of colonialism. This work takes a 'neutral' stance towards imperial policies and focusses primarily on the economic dimension of colonial enterprise. See, 'Colonialism and Development' in Tirthankar Roy, *India in the World Economy: From Antiquity to the Present* (Cambridge University Press, New York 2012) 181-209.

²³ William H. Morley, *The Administration of Justice in British India: Its past history and present state* (Williams and Northgate, London 1858) 177.

²⁴ Anibal Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' (2000) 1 *Nepentla: Views from South* 533, 552.

²⁵ Dirks, 'Introduction: Colonialism and Culture' 3.

²⁶ *Ibid* 5.

²⁷ Shalini Randeria, 'Entangled Histories: Civil Society, Caste Solidarities and Legal Pluralism in Post-colonial India' in John Keane (ed), *Civil Society: Berlin Perspectives* (Berghahn Books, New York 2006) 226.

²⁸ *Ibid*.

²⁹ Dirks, 'Introduction: Colonialism and Culture' 176.

³⁰ As Foucault suggests, there is a constant 'articulation... of power on knowledge and knowledge on power.' Colin Gordon (ed), *Power/knowledge: Selected Interviews and Other Writings, 1972-1977 by Michel Foucault* (Harvester Press, Brighton 1980) 51.

It might be argued, however, that to talk of colonialism in the singular in this context is as problematic as the reductionism being critiqued here. While countering the essentialisation by this knowledge-based enterprise, we run the risk of painting the colonial empire(s) as monolithic and static across space and time, or completely devoid of resistance and collaboration on part of the colonised.³¹ The disharmonious co-existence of the discordant voices and norms is, after all, what characterises the contrapuntal development of *nomoi* in the colonies. But while the charge of oversimplification is granted, it is argued here that there was a certain commonality in the colonial enterprise(s) that can be identified and problematised. This was above all an epistemological project that veiled, as well as caused, domination and appropriation. It created a divide between the culture and laws of ‘science, progress, rationality, and modernity’³² on the one side and ‘savagery and barbarian despotisms’³³ on the other. This differentiation between the rational and the irrational, between modern and primitive, and between civilised and savage is what marked the British colonial empire in the Indian sub-continent.

In this regard, it is argued here that it is not simply the specific colonial practices that need to be problematised but the logics that governed them and the epistemology that guided them and, taking a lead from Anibal Quijano and Walter Dignolo, the paper terms this enterprise as *Coloniality*.³⁴ The assertion here is that Coloniality can be examined as an abstract idea, with colonialism(s) mainly appearing as its historical manifestation. Divesting these notions of colonial law and Coloniality from the actual historical event of colonialism changes the mode of analysis and permits us to focus on the underlying principles in the backdrop of the express policies. Discussing this concept in the framework of knowledge, modernity/rationality and European/Western domination, Quijano argues that Coloniality ‘is still the most general form of domination in the world today, even after colonialism as an explicit political order was destroyed.’³⁵ Linking Coloniality to modernity, he maintains that they are mutually constitutive³⁶ and this duality, in the Eurocentric experience in relation to the rest of the world, represented a ‘specific rationality or perspective of knowledge that was made globally hegemonic.’³⁷ More than merely an Empire based on political considerations and material forces, it was this rationality and knowledge that colonised and overwhelmed other conceptions, formulations, knowledges and people.

Coloniality, and therefore colonialism that stemmed from it, was not only a political act of conquest or domination, but involved a cognitive engagement for the colonisers as well as the colonised, which was based on racial, cultural, temporal, historical and systemic

³¹ Dirks, 'Introduction: Colonialism and Culture' 7-9.

³² Ibid 7.

³³ Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge, London 1992) 81.

³⁴ Quijano was the first theorist to coin the terminology of Coloniality of Power, and applied it to the Latin American situation. See, Quijano, 'Coloniality of Power, Eurocentrism, and Latin America'. Also see, Walter D. Dignolo, 'Epistemic Disobedience, Independent Thought and Decolonial Freedom' (2009) 26 Theory Culture Society 159.

³⁵ Anibal Quijano, 'Coloniality and Modernity/Rationality' (2007) 21 Cultural Studies 168 170.

³⁶ Quijano, 'Coloniality of Power, Eurocentrism, and Latin America' 548.

³⁷ Ibid 549.

differentiation.³⁸ This mode of analysis is similar to Boaventura De Sousa Santos's examination of colonialism as an epistemologically hegemonic project that, he argues, generated an 'abyssal divide' between the coloniser and the colonised.³⁹ Santos contends that the abyssal thinking that lies at the heart of modernity and colonialism continues in the post-colonial era and which, in addition to dividing the colonial and the colonised, renders the latter absent and invisible. Those who are excluded and colonised cease to exist 'in any relevant or comprehensible way of being.'⁴⁰ Taking Coloniality both as the form and logic of domination, Quijano employs this category to describe, not just the occurrences during colonialism, but also the power disparity, hegemony and global inequality that continues in the post-colonial era and prevails in post-colonial contexts.⁴¹ Based on this, Escobar writes that Coloniality as an idea 'incorporates colonialism and imperialism but goes beyond them; this is why Coloniality did not end with the end of colonialism... but was rearticulated.'⁴²

Coloniality, then, is a 'totalitarian' conception that encounters other knowledges, rationalities and systems, and asserts itself as the sole and ultimate truth.⁴³ Mignolo suggests that taken in this sense of a totality, Coloniality represents a conception 'that negates, excludes, occludes the difference and the possibilities of other totalities.'⁴⁴ It is, then, the knowledge that debases other knowledges; the rationality that mutilates, appropriates or destroys other rationalities. This notion of Coloniality, which Mignolo considers as *Ego-logy*⁴⁵ (a rational, paradigmatic and historical solipsism), appears as 'engulfing and at the same time defensive and exclusionary.'⁴⁶ The power of this assertion of 'I/Mine' is, thus, exclusionary at the point of inclusion. Significantly, in this view Coloniality is conceptualised as a systemic tendency which can be present in systems other than those emerging from the European traditions of colonialism or modernity/rationality, as long as the totalitarian characteristics remain at the core of such systems. Understanding Coloniality as the epistemological logic behind colonialism and approaching it as a totality that *negates and excludes difference and the possibility of other totalities* permits us to focus on Coloniality in Law⁴⁷ that laid the socio-legal terrain of the Indian sub-continent and continues to guide its contestations in the post-colonial period.

³⁸ Quijano, 'Coloniality and Modernity/Rationality' 171-173.

³⁹ Boaventura De Sousa Santos, 'A Non-Occidental West? Learned Ignorance and Ecology of Knowledge' (2009) 26 *Theory Culture Society* 103, 113-114.

⁴⁰ Boaventura De Sousa Santos, 'Beyond Abyssal Thinking: From Global Lines to Ecologies of Knowledges' (2007) XXX *Review Fernand Braudel Center* 45, 45.

⁴¹ Quijano, 'Coloniality and Modernity/Rationality' 176-178.

⁴² Arturo Escobar, 'Beyond the Third World: Imperial Globality, Global Coloniality and Anti-Globalisation Social Movements' (2004) 25 *Third World Quarterly* 207, 219.

⁴³ Walter D. Mignolo, 'Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' (2007) 21 *Cultural Studies* 449, 451.

⁴⁴ *Ibid.*

⁴⁵ *Ibid* 459-460.

⁴⁶ *Ibid* 451.

⁴⁷ I use the term Coloniality *in* Law rather than Coloniality *of* Law, because the latter phrase implies a necessary and hegemonic link between law and Coloniality, from which there may be no exit. Coloniality *in* Law is used primarily to argue that there may be a way to uncover and approach any emancipatory potential that exists within law.

4 COLONIALITY AND THE NORMATIVE ORDERINGS IN THE INDIAN SUB-CONTINENT

If Coloniality reveals the transformation of rationalities, appropriation of norms, destruction of knowledges and creation of totalities by the colonial enterprise, the religious and indigenous normative orderings in the sub-continent offer the most pertinent examples of this encounter. While the purpose here is not to paint any romanticised picture of the indigenous normative orderings, there was nonetheless a marked difference between the structures and perceptions of law that existed in the sub-continent before the advent of the British Empire in comparison to the ones that emerged through this engagement.

The history of *Panchayats*, *Jirgas* and *Faislos* (local courts in different regions) in South Asia dates back centuries, and predates the formalisation of law during colonial times.⁴⁸ Elphinstone, during his journey through the Frontier region of the sub-continent in 1809, regarded the Jirga to be in a ‘remarkably high state of organisation’.⁴⁹ The British Imperial Gazetteer of India mentioned that ‘for the ordinary rustic, it is caste and the Panchayat or caste-council that enforce the only moral code which he understands.’⁵⁰ The Gazetteer also acknowledged that ‘most civil suits are referred by the *Hakims* (rulers) of districts to a panchayat (council of elders).’⁵¹ The amalgamation of religious, cultural and communal courts, therefore, were not merely communitarian tribunals but possessed efficacy and legitimacy as courts of dispute resolution and criminal tribunals, bringing together the varied norms that existed in a particular locality. Galanter writes that in pre-colonial India, ‘there were innumerable, overlapping local jurisdictions and many groups enjoyed one or another degree of autonomy in administering law to themselves.’⁵² These groupings did not relate to any single mode of classification – religion, caste, culture, geography and locality all played different roles in constructing their own legal and normative spheres. But while widely existent and respected as forums of dispute resolution and punishing criminality, such tribunals did not adhere to formalistic structures. Galanter further elaborates that

The relation of the “highest” and most authoritative parts of the legal system to the “lower” end of the system was not that of superior to subordinate in a bureaucratic hierarchy.... Instead of systematic imposition, of “higher” law on lesser tribunals, there

⁴⁸ Justice Saleem Akhtar and others, *Study on Informal Justice System in Pakistan* (Sindh Judicial Academy, 2009) 23. For a brief overview of the history of *panchayats*, see Ali and Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* 92-97.

⁴⁹ Elphinstone, quoted in Shaheen Sardar Ali, 'The Rights of Ethnic Minorities in Pakistan: A Legal Analysis' (1999) 6 *International Journal on Minority and Group Rights* 169, 187.

⁵⁰ W. Crooke, 'Religions' in Herbert Risley and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol I*, vol 1 (Clarendon Press, Oxford 1909) 433.

⁵¹ E. H. S. Clarke, 'Afghanistan' in Herbert Risley and others (eds), *The Imperial Gazetteer of India: The Indian Empire Vol V*, vol 5 (Clarendon Press, Oxford 1909) 60.

⁵² Marc Galanter, 'The Displacement of Traditional Law in Modern India' (1968) 24 *Journal of Social Issues* 65, 66.

was a general diffusion by filtering down (and occasionally up) of ideas and techniques by conscious imitation and by movement of personnel.⁵³

However, as these tribunals were primarily based on an oral tradition of law,⁵⁴ few traces of the pre-colonial traditional legal systems remain. The systems of local tribunals, along with various other traditional and indigenous normative systems, exist today as mediated by two centuries of colonial rule. With the advent of the British, these local systems of justice, some of which were equated to Athenian model of democracy,⁵⁵ underwent radical transformation. Galanter, notwithstanding his praise for the unification and modernisation of Indian customary law by the colonial regime, highlights three major changes that the local and customary systems underwent.⁵⁶ These entailed the shift in the administration of indigenous law from informal to formal court, restrictions on the geographical and substantive remits of the informal courts, and the transformation of the local norms through their application by the state courts.⁵⁷ These changes radically altered and limited the structure, substantive content, jurisdiction and efficacy of customary law in the region.

Shah writes that through this appropriation, scripting and application based on common law method, the custom itself went through major changes as ‘the British imperialists narrativised, defined and codified custom and formalised the informal.’⁵⁸ But the ossification of this facet of sub-continent’s ‘living law’⁵⁹ was not the only outcome of the colonial encounter, as the local customary systems were co-opted further in the interest of the empire. While curtailed and even outlawed in some areas of the colony, where they were actively replaced by state courts, the tribunals such as *jirgas* were effectively incorporated in other regions for the control and exclusion of the local communities.⁶⁰ In regions which now formulate the provinces of Punjab and Sindh in modern day Pakistan, the British were able to establish the multiple institutions necessary to carry out the core functions for the colonial state: revenue extraction mechanisms, courts and policing institutions, among others.⁶¹ The existence of *panchayats* and *faislos*, therefore, ceased to be essential for the functioning of the state. In the Frontier and Balochistan regions, however, the British regime was not able to expand its rule in the same manner, and the colonial state resorted to including the system of *jirgas* within

⁵³ Ibid 67.

⁵⁴ Akhtar and others, *Study on Informal Justice System in Pakistan* 24.

⁵⁵ Elphinstone, quoted in Ali, 'The Rights of Ethnic Minorities in Pakistan: A Legal Analysis' 187.

⁵⁶ Galanter, 'The Displacement of Traditional Law in Modern India', 68.

⁵⁷ Ibid 69.

⁵⁸ Nafisa Shah, 'Making of Crime, Custom and Culture: The Case of Karo Kari Killings of Upper Sindh' in Jennifer Bennett (ed), *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007) 138.

⁵⁹ 'Living law' as the 'inner order of associations'; Eugen Ehrlich quoted in Peter Fitzpatrick, 'Law and Societies' (1984) 22 *Osgoode Hall Law Journal* 115, 116; or 'living law' as the 'law that lives in citizens' experience', as opposed to formal and state-centred legal systems, Roger Cotterrell, 'Ehrlich at the Edge of Empire: Centres and Peripheries in Legal Studies' in Marc Hertogh (ed), *Living Law: Reconsidering Eugen Ehrlich* (Hart Publishing, Oxford 2009) 77.

⁶⁰ Ali and Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* 92.

⁶¹ Ibid 93-94.

its legal framework to control these territories. Laws, such as the Frontier Crimes Regulations, instituted the category of official *jirgas* that operated at the behest of the state to apply (state authorised version of) customary law, and acted as the main judicial body within the tribal regions. These appropriated 'official *jirgas*' are differentiated from the 'traditional *jirgas*' as they apply a mutilated version of customary law,⁶² and they still exist as a parallel system of law in Pakistan as part of the legal framework governing the Tribal Regions.

After independence, these tribunals faced different trajectories. In India, the *panchayat* was considered a necessary part of village life and local government, and thus it was included and subsumed within the local government structure.⁶³ In Pakistan, although these local courts are considered part of rural life as a *de facto* condition, the state does not formally accept their legitimacy or legality, continuing the policy of appropriation and exclusion.⁶⁴ The *jirgas* in the Federally Administered Tribal Areas, however, are considered a part of the constitutional and legal frameworks with the continuation of the Frontier Crimes Regulations as a colonial legacy.

As previously stated, the aim here is not to present a romanticised view of the indigenous and local normative orderings as these local tribunals, in their modern manifestation, do pose problems of patriarchy and human rights violations. Rights activists and political commentators generally denounce the continuation of these traditional tribunals, both on account of their existence as a parallel judicial system as well as their perceived incompatibility with human rights.⁶⁵ They argue that the traditional and local normative orderings reflect skewed structures of power, patriarchy, misogyny and religious totalitarianism.⁶⁶ There have been numerous instances in which the rulings and conduct of the local courts have resulted in persecution of women and the marginalised communities. However, the exclusion and appropriation of the localised systems of justice through imposition of a different normative order (which violated the rights of individuals in an altogether different manner) highlights the epistemic injustice at the heart of the colonial enterprise.

The colonial encounter, thus, radically altered the nature of the traditional and customary laws that existed in the region.⁶⁷ The traditional systems that could prove to be beneficial for the governance needs of the colonial state were altered and subsumed within the overall state structure,⁶⁸ while those that were not needed for administrative or regulatory purposes were disregarded. This manner of selective engagement with traditional normative orders has continued in the region in the post-independence period.

⁶² Ali, 'The Rights of Ethnic Minorities in Pakistan: A Legal Analysis' 188.

⁶³ For instance, see A. R. Desai, *Rural Sociology in India* (Popular Prakashan, Mumbai 1969).

⁶⁴ The Basic Democracies Plan, implemented by President General Ayub Khan abolished the system of *panchayats* in 1959. See, Ali and Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* 91.

⁶⁵ Rabia Ali, *The Dark Side of Honour* (Shirkat Gah Women's Resource Centre: Women victims in Pakistan, 2001) 25.

⁶⁶ Saima Jasam, *Cultural Violence, Legal Pluralism and Women Rights: A Case Study of Pakistan* (Heinrich Boll Foundation, 2009) 2.

⁶⁷ Ali and Rehman, *Indigenous Peoples and Ethnic Minorities of Pakistan: Constitutional and Legal Perspectives* 51-55.

⁶⁸ *Ibid* 94.

But the writing and recording of differences ‘to make sense of the multiplicity of cultural norms’ led not just to the ‘fossilisation of culture,’⁶⁹ but also led to the appropriation, classification and transformation of the religious normative orders in the region. These normative systems linked with sub-continental religions, particularly Islamic conceptions as is the focus here, faced a similar fate. It is asserted here that this engagement completely altered the nature and rationality of these religious orderings.

In terms of religious law, the most substantial move was perhaps the shift in the nature of religious laws from personal to territorial. The Imperial Gazetteer of India,⁷⁰ which was first published in 1881 (with the new edition cited here published in 1909), noted that the ‘indigenous law of India is personal’⁷¹ and then went on to classify this law between two major groups: the Hindu and Muhammadan. Based on this knowledge, it then moves further to state that at the advent of the British in India

[T]he natural consequence would have been their [colonial administrators’] submission to Native law. But there was, in the first place, no *lex loci* to govern the new comers, for the idea of a territorial, as opposed to a personal law, is of European and modern origin, and the Shastras and Koran alike know no local limits, but bind individuals united only by a common faith.⁷²

These normative systems, then, were not considered to constitute *the law* as judged through the lens of Modernity. Henry Maine, for instance, had argued about India being ‘singularly empty of law’ at the time of colonisation.⁷³ But statements such as these emerged from the vantage point of the dominant power and were themselves based on a restrictive notion of law and its sources, institutions or even purpose. Based on this perceived absence of law, the overall tendency of the British colonial administration was to ‘make their law public and territorial,’⁷⁴ which would apply equally to natives and colonial incomers. This, however, was not a uniform approach and changed during the course of imperial rule as the role and needs of the colonial regime evolved over time. Initially concerned more with trade and less with matter of governance, the regime (of what was then the East India Company) promulgated through the British Parliament’s Declaratory Act of 1780, that ‘as against a Hindu, the Hindu law and usage, and as against a Muhammadan the laws and customs of Islam, should be applied.’⁷⁵ Notwithstanding the problems with the very decision and power to determine the applicability

⁶⁹ Shaheen Sardar Ali, 'Overlapping Discursive Terrains of Culture, Law and Women's Rights: An Exploratory Study on Legal Pluralism at Play in Pakistan' in Jennifer Bennett (ed), *Scratching the Surface: Democracy, Traditions, Gender* (Heinrich Boll Foundation, Lahore 2007) 78.

⁷⁰ Calling the Gazetteer ‘the new bible’ for the colonial state, Shaheen Ali writes that ‘British [Officials] travelled the length and breadth of the country, from village to village, gathering people to question them on what their culture was, and compiling notes, later published (as Gazetteers). The crucial question to pose here is: who were the participants and informants in these culture-gathering meetings? It was no doubt, the male elite, excluding working classes, minority groups and women.’ *ibid* 78.

⁷¹ Carnduff, 'Legislation and Justice' 126.

⁷² *Ibid* 127.

⁷³ Galanter, 'The Displacement of Traditional Law in Modern India' 72.

⁷⁴ Carnduff, 'Legislation and Justice' 127.

⁷⁵ *Ibid* 127.

of laws in such a manner, the colonial *knowledge* of the so-called laws and customs of Hindus and Muhammadans was itself problematic. The assumption that Muslims and Hindus were ‘homogenous communities following uniform laws’ was itself a ‘legal fiction’⁷⁶ that, coupled with the strict rooting of these laws in scriptures, lead to ‘the *Brahminisation* and *Islamisation* of laws.’⁷⁷ Hindus and Muslims were heterogeneous communities involving several different sub-communities of practice, diversity of interpretations and lacked any formal code that could be applied readily to all who were part of these larger religious denominations. There was the additional problem of smaller segments of the population belonging to other religious systems such as Jains and Sikhs who, in the interest of convenience and arising from a profound lack of understanding, were heaped together in the category of Hindus.⁷⁸

Even when the laws of different communities were applied in parallel, the authority of adjudication was vested in British courts and judges, assisted by religious scholars as court officers.⁷⁹ The rulings issued by these court officers were taken mainly as guidance and were liable to be overturned by the judges. But the application of these laws, especially by those who knew neither the language nor the principles of these normative systems, required a certain corpus of norms and codes of laws. In an insightful account of the development of Anglo-Muhammadan Law, Scott Kugle suggests that there were two different dimensions of codification linked to this sphere of law: conceptual and textual.⁸⁰ In relation to conceptual codification, the British administrators assumed ‘Islamic law’, as well as Hindu law for that matter, to exist as a single code, providing one correct or dominant interpretation in each circumstance. This view of the religious orderings was more a reflection of the assumptions of the colonial administrators and judges than anything that existed in the systems themselves. Associated with the conceptual dimension was the textual codification which, Morley writes, was an exercise in the reduction of ‘uncertainties’ of the religious legal structures.⁸¹

Kugle suggests that there was only a limited number of texts linked to particular schools of jurisprudence within the Islamic corpus that could be translated and thus became the foundational texts of the Anglo-Muhammadan Law.⁸² Similarly, Anderson writes that the textual foundation of Anglo-Muhammadan law was primarily based on three texts translated

⁷⁶ Peter Fitzpatrick, 'Dominions: Law, Literature and the Right to Death' (2004) 31 *Journal of Law and Society* 142, 147.

⁷⁷ Flavia Agnes, quoted in Shaheen Sardar Ali, *Conceptualising Islamic Law, CEDAW, and Women's Human Rights in Plural Legal Settings*, 2006) 95 (emphasis added).

⁷⁸ Morley presents a useful case to highlight this point. He writes that ‘In the Supreme Court at Calcutta a case appears to have been once decided according to the Sikh law, but this was by reference to the Pandits; and thus, to use Sir Edward H. East’s own words, he being Chief Justice at the time, “The difficulty was gotten over, by considering the Sikhs as a sect of Gentoos or Hindoos, of whom they were a dissenting branch.’ Morley, *The Administration of Justice in British India: Its past history and present state* 187. See, also, Elisa Giunchi, 'The Reinvention of Shari’a under the British Raj: In Search of Authenticity and Certainty' (2010) 69 *The Journal of Asian Studies* 1119, 1134.

⁷⁹ Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' 265.

⁸⁰ *Ibid* 270.

⁸¹ Morley, *The Administration of Justice in British India: Its past history and present state* 198.

⁸² Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' 271-274.

during the eighteenth and nineteenth centuries – the *al-Hidaya* (a compilation of texts from the *Hanafi* school of Islamic jurisprudence); *al-Sirajiyya* (which covered inheritance issues); and Baillie’s *A Digest of Moohammadan Law*, which included abbreviations and portions of Shi’a jurisprudence and *Fatwa Alamgiri* (the seventeenth century anthology of Shariah law, mainly based on Hanafi jurisprudence, compiled during Aurangzeb’s Empire).⁸³ Some errors in the translations were discovered during the nineteenth century, but were never incorporated in the English versions.⁸⁴ The subtleties of judicial reasoning and debate within Islamic jurisprudence were also removed so as to minimise perceived ambiguities.⁸⁵ Moreover, the religious rulings which were neither based around adversarial practices of law, nor were meant to be binding on others, were incorporated and transformed through the practices of the courts and the development of a legal corpus through binding precedents. The appropriation of Islamic law by the colonial legal framework divested it of the complexity of its perspectives, the multiplicity of outlooks and the differences of opinion. More significantly, it increased its rigidity and radically altered its substantive rationality to a formal one.⁸⁶ Once tied to a formal code and binding judgements, the possibility of evolution within the religious normative orderings became linked with the external authority of the state – the religious code became static and ‘later Muslims sought to regain political power through rhetoric justified by this exact “colonised” sharia [Islamic jurisprudence].’⁸⁷ It is this return within and through a tainted frame of reference, using the notions of totalitarian rationalities, which mark some of the struggles of the contemporary period.

There are certainly those who praise the colonial law for removing ‘the angularities of the law of Islam’ and bringing it ‘in line with the modern notions of social justice.’⁸⁸ The British accounts of the time themselves mention that the interests of modernity, equity and justice created the ‘impossibility of allowing the crude penal law of the Musلمان system to be followed... and here also radical alterations were made.’⁸⁹ The Imperial Gazetteer acknowledges that

Owing to the influence of Western jurisprudence, to the case-law emanating from the courts established and moulded on English models, to the advance of enlightened ideas,

⁸³ Michael Anderson, 'Islamic Law and the Colonial Encounter in British India' in Chibli Mallat and Jane Connors (eds), *Islamic Family Law* (Graham & Trotman Limited, London 1993) 214.

⁸⁴ *Ibid.* John Strawson provides a detailed account of how the translation of religious texts by the colonial administrators was bound to be a problematic enterprise due to the location and context of the translator, as well as language barriers, and *Al-Hidaya* became a key example of this. See, John Strawson, 'Revisiting Islamic Law: Marginal Notes from Colonial History' (2003) 12 *Griffith Law Review* 362, 368. On the topic of translation and codification of religious texts by the colonial administration, see also, Giunchi, 'The Reinvention of Shari’a under the British Raj: In Search of Authenticity and Certainty’.

⁸⁵ Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' 272.

⁸⁶ *Ibid* 274-275.

⁸⁷ *Ibid* 258-259 (emphasis added).

⁸⁸ Asaf A. A. Fyzee, 'Muhammadan Law in India' (1963) 5 *Comparative Studies in Society and History* 401, 413.

⁸⁹ Carnduff, 'Legislation and Justice' 144.

and to the progress of education, the rules of the Shastras and the Koran have gradually been *altered* and relaxed.⁹⁰

But such perspectives ignore or hide the very injustice, inequality and ‘epistemic violence’⁹¹ that lie at the heart of this classificatory enterprise. The codification, appropriation and ‘removal of angularities’⁹² in existing laws and customs was not an exercise in advancing justice, but served as an aid to conquest and domination. It led both to the fossilisation of religion, culture, customs and norms, as well as to their impoverishment. More significantly, it led to a transformation of rationality that lay at the heart of the religious normative orderings and turned these into rigid systems with totalitarian rationalities. The understanding of Islamic principles applied by British Indian courts and administrators mainly stemmed from translations of selected texts, which disregarded the diversity of opinions, schools of thought and sects within Islam. The dynamics of Islam’s historical and dialectical evolution meant that ‘unity in diversity’⁹³ and differences of opinions had become cornerstones of Islamic jurisprudence. This is precisely what is exhibited by concepts such as *Ikhtilaf* (‘the tolerated diversity of human opinion’)⁹⁴ and the presence of multiple schools of thought in Islamic jurisprudence. The translation, codification and appropriation generated and embedded ‘an essentialist, static Islam incapable of change from within,’⁹⁵ which marked the trajectory of the understanding and application of Islamic law in the region even post-independence.

It should be noted here that the argument should not imply a complete loss of agency on the part of Muslim jurists, or scholars of other religions. Scholars and experts engaged with the colonial legal policies on different terms – on the one side of the spectrum there were those who supported the colonial legal enterprise in the name of ‘modernisation’; on the other, those who attempted to engage in new ways to challenge or disrupt the appropriation and modification of norms.⁹⁶ Hussin addresses this ‘politics of Islamic law’ where local elites and religious scholars played a part in the codification and formalisation of Islamic law, albeit within the boundaries laid by the colonial enterprise.⁹⁷ The resistance or cooperation both occurred in the context of the questions raised by the colonial encounter; the terrain of contestation confined within the *topos* laid out by the colonial administration. While the colonial legal project may not have removed native agency completely, it provided a ‘societal

⁹⁰ Ibid 128 (emphasis added).

⁹¹ To borrow a term from Spivak. See, Gayatri Chakravorty Spivak, ‘Can the Subaltern Speak?’ in Cary Nelson and Lawrence Grossberg (eds), *Marxism and the Interpretation of Culture* (Macmillan Education, Basingstoke 1988) 82-84.

⁹² Fyze, ‘Muhammadan Law in India’ 413.

⁹³ Shaheen Sardar Ali, ‘Cyberspace as Emerging Muslim Discursive Space? Online Fatawa on Women and Gender relations and its impact on Muslim Family Law Norms’ (2010) 24(3) *International Journal of Law, Policy and Family* 338, 340.

⁹⁴ Werner Menski, ‘Law as a Kite: Managing Legal Pluralism in the context of Islamic Finance’ in Valentino Cattelan (ed.) *Islamic Finance in Europe* (Edward Elgar, Cheltenham 2013) 74.

⁹⁵ Anderson, ‘Islamic Law and the Colonial Encounter in British India’ 214.

⁹⁶ Iza R. Hussin, *The Politics of Islamic Law: Local Elites, Colonial Authority, and the Making of the Muslim State* (The University of Chicago Press, Chicago 2016) 33.

⁹⁷ Ibid 9-38. She argues that colonialism both marginalised Islamic law, as well as centralised it through selective application and reification.

and epistemological paradigm' that shaped the 'horizon of possibilities' within which options of cooperation or resistance were chosen.⁹⁸

Colonialism transformed a 'living law'⁹⁹ into ossified conceptions perpetually geared towards the past. It distorted the 'law of the jurists' that was free from the idea of binding precedents and was predisposed to 'respond to its immediate social context'¹⁰⁰ to a stagnant and fossilised version of itself. Based on this, Ali asserts that 'by codifying Islamic law, the rich variation and flexibility in interpreting the religious text in Islam was lost and is a burden carried over to the post-colonial era.'¹⁰¹ Colonialism, then, lays the very terrain on which the legal architecture of the Indian sub-continent stands; it pervades the very fabric on which the socio-legal architecture is built. While the continuation of colonial laws is evident within the formal legal system and common law tradition, this historical legacy also lies at the foundation of customary or traditional orderings and the Islamic conceptions currently dominant in the region.

5 COLONIALITY AND THE CONFLICT OF LEGAL RATIONALITIES

It has been discussed above how colonialism employed the instrumentality of law to impose its particular rationality and knowledge on the Indian sub-continent – the cognitive element that was both a necessity and a corollary of conquest.¹⁰² In this process, the legal frameworks that existed in the region prior to colonial arrival also underwent a radical shift. But the logics of Coloniality, once introduced in the region, did not end with the so-termed decolonisation movements of the first half of the twentieth century. This idea of Coloniality became tied to the instrumentality of law and the state and was carried over to the post-independence period. Quijano, Mignolo and others argue that what lies at the heart of the continued disparity of power in the post-colonial era are global power structures and the Eurocentric paradigm.¹⁰³ Based on the foregoing discussion, it is argued here that the link between Coloniality and instrumentality of law and their encounter with the local normative orderings, particularly in relation to Islamic conceptions, was far greater than the analysis on Anglo-Muhammadan or Muslim Personal Law would highlight. A significant shift that Coloniality introduced within the socio-legal system of the region was the *co-optation or transformation* of not just existent legal systems, but also their underlying *rationalities*. It altered the inter-personal laws to territorial ones; it reduced customary, religious and traditional legal norms, based on a diversity of opinions, into strict textual modes of law.

⁹⁸ Boaventura De Sousa Santos, 'If God were a Human Rights Activist: Human Rights and the Challenge of Political Theologies' Law, Social Justice & Global Development Journal (LGD) <http://www.go.warwick.ac.uk/elj/lgd/2009_1/santos> accessed 5 September 2013, 3.

⁹⁹ See footnote 59, above.

¹⁰⁰ Osama Siddique, *Pakistan's Experience with Formal Law: An Alien Justice* (Cambridge University Press, Cambridge 2013) 62.

¹⁰¹ Ali, *Conceptualising Islamic Law, CEDAW, and Women's Human Rights in Plural Legal Settings* 267.

¹⁰² Dirks, 'Introduction: Colonialism and Culture' 3.

¹⁰³ See Quijano, 'Coloniality of Power, Eurocentrism, and Latin America'; Quijano, 'Coloniality and Modernity/Rationality'.

While scholars argue that this change in the rationalities of law can be traced to the ‘unfinished project of Modernity’,¹⁰⁴ a detailed discussion on the Modernity/Rationality link will have to be dealt elsewhere. Nonetheless, it is contended here that territorial, static and fossilised nature of law that was introduced in the sub-continent has now become so embedded within the socio-legal terrain, that Quijano and Mignolo’s linking (or limitation) of Coloniality to Eurocentric rationalities requires a reconsideration. Grosfoguel, for instance, writes that ‘unlike other traditions of knowledge, the western is a point of view that does not assume itself as a point of view.’¹⁰⁵ However, looking at the contestation surrounding the Islamic narrative in Pakistan, this seems like a romanticised notion of non-Western traditions of knowledge. The propagation by the Eurocentric civilisation of a particular *Ego-logical* perspective,¹⁰⁶ although historically dominant, is not the only instance where Coloniality is visible today. Other totalitarian claims, and particularly the ‘Islamist’ political claims in the region, stem from the same principle and exhibit the same motivation. They too assume the mantle of sole truths and singular conceptions of the world, and refuse to consider themselves as points of view.¹⁰⁷

This clash of rival rationalities provides us a more nuanced insight into the conflict and contestation between competing legal and normative orderings in Pakistan. One of the major historical crises that has dominated the constitutional and legal developments in Pakistan is related to its identity. Claiming to represent a new homeland for the Muslims of the Indian sub-continent, the country’s legal and constitutional frameworks could never shape this idea into a viable working charter.¹⁰⁸ While Islam proved to be the most potent symbol that could give a semblance of unity to this ‘inoperative community’,¹⁰⁹ whether this was meant to be translated into a democratic or a theocratic state is still an unresolved question. The ambiguity of this notion has had major impacts on the legal architecture, as it has created room for the rise of religious militant discourse. Religious political parties and militant groups continue to assert that the country was founded in the name of Islam and through political manoeuvring, and outright violence in some instances, these groups have proved successful in making the Islamic narrative as a competing and strong facet of Pakistan’s legal context. This political struggle, then, is characterised by the wish to return to a ‘pre-colonial’ point, but it is unable to escape the tainted reference point and is trapped within the framework of the rigid, totalitarian and exclusive rationality.¹¹⁰

¹⁰⁴ Werner Menski, 'Flying kites in Pakistan: Turbulences in theory and practice' (2010) 1 *Journal of Law and Social Research* 41, 46.

¹⁰⁵ Ramón Grosfoguel, 'A Decolonial Approach to Political-Economy: Transmodernity, Border Thinking and Global Coloniality' (2009) 6 *KULT* 10, 11.

¹⁰⁶ Mignolo, 'Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' 459-460.

¹⁰⁷ Grosfoguel, 'A Decolonial Approach to Political-Economy: Transmodernity, Border Thinking and Global Coloniality' 11.

¹⁰⁸ See, generally, Hamza Alavi, 'Ethnicity, Muslim Society, and the Pakistan Ideology' in Anita Weiss (ed), *Islamic Reassertion in Pakistan* (Syracuse University press, Syracuse 1986).

¹⁰⁹ See Jean-Luc Nancy, 'The Inoperative Community' in Peter Connor (ed), *The Inoperative Community*, vol 76 (University of Minnesota Press, Minnesota 1991).

¹¹⁰ Giunchi refers to this search for a *pure* historical reference point as ‘abandoning history’ (borrowing from Edward Said) or an ‘invented tradition’ (in the terms of Eric Hobsbawm). Giunchi, 'The Reinvention of Shari’a under the British Raj: In Search of Authenticity and Certainty', 1119-1120.

What lies at the heart of the struggle between secular law and Islamic law, between mainstream legal frameworks and that which stands to challenge them, is the struggle of rival conceptions based on Coloniality and totalitarian notions of law. The engendering of totalitarian and colonial rationalities in the sub-continent has meant that the socio-legal system of Pakistan is caught within two rival totalitarian notions. On the one hand is the system that is linked to the state-run legal system inherited from the colonial state; while on the other is the religious notion of law and politics which was adopted to provide a semblance of identity to the country. Both of these totalitarian conceptions struggle to gain greater control of the state, and deny the possibility of existence, not just to each other, but also to local mechanisms of justice and the marginalised sections of the society. A corollary of this is that the law of Pakistan presents not a harmonious pluralistic system of multiple normative orders, but an uncertain and violent amalgam of common law, secularism and religious law. The Coloniality and totality embedded in the mainstream legal narrative as well as the Islamic discourse has dominated the legal history of Pakistan, and will continue on this path unless their foundational paradigms are challenged. In this vein, it is argued here that it is not the assertions of either of these two narratives that can resolve the conflict, but rather a de-colonial deconstruction of the two.¹¹¹ With the acknowledgement that this requires considerable further analysis, this paper nonetheless provides a step in this direction.

6 CONCLUSION: LAW AND DE-COLONIALITY

The foregoing discussion has attempted to present a more nuanced understanding to approach and the socio-legal architecture of the sub-continent and the clash of ideologies in Pakistan. It has been argued above that colonialism and Coloniality form the very terrain on which the contestations of the multiple normative and legal order now occur. Through this lens of Coloniality and its link with the instrumentality of law, the discussion introduced the issue of a totalitarian rationality at the heart of legal orderings which emerged in the legal system of the sub-continent, and was later inherited by Pakistan. It should be highlighted that the claim made here is significantly different from the ideas of post-independence colonial continuities that have been debated in post-colonial literature, especially in relation to South Asian and African countries.¹¹² The crucial difference is that recognition of post-colonial and historical continuities¹¹³ focusses more on material manifestations rather than the logics that govern these continuities, which the framework of Coloniality transcends. The mere acknowledgement of continuities does not offer a framework to move beyond this recognition, and is trapped within

¹¹¹ Borrowing an insight from Mignolo. Mignolo, 'Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality'.

¹¹² See, for instance, Katharine Adeney, 'Constitutional Centring: Nation Formation and Consociational Federalism in India and Pakistan' (2002) 40 *Commonwealth & Comparative Politics* 8; Richard Higgott, 'Structural dependence and decolonisation in a West African land-locked state: Niger' (1980) 7 *Review of African Political Economy* 43.

¹¹³ See, Introduction in John Dunn, *West African States, Failure and Promise: A study in comparative politics* (Cambridge University Press, Cambridge 1978).

the same paradox it attempts to critique. The notion of Coloniality has been adopted here to move beyond these weaknesses.

The recognition that the major contradictions and struggles within the socio-legal setup of the sub-continent, and particularly the architecture of Pakistan, are born out of colonialism moves the analysis further, but only to a limited extent. While the ‘vigilance to the colonial legacy’ in the context of law is essential, ‘*Where do we go from here?*’ is the question that emerges from this and requires due attention. It is argued here that the recognition and problematisation of the colonial legacy of law in this context, and indeed other post-colonial countries, can mainly lead to three divergent options. One possibility is to continue with the existing state of affairs, acknowledging the troubled histories of legal orders; reforming them to address the situation, tweaking and tuning them to respond to the generally perceived problems, operating within the overarching and inherited frameworks. This, however, is a false choice.¹¹⁴ Given the situation, the detrimental effects of the current structures and narratives for the people, the ‘ubiquitous suffering’¹¹⁵ that haunts day to day living in some of these contexts, opting for status quo is not really an option if the situation is considered from the vantage point of the marginalised.

Another course that emerges from the foregoing problematisation is that an admission of the colonial legacy should lead to its reversal and to an overturning of its laws, institutions and impact. Its demand is to radically ‘transform and abrupt’ the colonial legal legacy, ‘severing the past from the present.’¹¹⁶ This argument calls for a return to the local, traditional, and indigenous. This stance is visibly adopted by those who advocate religious or romanticised notions of indigenous law to denounce the *alien law* and assert the significance of their own legal modalities. However, appealing as it may seem, it is far more problematic than it appears in the first instance. As considered previously, colonialism implemented not just its own version of formal law in the region, but radically transformed the nature of the indigenous, cultural, religious and local normative orders. In the modern manifestation, the local, traditional and religious systems as they exist in the region are formations of the colonial encounter. And given that their modern origins are rooted in colonial history, no religious, local or cultural ordering can claim to be pure and truly indigenous.

¹¹⁴ Jayan Nayar, 'The Politics of Hope and the Other-in-the-World: Thinking Exteriority' (2013) 24 *Law and Critique* 63, 64.

¹¹⁵ As Upendra Baxi argues, ‘Suffering is ubiquitous to the point of being natural’. Upendra Baxi, 'Voices of Suffering and the Future of Human Rights' (1998) 8 *Transnational Law & Contemporary Problems* 125, 131. He even criticises the grammar of the current human rights discourse that ‘dissipate human and social suffering, at times to a point of social illegibility.’ Upendra Baxi, *The Future of Human Rights* (Oxford University Press, New Delhi 2006) xvi. For an exposition of the conceptual category of suffering and its engagement with the western philosophical discourse, see Nayar, 'The Politics of Hope and the Other-in-the-World: Thinking Exteriority'

¹¹⁶ Matthew C. R. Craven, *The decolonization of international law: State Succession and the Law of Treaties* (Oxford Monographs in International Law, Oxford University Press, Oxford 2007) 19. Craven identifies these first two modes of decolonisation (evolution and radical transformation) in relation to International Law, and its post-colonial manifestation.

The idea, then, of a romanticised *pre-colonial* mode of legality or normativity to which a return is possible is nothing more than a ‘myth’¹¹⁷ and a fallacy. And this romanticised fallacy ignores both the radical transformation that the region’s existing normative and legal systems underwent as well as the fact that these systems themselves were and are rooted in their own respective modes of exclusion, patriarchy, coercion and repression. The religious and local mechanisms of justice that we see today, therefore, cannot be considered manifestations of the pre-colonial, or as viable reference points for de-colonisation. Moreover, even if the de-colonisation to the pre-colonial is accepted in principle, where does the search for a truly pure and indigenous system end? Should it move beyond the British Crown’s reign to preceding centuries of Muslim Empires, as even these were external influences at one point in time, or perhaps even beyond that? Any idealised notion of pre-colonial religious and customary laws as untainted and unadulterated systems representing the true ethos of the society and beliefs of the people serves the purpose of rhetoric well, but it does not offer any concrete possibilities of real change.

Finally, and significantly, the most viable option then is to interpret the socio-legal context and the idea of colonialism and law differently; to think of new avenues to read, analyse and (re)form the legal realities of the country.¹¹⁸ If a *return* to the pre-colonial is not possible, can we move towards some conception or formulation of law in this context that is ‘de-colonial’?¹¹⁹ From this perspective, it is the identifiable facets of colonial law – judgement of/on the *other*; totalitarian rationalities; appropriation of knowledge and norms; unaccountability; systems based on alienation of those it purports to govern; aligning of state with the interests of specific groups, classes and personalities – that need to be recognised and challenged. This is where the concept of Coloniality in Law allows us to go further than the prevalent narratives to law. Mignolo asserts that approaching the idea of hegemony, of knowledge as well as its material manifestations, through Coloniality and its totalitarian nature opens up the door to its examination, critique and restructuring from the outside.¹²⁰ This outsider’s perspective offers a possibility that, he argues, post-colonialism and post-modernity do not entail, as they remain part of the internal critique of colonialism, modernity and Eurocentrism.¹²¹ Conceptualising the situation in these terms does not ‘lead necessarily to post-coloniality, but to de-coloniality.’¹²² De-coloniality requires the consideration of other

¹¹⁷ Myth is used here in the sense in which Peter Fitzpatrick proposes it, as ‘the world of limits which captures those within it.’ Fitzpatrick, *The Mythology of Modern Law* 24.

¹¹⁸ See, generally, Jayan Nayar, ‘Peoples’ Law: Decolonising Legal Imagination’ *Law, Social Justice & Global Development* <http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/nayar/> accessed 10 June 2010; Amita Dhanda and Archana Parashar, ‘Decolonisation of Legal Knowledge: Whose Responsibility?’ in Amita Dhanda and Archana Parashar (eds), *Decolonisation of Legal Knowledge* (Routledge, Abingdon 2009); Boaventura De Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Law in Context, Butterworths LexisNexis, London 2002).

¹¹⁹ Walter D. Mignolo, ‘Geopolitics of sensing and knowing: On (de)coloniality, border thinking, and epistemic disobedience’ (2013) 1 *Confero: Essays on Education, Philosophy and Politics* 129.

¹²⁰ Mignolo, ‘Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality’ 451.

¹²¹ *Ibid.*

¹²² *Ibid.* 452.

knowledges, other rationalities, other forms, as it essentially ‘starts from other sources.’¹²³ This idea of de-coloniality, then, marks the most urgent and pressing task for socio-legal scholars of the region and religion today. The need of the time, in this sense, is to understand law through alternative lenses – as part of ‘ecology of knowledges’,¹²⁴ a ‘decolonisation of legal imagination’¹²⁵ or a ‘de-linking’ from the dominant narratives and systems ‘as an epistemic de-colonisation’.¹²⁶

A potent direction to identify a de-colonial approach to law is to look towards experiments of the creation of legal meaning conceived by people on the ground, as documented by Santos, Mignolo and others.¹²⁷ Such initiatives provide us instances of how local mechanisms of justice may be used by marginalised groups to move beyond the forms and procedures of dominant law, as well as beyond the patriarchal confines of local normative orderings. The value of these experiments, albeit symbolic, is in presenting a challenge to our conceptions of law and our notions of justice. It is towards these steps that the focus of socio-legal and legal-theoretical discussions should lie, for such attempts towards de-coloniality can help us surpass our limitations, assumptions and preconceptions of *the law*.

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¹²³ Ibid.

¹²⁴ See, generally, Santos, 'A Non-Occidental West? Learned Ignorance and Ecology of Knowledge'.

¹²⁵ Nayar, 'Peoples' Law: Decolonising Legal Imagination'.

¹²⁶ Mignolo, 'Delinking: The Rhetoric of modernity, the logic of coloniality and the grammar of de-coloniality' 453.

¹²⁷ The case of the first women's Jirga in Pakistan, organised in 2013, provides one such example.

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