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THE "LAW"/"POLITICS" DISTINCTION IN THE COLONIAL/POSTCOLONIAL CONTEXT

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In one sense, and most generally, one might say that all of these papers are about, in one way or another, the law's power to *produce* certain kinds of identities. One could of course observe that the identities at stake in the different papers are very different from each other, shaped as they are by very different historical, political and social circumstances. However, that would not detract significantly from the fundamental correctness of grouping these papers under the rubric of law and identity.

These days, it seems that one cannot turn anywhere within the legal academy without running into the idea that the law is fundamentally involved in the *production* of identities, rather than in the repression of already existing identities, and that this production of identities is deeply political. In this mode of understanding the relationship between law and identity, there is of course a certain kind of relationship being worked out with the writings of Michel Foucault, which one associates fundamentally with the idea of *productive* power.[1]

However, because we are, so to speak, among friends—and because we all agree that the law does in fact have a great deal to do with the production of identities —I thought it might be more productive to move beyond that question. Of the many different points of departure that one could adopt here, I shall choose to focus

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1. *See generally* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A.M. Sheridan trans., 1985); DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1978).

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upon the distinction between "law" and "politics." This distinction, I submit, is particularly important in the colonial/postcolonial situation, and often grievously under-explored.

We all know that "law" is political, but I think that something we need to know more about— once again particularly in the colonial/postcolonial situation— is the way in which the discursive domain of "law" developed— indeed, continues to develop— in relation to the discursive domain of "politics." In other words, what made something a "legal" question as opposed to a "political" question, and how might the relationship between certain kinds of "legal"— as opposed to "political"— activities change our understanding of colonial history or, today, inform our understanding of legal practice?

Let me illustrate something of what I mean with an example drawn from Indian colonial history. First, a somewhat lengthy digression into the historiography of Indian nationalism and the "women's question." I draw here upon the work of Partha Chatterjee, who has written very extensively, and certainly most influentially, about these questions.[2] Chatterjee poses the question of why the "women's question" which so deeply occupied Indian social reformers throughout the nineteenth century— for example, through debates over *sati*,[3] widow remarriage, the Rakhmabai case,[4] the "age of consent" controversy— disappeared from public debate towards the end of the nineteenth century.[5] Rejecting the responses of liberal historians (who interpret the disappearance of such debates as the occlusion of women's issues by the rise of an atavistic nationalism), Chatterjee argues instead that Indian/Hindu nationalism located the "women's question" within "an inner domain of sovereignty, far removed from the arena of political contest with the colonial state [where] [t]his inner domain of national culture was constituted in

2. *See, e.g.*, PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES (1993).

3. *See* V. Venkatesan, *The Law, and the Facts*, FRONTLINE, Nov. 27-Dec. 10, 1999 (defining *sati* under the Commission of Sati (Prevention) Act, 1987, as the "act of burning or burying alive any widow along with the body of her deceased husband or any other relative . . . whether the widow voluntarily submits herself to such burning or burying or is coerced or persuaded into doing so."), *available at* http://www.flonnet.com/fl1625/16250280.htm

4. *See* Mahesh Vijapurkar, *The Doctor Who Opposed Child Marriage*, THE HINDU— ONLINE ED. OF INDIA'S NAT'L NEWSPAPER, July 4, 2001 (providing background on Dr. Rakhmabai, who was married without her consent when she was ten years old, became a doctor ten years later, and successfully resisted her husband's demand for restoration of conjugal rights), *available at* http://www.hinduonnet.com/thehindu/2001/07/04/stories/ 0204000n.htm.

5. *See* CHATTERJEE, *supra* note 2, at 116.

the light of the discovery of 'tradition'".[6] This took place through a new coding of the familiar distinction between the "world" and the "home."[7] I quote at length a very familiar passage from Chatterjee's work:

> The material/spiritual dichotomy, to which the terms *world* and *home* corresponded, had acquired . . . a very special significance in the nationalist mind. The world was where the European power had challenged the non-European peoples and, by virtue of its superior material culture, had subjugated them. But, the nationalists asserted, it had failed to colonize the inner, essential, identity of the East, which lay in its distinctive, and superior, spiritual culture. Here the East was undominated, sovereign, master of its own fate. For a colonized people, the world was a distressing constraint, forced upon it by the fact of its material weakness. It was a place of oppression and daily humiliation, a place where the norms of the colonizer had perforce to be accepted. It was also the place, as nationalists were soon to argue, where the battle would be waged for national independence. The subjugated must learn the modern sciences and arts of the material world from the West in order to match their strengths and ultimately overthrow the colonizer. But in the entire phase of the national struggle, the crucial need was to protect, preserve, and strengthen the inner core of the national culture, its spiritual essence. No encroachments by the colonizer must be allowed in that inner sanctum. In the world, imitation of and adaptation to Western norms was a necessity; at home, they were tantamount to annihilation of one's very identity.[8]

As might be expected, the "inner" is coded as female, the "outer" as male, so that men are soiled by their necessary negotiation of the "outer" imposed by colonialism and women represent the "inner," coming thereby to play a very special role in symbolizing, preserving, and perpetuating the nation. In this regard, Chatterjee points out that a "new" or "enlightened" patriarchy comes to define this woman representing the inner "autonomous" domain:

> The new woman defined in this way was subjected to a *new* patriarchy. In fact, the social order connecting the home and the world in which nationalists placed the new woman was contrasted not only with that of modern Western society; it was explicitly distinguished from the patriarchy of indigenous tradition, the same tradition that had been put on the dock by colonial interrogators. Sure enough, nationalism adopted several elements from tradition

6. CHATTERJEE, *supra* note 2, at 117.

7. CHATTERJEE, *supra* note 2, at 120-21.

8. CHATTERJEE, *supra* note 2, at 121.

> as marks of its native cultural identity, but this was now a "classicized" tradition— reformed, reconstructed, fortified against charges of barbarism and irrationality.
>
> The new patriarchy was also sharply distinguished from the immediate social and cultural condition in which the majority of the people lived, for the "new" woman was quite the reverse of the "common" woman, who was coarse, vulgar, loud, quarrelsome, devoid of superior moral sense, sexually promiscuous, subjected to brutal physical oppression by males . . . It was precisely this degenerate condition of women that nationalism claimed it would reform . . . .[9]

Thus, Chatterjee explains both (i) the disappearance of the "women's question" from late Nineteenth century public discourse[10] and (ii) the passage of the Hindu Code in the post-Independence period in terms of this nationalist arrogation of claims over Indian/Hindu women, who were made to inhabit the space of the sovereign, untainted "tradition" that would be removed from negotiation with the colonial state, on the one hand, and imposed upon all kinds of women in the post-Independence period, on the other hand.[11]

My object in citing Chatterjee's work so extensively is to show how even the most brilliant historian of Indian nationalism fails to distinguish adequately between "politics" and "law." Chatterjee is correct to observe that certain kinds of "political" issues having to do with gender reform disappeared from the public arena as nationalist discourse increasingly made the "women's question" one that was internal to the nation, and hence something that was not up for negotiation with the colonial state.[12] However, what Chatterjee fails to notice is that certain kinds of "legal" issues having to do with gender reform— which wreaked havoc upon the lives of various subaltern women in Nineteenth century India— continued to take place, and were even enthusiastically applauded within certain kinds of nationalist discourse. How then is one to explain the coexistence of (i) the disappearance of frontal assaults upon the Anglo-Hindu law— *sati*, widow remarriage, the Rakhmabai case, the age of consent

9. CHATTERJEE, *supra* note 2, at 127.

10. *See* CHATTERJEE, *supra* note 2, at 132 (asserting that "female emancipation" disappeared from the public agenda because of the "refusal of nationalism to make the women's question an issue of political negotiation with the colonial state").

11. *See* CHATTERJEE, *supra* note 2, at 133 (noting that, while after independence it became legitimate to carry out social reform through marriage rules, property rights, and equal opportunity, the women's question has once again become a political issue).

12. CHATTERJEE, *supra* note 2, at 132.

issue, and so on— from the arena of colonial public debate and (ii) the judicial "reformist" onslaught against various subaltern women that took place with the approbation of nationalists? Although much could be said with respect to this question, for my purposes here, this has much to do with the discursive construction of the domains of "politics" and "law."

This idea is all-too familiar to all Anglo-American legal historians. For example, the distinction between "politics" and law" has been explored productively in the context of capital-labor relations in Nineteenth century America to explain how explicitly "political" questions relating to the claims of labor were removed from the arena of "politics," transformed into "legal" questions, and displaced into the arena of "law," where they could be contained within the intricacies of legal doctrine.[13]

However, the historical development of the distinction between "politics" and "law" has not been adequately studied in the context of colonial India, and it can and should be studied. Certain kinds of highly public "reformist" activity surrounding women clearly occupied the realm of "politics," and therefore disappeared as nationalist discourse removed the "women's question" from the realm of contestation with the colonial state. Other kinds of surreptitious judicial "reformist" activity surrounding women clearly occupied the realm of "law," and therefore continued to flourish even as nationalist discourse claimed Indian/Hindu women for itself. The fact that nationalist discourse never attempted to save the latter women from the colonial state, even as it erased such women— as well as its debts to colonial law— from national history is telling insofar as it exposes the way in which the realms of "politics" and "law" are constructed in the context of "negotiated independence" in postcolonial India. I will leave out, for reasons of length, the implication of this understanding for the "personal laws" debate in contemporary India, which is a debate that flares up over and over again.

My objective in drawing attention to the distinction between the discursive construction of the domains of "politics" and "law" is not to show that oppressive things can be done surreptitiously through "law" when they cannot be done through "politics." Neither is it my objective to invoke the idea of the "relative autonomy of law." Neither is it my object to insist upon the difference of law, as if law— like art in Adorno's aesthetic theory— always exists *beyond* everything

13. *See, e.g.*, CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (1993).

else, such that all that is left is one's own ferocious insistence on producing the difference of law (while insisting upon one's Marxist credentials at the same time).[14] In other words, I am not pushing any particular agenda in suggesting that it might be interesting to explore the discursive development of "law" and "politics." Instead, my aim is to urge the presenters of the papers to consider how, why and when "law" and "politics" separate from each other in the specific contexts that they explore, and to examine how that separation "works" in the specific contexts of the pasts and presents that they are interested in because that work urgently needs to be done for the colonial/postcolonial world. I hope that these brief remarks might serve as the basis for a discussion of these wonderful papers.

14. *See generally* THEODOR W. ADORNO, AESTHETIC THEORY (Gretel Adorno & Rolf Tiedemann eds., C. Lenhardt trans., Routledge & Kegan Paul 1984).