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Indigo and law in colonial India[1]

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Recent scholarship has explored the process by which modern commercial and property law came into being in the non-western world, and has emphasized the role played by colonialism and conquest in this process. Using a case study from colonial India, this article suggests that the coding of commercial law was influenced more by commercialization than by the nature of the state, and was an endogenous response to the failure of local custom and common law to secure frictionless trade.

The institutional approach to economic history attributes the origins of international economic inequality in the modern world to a divergence in the quality of institutions.[2] Property rights and commercial law are key illustrations of this argument. However, historians disagree on the process of evolution of property and contract law in the non-western world. Various approaches addressing this theme share the idea that the process was influenced by colonialism and conquest, and that the new states formed out of conquest influenced legislation and the efficiency implications of law. Nevertheless, different views exist on the relationship between westernization, law, and development. Four positions can be distinguished.

One of these suggests that the physical quality of life in zones of settlement shaped the motivation of European colonists to erect European-type institutions in the colonies.[3] Another position suggests that in Latin America, the initial inequality in political power between settlers and natives was institutionalized by, among other means, law restricting access to abundant natural resources.[4] A third position considers that the economic outcome of legal regimes sharing a western root differed according to the system of laws borrowed, and proposes that regions of the world that adopted or received via colonization the more investor-friendly English common law system performed better than those that received the French or German civil law systems or the socialist systems.[5] These views are susceptible to the broad criticism that they ignore the agency of indigenous law upon the process of evolution, especially in regions where juristic traditions had been well developed before colonization and European settlement.[6] Within the historiography of law in Africa and south Asia, there is a further view that indigenous law was in some cases destroyed by, and in a large number of cases incorporated into, the framework of modern law, at times presenting a distorted view of the local order in the process.[7] This literature does not draw lessons relevant for institutional analysis.

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[2] North, *Institutions*, pp. 3–10.

[3] Acemoglu, Johnson, and Robinson, 'Colonial origins'.

[4] Engerman and Sokoloff, 'Factor endowments'.

[5] La Porta, Lopez-de-Silanes, Shleifer, and Vishny, 'Quality of government'.

[6] Berkowitz, Pistor, and Richard, 'Transplant effect'.

[7] The literature is very large. Major contributions include Cohn, 'Some notes on law and change'; Stokes, 'First century'; Washbrook, 'Law'. Menski, *Hindu law*, pp. 131–85, among others, argues the point of mistranslation.

This article contributes to the literature on the origins of economic law in the non-western world by means of a case study from colonial Bengal, focusing on the indigo 'mutiny' of 1860. The indigo mutiny involved a dispute between Bengali peasants who produced and sold indigo leaves and European capitalists who manufactured indigo dye from these leaves. The received view of the dispute suggests that the planter community ran the business by coercive means, and that the dispute was an outburst against such practices. This article offers an institutional narrative, as an alternative to the political narrative of the received view. In this article, it is suggested that the crisis resulted from a failure of the common indigo contract to accommodate risks. Reading the crisis as the outcome of a flawed contract provides a somewhat better explanation of the administrative response to the episode. This response was the formulation of a contract law. The contract act, furthermore, marked a legislative transition point when a long-standing administrative bias in favour of protecting indigenous institutions began to weaken.

This case study contributes four lessons to the larger discourse on law and development. Firstly, westernization and indigenization were not alternative trajectories in institution-building, but tended to be combined in many historical situations. In this case, westernization did not automatically follow colonization and conquest, but was a response to a discordant indigenization. Secondly, events could play a role as important as ideology, inherited practice, and politics. Thirdly, contrary to the existing scholarship on south Asia, distortions did not only result from the misreading of Indian law by foreigners. The potential for conflict could be hidden within indigenous practices; for example, in the failure of custom to regulate conduct when transacting parties did not share the same custom. Fourthly, business imperatives, as opposed to politico-administrative imperatives highlighted in the institutional literature, also shaped institutional trajectories in the non-western world.

The rest of the article is arranged in four sections, discussing the indigo business and the contractual environment, the indigo mutiny, legislative response, and the main conclusions, respectively.

I

In the first half of the nineteenth century, indigo was one of India's major exports. It was at first exported by the English East India Company as a convenient means of transferring its revenue surplus to Britain. Indian exports picked up from the last quarter of the eighteenth century, when the Caribbean sources of the dye had become unreliable.[8] With the end of the Company's monopoly trading rights, it emerged as a lucrative but risky commodity for private trade. Indigo was procured mainly from northern India and Bengal. In northern India, merchants preferred to buy crude indigo from the peasants. In Bengal, indigo was produced in factories owned by European capitalists. The factories entered direct agreements with the peasants to buy leaves. Such farm–factory contracts were not common elsewhere, presumably because northern India was not very safe, nor was it well-known territory for foreign capitalists, and some land rights in this area could be a barrier

[8] For the general history of indigo trade and production, see Chowdhury, *Growth of commercial agriculture*; Kumar, 'Facing competition', pp. 20–58.

to direct contracting. In the last decade of the eighteenth century, total British imports of indigo increased from one to two million kilograms, Bengal's share rising from well below one-third to about three-quarters. A small transit duty imposed on its northern rival assisted in the rise of Bengal's indigo trade. A more important factor was the established position of Calcutta as a financial centre, a port, a point of information exchange, and as the capital of British India. The Company's servants deposited their savings in Indo-British partnership firms known as the Agency houses. This money was invested in indigo. Demand, however, was unstable. Raising money at low rates of interest was not easy, especially since government bonds competed with indigo investments. Despite efforts to induce the government to create a lender of last resort, no such institution came into being. Panics about depression could thus induce contagious bankruptcy, two such episodes having occurred in 1833 and 1846–7.

Land ownership at this time vested with the zamindars. Zamindars were owners of large estates, the zamindari property right having been defined by the Permanent Settlement of 1793. In this scenario, there were two methods commonly used by the manufacturers to procure indigo. The manufacturers could grow indigo themselves on estates that they purchased or leased from a zamindar (called *nij* or own farming) or contract with peasants for growing the crop on lands to which the latter had tenant rights (called *raiyati* or peasant farming). Before 1829, almost all land held by the planter was on leasehold, but usually not in the name of the planter. In 1829, direct leasehold was made possible by a new law, though numerous restrictions on Europeans owning or leasing land continued. In 1837, Crown subjects were granted equal rights to acquire or hold land in perpetuity. Thereafter, a few planters bought estates, and many took land on secure lease signed with a zamindar or with a tenant. The basic data on land tenure were printed as appendix I, part I of the *Report of the Indigo Commission* (1861). The division between *nij* and *raiyati* cultivation, according to this source, was about 1:4.[9] The division between zamindaries and leaseholds is difficult to estimate because the data do not report the extent of land under these tenures. Of the 25 large concerns in Bengal who furnished responses on the question, only two reported having zamindaries (landed estates)—the Bengal Indigo Company in Nadia district, and the Sirajabad Concern in Dacca district—and their figures (which appear to be presented in terms of estates or villages) suggest a limited engagement with direct property ownership.

The make-or-buy choice depended on several factors. Own farming had to deal with relatively undeveloped markets for land, labour, and capital in the rural areas where the factories were located. Buying estates was expensive in the densely populated districts of lower Bengal. While own farming often gave the planter access to the best lands for growing indigo, namely sandbanks that formed out of alluvial deposits in the middle of the rivers of the Ganges delta, few planters wanted to become fully-fledged landlords or farmers. Their main commitment was indigo, not agriculture. However, growing indigo alone was a gamble. Two sowings, in October and in March, were possible. The latter sowing was greatly helped by rain in late March. When it did rain at this time, there was a scramble to sow the crop. Sowing an area of 4,000–8,000 acres of non-adjacent plots in two

[9] The data are summarized in a table in Bose, *Peasant labour*, p. 75.

days was an impossible task for the men employed by the planter. Planters complained that the peasants 'will not value the labour of themselves and families at anything' when working for themselves, but 'charge very highly and do very little' if the planters engaged them, so that 'supervision of cultivation becomes a very large item in its cost'.[10] In own farms, the planters tried to address the labour problem by recruiting migrants from Chota Nagpur hills, but this solution presented its own difficulties. The job needed not only labour, but also large amounts of money, usually borrowed from the local moneylenders at interest rates that were considerably higher than those prevailing in Calcutta.

Contracting kept the rates within established convention, but required close monitoring. Boundary disputes were frequent between the new lessors and individuals with customary titles. The zamindars were wary of planter power.[11] In own farming, wage was the only point of negotiation, but in contract farming, there were many potential points of negotiation—price, costs, quantity, and risks. Contract farming meant that planters would have to induce peasants already tilling that land to grow indigo in place of food crops. Their dependence on indigo, and the weather factor, made a good sowing a life-and-death matter for the planters. Given that the land and labour did not belong to him, planters were wont to exercise a degree of supervision that the peasants found 'harassing and vexatious'.[12]

In principle, planters could contract with the zamindars and avoid some of these problems. Planters rarely took this option. There were three reasons why planters might not want to contract with a zamindar: firstly, conflict of interest, the zamindar being more interested in a competing crop, rice; secondly, zamindars were rent-earners rather than entrepreneurs, and unreliable partners; and thirdly, zamindars, despite their proprietary rights, could not necessarily influence cropping decisions, because some tenant-proprietary rights were strong and the estates were large.

How profitable was the contract for planters and peasants? In 1855, planters expected to receive Rs. 165 for a maund (37 kg) of manufactured indigo sold in Calcutta (Rs. 10 = £1). It took 200 standard bundles of leaves to produce one maund of the dye.[13] A calculation made in an administrative note stated that the average produce of a bigha was nine bundles.[14] Planters, then, received Rs. 7.4 from each bigha sown with indigo, whereas peasants received a payment of Rs. 2 per bigha.[15] Even after adding transportation, rents, processing, and supervision costs, the business was a lucrative one for the planters. The planters, however, had to factor in risks of non-delivery.

Direct profitability of the peasants depends on the assumptions we make about purchased and domestically supplied inputs. A more reliable calculation would be the opportunity cost of indigo. Indigo did not compete with the main crop, winter rice. In most areas of Bengal, it did not compete with the secondary crop, autumn

[10] J. P. Sage, planter, *Report of Indigo Commission* (P.P. 1861, XLIV), pp. 27–8.

[11] A. S. Sawers, planter, Culna (Kalna), Burdwan, ibid., p. 83.

[12] Ibid., pp. xvii–xviii. For example, the planters were closely involved in land preparation and weeding. It is plausible that some of this zeal owed to the emphasis on intensive cultivation then prevalent in England and continental Europe.

[13] J. P. Wise, planter, ibid., pp. 3–5.

[14] There were three measures of bigha in use in Bengal: zamindari (0.41 acres), government (0.33 acres), and indigo (0.49 acres). All references to bigha in this article refer to the third of these measures.

[15] *Memorial of Landowners* (P.P. 1861, XLV), p. 18.

rice, either. However, on some lands in Jessore and Nadia districts both crops could be grown, and the indigo and autumn rice sowing seasons overlapped. Autumn rice in these two districts produced an average of 282 kg per acre of husked rice, or 141 kg for each indigo bigha.[16] In 1855, the price of coarse rice was Rs. 0.015 per kg.[17] A bigha would then yield a gross return of Rs. 2.12, almost identical with the amount of advance ordinarily received against one bigha of indigo. Any yield of rice lower than this would make indigo decisively more profitable.

The risk that the peasants would not deliver the goods was relatively high. In the planters' opinion, 'a Bengali ryot very seldom keeps his engagement in anything if he can help it'.[18] A money advance was given in October so as to tie in the peasants until March. The money came in handy when rent was due and the festival season near. By March, however, the peasants grew 'unwilling and perfunctory' as cultivators.[19] There were simple ways in which peasants could renege on contracts. They could and on occasion did try to run away with the advance. The contracts did not specify the quantity of the crop to be delivered, but the extent of land to be sown with it. The peasants could sow a smaller area than agreed, under-report the yield, or, on the three days when the sowing had to be completed, make themselves scarce.[20] The contracts did not specify a credible punishment for the defaulter. The planters had no authority to dispossess a peasant of land.

Recent scholarship has shown that the problem of contract enforcement was pervasive in several early modern export trades similar to indigo.[21] As Indian Ocean trade expanded in scale, transactions increasingly occurred outside the sphere of control of traditional mechanisms for dispute settlement, such as the mediation of community elders or caste *panchayats*. The new relationship between the European merchants, the Indian intermediary, and the artisans was a conflict-ridden one. In the case of cotton textile purchases by the so-called contract system, for example, there were frequent complaints that the delivery time was never predictable; suppliers routinely contracted with more buyers than they could satisfy; goods were diverted from contract sales to other bidders, from contract to spot markets, and from the Company to private traders; and in Bengal the Dutch and the English were played off against one another. The artisans were hard to track down, and there was no feasible third-party enforcer of contracts.

In this vacuum, the contracts were enforced by using interlinked markets and customary authority. An established practice in informal trades had been to link credit and commodity transactions. This system was used in the silk, salt, hides, and cloth trades, as well as the indigo trade. The contractor advanced a sum of money, and did not fully clear the credit account when the crops came in. Given that interest rates on ordinary loans were high, trade credit was an attractive form of loan. The threat of losing the unpaid balance on a previous transaction was

[16] 1902 figures from Bengal, *Season and crop report*, pp. vi–vii. Hunter, *Famine aspects*, pp. 183–4, reports 127 kg as the average for Nadia district in 1866, which in the author's own judgement 'seems too low'.

[17] R. T. Larmour, planter, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 126.

[18] W. G. Rose, planter, ibid., p. 17.

[19] Ibid., p. xxxiv.

[20] Beaufort, a magistrate, stated that he knew many instances in which a peasant signed agreements knowing that these would be broken, in some cases with covert encouragement from the zamindar; ibid., p. 12.

[21] Gupta, 'Competition and control'; Kranton and Swamy, 'Contracts, hold-up, and exports'. See also Torri, 'Mughal nobles', pp. 262–3, on the unstable relationship between Company officers and Indian brokers.

expected to induce the supplier to fulfil the terms of the current transaction. Indigo followed this precedent. A loan account was created. It showed debit when money was left unpaid, and credit in the case of bad debt. The sign of the balance was immaterial. The creditor knew these were irrecoverable debts and the debtor was not too worried about repayment. All that the loan account did was to make the relationship as permanent as possible.[22]

Despite being a universal system, it was not sufficient from the contractor's point of view. The risk that the supplier, once they 'worked up the amount they really had received, ran away', was pervasive in these trades.[23] Depending on market fluctuations, the supplier had an incentive to jump from contractual to spot markets and back again. In order to avoid such hazards, the private European merchants and Company officers purchased cotton textiles through the intermediation of the headmen of local weaving communities. The intermediaries were expected to ensure a supply of work. The privilege commonly granted to them was that the contractor would not buy directly even when there was excess supply in the market. In effect, the contractor shared a part of the profits with the sub-contractor in exchange for assurance on quantity delivered. The sub-contractor claimed a part of the advances with the producers in return for giving them custom.

Likewise, the indigo planters pinned their hopes on those members of the society 'better able to secure . . . cultivation, from their intimate connexion with the cultivators'.[24] Of the two main regions of cultivation in Bengal—Murshidabad in central Bengal, and Nadia in the lower reaches of the delta—headmen had more influence on cropping decisions in the former, where peasant rights tended to be more unequal. Headmen also had more authority in areas where indigo had been introduced recently.[25] In lower Bengal, by contrast, the headmen's authority had been largely appropriated by paid officers of the factory. These officers had an 'intimate connexion with the cultivators', but they were not necessarily of peasant background. In this region, which was more accessible by the administrative machine, planters also hoped to use the systems of police and justice in enforcing contracts, so the officers needed to be literate and in possession of a working knowledge of English. They came from the upper caste residents of the villages. Usually such people possessed superior tenancy rights on land, but did not cultivate the land themselves. They were, in other words, distinct from the peasant headmen, and yet were linked with them through their own dealings. The factory officers and the peasants, while they knew one another, did not necessarily belong to the same club bound by rules of reciprocity.

When a planter obtained possession of a village, some of the influential peasants were summoned to the factory and given advances against signature on a contract. Out of these advances a small sum went to the factory clerk and manager. This act of payment reflected the ordinarily profitable nature of the business, and also

[22] The Bengal Indigo factory accounts recorded a total advance (money actually paid to cultivators) of Rs. 778,000. Of this amount, the cultivators were in the process of returning Rs. 316,000 in the ongoing indigo season. The remaining amount was technically a bad debt. The bad debts, however, had remained in the books for 40 years. R. T. Larmour, planter, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 125.

[23] Reverend S. J. Hill, London Missionary Society, ibid., p. 105, refers particularly to silk weavers.

[24] J. O'Brien Saunders, editor of *Englishman* and former planter, ibid., p. 139.

[25] J. P. Sage, ibid., p. 28.

promised a lenient enforcement of the contract in case of default. Where peasant headmen were present as sub-contractors, the headmen 'afterwards get a slice out of the money'.[26] The 'richer neighbour' could gain at the cost of the poorer from mild doctoring of the accounts.[27]

If this mildly extortionate system ordinarily served the interests of both parties, it collapsed in the indigo season of April 1860, when peasants in lower Bengal refused to sow the crop for the manufacturers of the dye after taking advances. The planter-manufacturers filed a large number of suits in the magistrates' courts, alleging that the action was in breach of written agreements. This episode has become known as the 'blue mutiny'. Why did the crisis occur?

II

The mainstream view of the crisis suggests that planters ordinarily enforced indigo contracts by coercive means, and that the 1860 episode saw an outburst of pent-up resentment against repression. In this section the political reading of the crisis is questioned, and it is suggested that the crisis was caused by the form of the contracts.

In popular perception in contemporary Bengal, in the campaign by Christian missionaries, and in present-day historical research, 'the planters' unceasing greed and atrocity', their 'plainly exploitative purposes', 'a contract system not far from slavery', 'the rapacious tenacity of the white planters'; their ability to manipulate the still quite Europeanized magistracy, and their fashioning 'a mechanism that efficiently and relentlessly attached unpaid labour', have received emphasis.[28] This thesis of a predatory capitalist class takes different forms. Nearly all authors agree that planters could 'terrorize ignorant ryots' with the connivance of the magistrates.[29] A recent study argues that the planters' power to oppress the peasants had increased after new laws allowed them to buy zamindaries.[30] In one work, the planter-peasant transactions are interpreted within a framework of unequal exchange between the metropolis and their satellites.[31] In another, the blue mutiny is interpreted as a peasant rebellion, one of many that the nineteenth century witnessed.[32] The word 'mutiny' further implies an uprising against the state, a reading that fits the idea that the planters were helped by the authorities.

Coercion was indeed applied from time to time. Zamindari authority was used too. For example, Robert Larmour of the Bengal Indigo Company was a planter who took a dim view about the reliability of the Bengali peasant, acquired a zamindari, and was made an honorary magistrate as well. Such men had hoped to use rent as an extra handle in enforcing contracts. After the tenancy reforms of 1859 made that route more difficult, the Bengal Indigo Company tried to expropriate the local notables who held old tenancy at low rates.

[26] W. G. Rose, planter, ibid., p. 18.
[27] J. P. Sage, ibid., p. 29.
[28] Bhattacharya, 'Indigo revolt'; Sah, 'British indigo'; Kling, *Blue mutiny*, p. 148; Bose, *Peasant labour*, p. 48; Hartmann and Boyce, *Quiet violence*, p. 13; Ray, 'Changing fortunes'. See also Oddie, *Missionaries*, pp. 101–7.
[29] Kling, *Blue mutiny*, p. 148.
[30] Ray, 'Indigo dye industry', p. 219.
[31] Sah, 'British indigo', pp. 75–6.
[32] Bhattacharya, 'Indigo revolt', pp. 13–14.

That being said, a primarily political reading of the episode overstates the role of coercion and the planters' ability to manipulate the institutions of the state. The word 'mutiny' is a misnomer, for the episode did not represent a challenge to the legitimacy of the state. The crisis was not a peasant revolt either (these were usually disputes over property). It was a commercial dispute over terms of sale.

A business that had been in existence for 60 years can hardly be understood in terms of coercion alone. Bengal in the early nineteenth century was not as lawless as it might seem from the received history. Land ownership belonged to the zamindars, and some of the tenants were organized and influential. As the Indigo Commission evidence shows, many of the planters' adversaries were not poorer peasants, but peasants with privileged tenure. Available data do not suggest that coercion was either a general or a successful method adopted to enforce contracts.[33] The more serious cases occurred during the crisis, suggesting that coercion was a symptom rather than the cause of the crisis. The most formidable critic of the planter class, Reverend James Long, disassociated himself from any opinion or confirmatory statement on points of criminal conduct of the planters.[34] The Christian missionaries in general admitted that acts of violence on the part of the planters were rare.[35] In fact, according to Long, 'various indigo planters secretly sympathise with the present movement for reform of the indigo system'.[36] Alexander Duff, the first missionary sent abroad by the Church of Scotland and a public figure of the time, considered that the planters did not deserve 'aversion and enmity any more than the cultivators'.[37] As a class, the planters did not have a uniform character, and did not act in concert. Many individual planters participated in local society. Some ran schools and hospitals, one built a mosque, and others held courts to decide petty disputes in their areas of authority.[38] After a cyclonic inundation in 1856, planters offered more help to the affected peasants than did the administration.

Furthermore, the belief that the courts and the police were freely used by the planters to terrorize the peasants is mistaken. When the crisis was at its peak, 173 individuals were in prison for breach of contract, 60 of them in one town.[39] The proportion of defaulters incarcerated in the population engaged in the indigo trade was less than 0.1 per cent. In one troubled area, Krishnanagar, Rs. 31,000 was directed by courts to be collected as damages from the peasants, whereas Rs. 1.8 million was the outlay of the indigo trade.[40]

In fact, the crisis was brought on, not by the partisan role of police and justice, but by something quite the opposite: a paralysis of the state. The planters complained bitterly about the ineffectiveness of legal redress. The legal means to enforce indigo contracts took two forms: upon a complaint, the magistrate could

[33] The report of the Indigo Commission and subsequent official statements absolved the planters of the graver cases of criminal conduct reported; minute by the Lieutenant Governor of Bengal on the Indigo Commission, *Papers Relating to Indigo Cultivation in Bengal* (P.P. 1861, XLV), p. 79.

[34] J. Long, Church Missionary Society, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 99.

[35] J. H. Anderson, Baptist missionary, and F. Schurr, Church Missionary Society, ibid., pp. 40, 47; C. H. Blumhardt, Church Missionary Society, ibid., pp. 46, 73.

[36] J. Long, ibid., p. 98.

[37] Letter from A. Duff to the Indigo Commission, ibid., app. III, p. 403.

[38] J. G. Lincke, ibid., p. 51.

[39] *Papers Relating to Indigo Cultivation in Bengal* (P.P. 1861, XLIV), p. 265.

[40] *Report of Indigo Commission* (P.P. 1861, XLIV), p. xxii.

issue an order to imprison the debtor, or the civil court could issue a decree to recover a fixed damage from the debtor. The proceedings depended on the decision of the magistrate regarding the criminal nature of the breach.[41] The civil court moved slowly because clear guidance from the codes was lacking in the case of breach of contract.[42] Court decrees for financial damage were usually unenforceable.[43] The planters were more interested in the profits to be had from a completed contract than the amount of money the courts awarded them after a delay. Contracts without performance clauses were worthless to them. '[T]he ordinary process of the civil courts is inoperative and powerless to compel specific performance if prayed for'.[44] The civil courts were, for the planters, 'a sham and a farce'.[45] The general situation, not surprisingly, was that 'many of the planters . . . are abstaining from [going to court]'.[46]

Contradictory orders passed in the indigo season of 1860 illustrate the problem of judicial indecision. Ashley Eden, the magistrate of Barasat, passed an order effectively withdrawing any commission upon the magistrates from the enforcement of indigo contracts, and leaving the matter to the civil court.[47] Shortly before this order was passed, the Governor General's Legislative Council had passed Act XI, which had affirmed that breach of contract on the part of peasants already indebted to factories was a criminal offence. Between 19 and 21 April, peasants accepted advance payments to sow indigo and sowed rice instead.[48] Therefore planters of lower Bengal filed a large number of breach of contract suits in the magistrates' courts. How were these cases settled? Alexander Maclean was the magistrate of a subdivision in Nadia when peasants refused to sow indigo there. Maclean, who was staying as a guest of a planter, 'there being no residence for magistrates in those parts', took the planters' side.[49] William Herschel, Maclean's superior, settled cases in favour of the peasants.[50] By July 1860 the majority of the breach of contract suits in this jurisdiction were withdrawn, having experienced 'a very unsatisfactory result'.

Planter coercion, therefore, does not explain the crisis well enough. An institutional explanation represents a superior alternative approach. The crux of the problem was the indigo contract. The typical contract specified the amount of outstanding debt, amount of advance, and the extent of land to be sown with indigo.[51] It allowed no room for negotiation on prices and quantities of leaves to be delivered. When the leaves were delivered, they were valued at a fixed price, and the accounts were either debited or credited. In 1860 the ordinary price at settlement was Rs. 1 for five bundles. At an average yield of nine bundles per bigha, we see that the price had been set exactly at the level of the customary advance payment, Rs.

[41] Meares, ibid., pp. 213–14.

[42] The lack of guidance is illustrated by the case of one factory manager who was advised to withdraw all pending suits on this ground; A. Taylor, ibid., p. 225.

[43] R. T. Larmour, ibid., p. 122.

[44] Ibid., p. xli.

[45] J. Hills, planter, to the Private Secretary of the Governor General, *Papers Relating to Indigo Cultivation in Bengal* (P.P. 1861, XLV), p. 57; see also *Report of Indigo Commission* (P.P. 1861, XLIV), p. 197.

[46] *Papers Relating to Indigo Cultivation in Bengal* (P.P. 1861, XLIV), p. 264.

[47] *Memorial of Landowners* (P.P. 1861, XLV), p. 4.

[48] A. Hills, planter, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 196.

[49] Ibid., p. 193.

[50] Ibid., p. 177.

[51] On the information content of an account book, see H. Sibbald, manager, ibid., p. 210.

2 per bigha sown with indigo. At a standard rice yield and the prevailing price of rice in 1855, the contract made the two crops equivalent. It would appear that the price was rarely revised, and did not play any role as an incentive to draw peasants into a contract. Such a contract minimized net payment, saved on information costs, and saved on negotiations.

However, this arrangement would have been acceptable when prices did not change too quickly. Excluding speculative bubbles, the prices of indigo and rice did not change very much and maintained a stable relationship between 1819 and 1849.[52] In the 1850s, relative prices changed decisively. The price of dye in Calcutta increased by 20 per cent between 1855 and 1860, but the price of rice increased about 40–80 per cent in the same time span, shored up by exports to Europe. When the price of rice began to increase, many peasants wanted to devote their inferior land to rice, even though it had already been contracted for indigo. Ironically, for the planters, the rise in the price of grain raised wages and squeezed own farming, leaving contracts the more profitable option. The planters had two choices: to change the terms of the agreement, or to enforce performance by going to court. As they had already paid out the advances, the planters were averse to changing the terms. Further, changing the terms would require a number of planters to believe that the price shock was a permanent one. In 1860, most planters preferred a wait-and-watch policy. Those in lower Bengal adopted the second option, that is, they went to court. The factory officers took this situation as their chance to threaten the indebted peasants with imprisonment and collect protection money. Evidence given by peasants before the Indigo Commission (1860) showed that the principal targets of their resentment were the intermediaries. Factory officers often threatened penal action, and expected 'to double or treble the amount of their pay by taking presents, as they call it, from the ryots'.[53]

Taking recourse to the courts did not succeed, because there was no law about how sale contracts should be written. After a regulatory act of 1830 had made breach of contract on the part of the peasants a criminal offence, a stamp paper agreement between cultivators and factories began to be prepared recording the amount of advance taken and specifying the penalty for breach.[54] Although a gesture towards the law, even the planters admitted that these documents amounted to no more than 'keeping up appearances'.[55]

III

Many planters and administrators therefore drew the lesson from the indigo crisis that the performance of contracts by means of a headman and advances was not defensible in existing law. A new law was necessary. An administrative note prepared in 1862 by the Secretary of State initiated the proceedings for the creation

[52] The price of indigo varied according to the season and quality, and between private trade and Company trade. The average price per maund varied in the range Rs. 100–150 between 1819 and 1849. The price of rice in Bengal was also approximately stable in the same time span. On indigo prices, see Wilkinson, *Commercial annual*, p. 49; Wilson, *Review*, p. 21; *Appendix to the Report* (P.P., 1831, VI), p. 3; *Imports and Exports* (P.P. 1849, L), p. 6; and Bell, *Comparative view*, p. 10.

[53] R. P. Sage, planter, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 27.

[54] The law was repealed three years later, and reintroduced in 1859.

[55] R. T. Larmour, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 122. Also, J. Cockburn, magistrate and planter, ibid., p. 27.

of a contract law in India.[56] The third paragraph of the note mentions the circumstances that led the India Office to take this step. 'From the date of the commencement of the differences between the indigo planters and the ryots in some of the districts of Lower Bengal', it stated, 'your Government has, on various occasions, considered the expediency of providing some more stringent measures than the ordinary process by civil action for the enforcement of contracts'.[57] However, the legislative process was neither speedy nor decisive.

The years between 1854 and 1859 had seen an explosion of complaints about the legal vacuum on behalf of the planters, jurists, and administrators. A Parliamentary Committee set up an enquiry into economic and social conditions in British India shortly after the Indian mutiny ended. The committee interviewed around 20 indigo planters, many of whom voiced concerns that 'a good law of contract is much required for all classes . . . The present law of complaining before the civil courts is so expensive and tedious, it is in fact an encouragement to ill-disposed people to break their contracts'.[58] Another planter stated before the Indigo Commission that 'Indigo being the most valuable product of Bengal, I consider the contract law peculiarly adapted to that product'.[59]

The planters were particularly interested in a law that would compel peasants to deliver the goods. On the other hand, an explicit contract law would also be in the peasants' interest by including common contingencies, for a contract law would allow for the annulment of a contract when there were grounds for exoneration on account of changed circumstances or events (the doctrine of *force majeure*).

In principle, breach of contract calls for penal action, enforced performance, award of damages, or a combination of these. The existing code of civil procedures and specific regulations vacillated between award of damages and penal law, and avoided performance clauses. For an administration reluctant to legislate on civil matters, the default policy was to deal with such emergencies by means of existing criminal laws. This was consistent with policy in other contexts. Act VIII of 1819, Act XIII of 1859, and Act IX of 1860, applicable to employment in the Presidency towns, plantations, and public works, respectively, treated breach of a contract of service as a criminal offence. In indigo specifically, regulations passed in 1823, 1824, and 1830 increased the authority of the magistrates to prosecute defaulters. Some of these clauses were repealed later, but the general principle was reaffirmed in 1839, when the Law Commission reiterated the position that the matter of 'affrays' resulting from indigo contracts be dealt with by means of penal laws.[60] Act XI of 1860 again made breach of contract in indigo a criminal offence. None of these regulations addressed contingency.

Redressing breach of contract with criminal action was not peculiar to India. Nevertheless, such methods were controversial in India. The criminal courts cost money. Planters could afford to employ lawyers, bribe court officials, hire wit-

[56] British India was administered by the Governor General in India, advised by a council, and the Secretary of State in London. The Lieutenant Governor was in charge of provincial administration.

[57] *Copy of the Legislative Despatch* (P.P. 1862, XL), p. 1.

[58] G. MacNair, indigo planter, *Second Report from the Select Committee* (P.P. 1857–8, VII, pt. I), p. 4.

[59] R. T. Larmour, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 133.

[60] Letter from J. P. Grant, Officiating Secretary to the Indian Law Commission, to W. H. Macnaghten, Secretary to the Government of India, in the Legislative Department, 11 July 1837, in *Copies of the Special Reports* (P.P. 1842, XXX), p. 266.

nesses, and pay for stamp tax. A particularly contentious point was the fact that Europeans, when charged with a criminal offence, could demand trial by jury at the Calcutta Supreme Court, and the jury did not have a clean reputation. The police report played a crucial role in criminal cases, and the police were neither impartial nor honest. If the criminal courts posed one form of inequity, the civil law of compensation left the planters dissatisfied, as we have seen.

The question of a contract law with a performance clause was debated at least twice by the Law Commissions of India. On the first occasion, an intermediate legal step was proposed by some officers of district administration: registration of contracts. Registration would make the contents of the contract more transparent, while it would also indicate the peasant's consent to the contract.[61] In 1835, a proposal that indigo contracts be registered before a magistrate was rejected by Thomas Macaulay as being too intrusive and impracticable. In 1839, a draft act that could enforce the contracted use of land was reviewed by the Governor General and returned to the Commission with the polite message that the matter needed further consultation.

Before the crisis, the executive branch of the administration duly saw the indigo situation as one of 'errors of law'.[62] The Indigo Commission (1860–1) agreed with that view. However, the members of the Commission did not agree on an alternative. The two proposals that emerged in the main report and the minutes of dissent were registration of contracts, and empowerment of the civil courts to try contract cases quickly. A proposal to produce a breach of contract act quickly appeared well beyond the capabilities of the Governor General's Lgeislative Council.[63] Administrative opinion was divided over the course of action. The administration in Bengal, including the Lieutenant-Governor, John Peter Grant, revealed great reluctance to adopt measures that could be construed as protecting the planters' class interest, even though Richard Temple, a dissenting member of the Indigo Commission, made statements indicating that the state was morally bound to protect capital. The Bengal view received support from the Secretary of State, who sympathized with the planters' case before concluding that the administration was not yet ready for a new law.[64]

The law-maker in this case was the administration of India, the Governor-General. The small amount of protection that indigo contracts received in the past had come from the Governor's Council. The intellectual resources of this Council were enhanced by the induction of Sir Henry Maine as the legal member in 1862. Shortly after joining, Maine voiced an apprehension that the absence of a contract law would kill the indigo industry.[65] His prediction came true. In the first half of the 1860s, the Bengal indigo industry was practically destroyed, many agency

[61] For example, A. Grote, Officiating Member of the Board of Revenue, *Report of Indigo Commission* (P.P. 1861, XLIV), p. 91.

[62] Minute by the Lieutenant Governor of Bengal, 5 June 1854, *Papers Relating to Indigo Cultivation in Bengal* (P.P. 1861, XLIV), p. 6.

[63] Ibid., p. 53.

[64] *Despatch from Secretary of State* (P.P. 1861, XLV), p. 3.

[65] 'I saw that the course likely to be followed would consist in preventing the indigo planters from enforcing their contracts, without, at the same time, taking any steps to sift the equitable from inequitable contracts, and to give facilities for enforcing the former'; *Copies of Papers* (P.P. 1868, XLIX), p. 92.

houses went under, others changed businesses, and indigo moved on a much diminished scale to north Bihar, where most planters were also zamindars.[66]

In 1866, a six-member committee headed by the judge and parliamentarian John Romilly produced a draft Indian contract act. The draft was a neat abridgement of English laws on the subject, with some borrowing from the New York state civil code. Perhaps for the first time in Indian history, the state that framed the Contract Act 'freely availed itself of its supreme power to define what shall henceforth be the law of the land in regard to a large part of the civil rights of the population of India which do not affect religious usages or institutions'.[67] Other spheres in which this radical principle was extended in the next decade were trusts, negotiated instruments, transfer of property, promissory notes, evidence, wills and probates, and specific relief.

It appeared to be a foregone conclusion that indigenous common law supplied no workable model for a law 'applicable to the whole population'. On this point, the 1866 committee was merely restating an opinion already well known among judicial administrators and jurists. In 1860, English law was accessible in the major cities and to the expatriates. In the small towns, suits were either settled with reference to Hindu or Muslim personal law, or left to the discretion of the judges. The Registrar of the chief civil court expressed that 'there is no law in the mofussil except the law of equity, justice, and good conscience of the judge'. In particular, contract was one of those 'great chapters of law on which in India there was no indigenous system of rules of any sort'.[68] An attorney of the Supreme Court, and the compiler of an authoritative digest of Muslim personal law, stated, 'I cannot charge my memory with any case in which there was an application of the Mahomedan law of contract to a Mahomedan and the Hindu law of contract to a Hindu. There is very little of any Hindu law of contract; and much of the Mahomedan law of contract is utterly inapplicable to the present times'.[69]

As the Sanskritist H. T. Colebrooke had shown some decades before, a digest on the Hindu law of contract was not an impossible project, yet, with the exception of some clauses on debt repayment, this digest was never extensively used as a guide in the courts. We can draw two lessons from this failure. Firstly, personal law was unlikely to be preferred by disputants in settling issues of impersonal exchange, and failed by definition when the parties belonged to different faiths. Secondly, neither code understood 'contract' to refer to a written agreement. The form of the contract was left unspecified. Sale disputes, consequently, were cases 'where there is no evidence of any contract'.[70] The lack of a written document and a common format made the nature of the evidence, in addition to the choice of code, a difficult issue to settle, and increased the costs of settlement.

All this should have made the draft act a welcome move. But the draft was soon caught up in a debate. The draft act introduced a performance clause and

[66] On the breakdown of the indigo industry in Bengal in the immediate aftermath of the revolt, see *Supplemental Papers* (P.P. 1861, XLV), see, for example, pp. 21–3. The Bihar system was less conflict-prone, because the planter 'has all the power a landlord possesses in order to enforce the production of the crop on which his livelihood depends'. The crop and rent rates in Bihar were also more variable, reflecting market demand; *Return of a Correspondence* (P.P. 1891, LIX), pp. 5–23.

[67] Rattigan, 'Influence of English law', p. 52.

[68] Rankin, *Background to Indian law*, p. 91.

[69] N. B. E. Baillie, *Second Report from the Select Committee* (P.P. 1857–8, VII, pt. I), p. 158.

[70] Ibid., p. 158.

exempted agricultural transactions from its jurisdiction, in a concession to the prevailing political mood, but possibly also from a sense that *force majeure* might need to be invoked too often in agriculture. Maine argued that these qualifications were unnecessary.[71] Along with other reasons, he hinted that contracts without performance caused market failure by becoming a deterrent to free negotiation. The majority of court judgments on unpaid debts in rural India remained unexecuted, for the average rural debtor had little property other than land, and land titles were not a convenient asset to be transferred. In the absence of an insolvency law, the debtor had no legal means to declare bankruptcy. 'The result is that these decrees are *hoarded*. They are divided, bequeathed, inherited, and sold in the open market', until these were purchased by someone who had the money and the patience to have them executed, at great cost to both the original debtor and the creditor.[72] In this interpretation, the indigo planters had been hoarding a set of agreements that were individually inadmissible in law, but could make an impact when released en masse upon a judge. Court decrees on financial damage, likewise, were often unenforceable, but the planters hoarded the decree to pre-empt the peasants contracting with other planters.[73] In short, if poor peasants were found guilty of breach of contract, the only law worth having would be one that compelled them to perform the contract.

These objections were found weighty enough for the draft to be kept on hold for six years. The administrative debate on contract revived the unfinished exchange between London and Calcutta on the broader issue of legislative autonomy for India.[74]

IV

In conclusion, it seems that the relationship between westernization, indigenous tradition, and commercialization was more complex than recent scholarship on law and economic growth has suggested. Westernization was not a variable external to local economic conditions, shaped by such factors as the European legal system or settler mortality. Westernization was often an endogenous response to the failure of local custom to secure frictionless global transactions.

This point has been illustrated by the indigo dispute in Bengal. The received view of the indigo crisis of 1860 suggests that the business was ordinarily performed by coercive means. This article has argued that this view overstates coercion and understates institutional complexity. Instead, the crisis has been presented as a dispute over terms of sale. The sale contract between the peasant and the planter ordinarily served both parties, but it was a flawed contract because it did not incorporate the peasants' and planters' risks and was not supported by a sale law. Peasants' risks stemmed from relative price shifts. Planters' risks

[71] *Copies of Papers* (P.P. 1868, XLIX), p. 92.

[72] Ibid., p. 97, emphasis in the original.

[73] On this practice, see J. A. F. Hawkins, Registrar of Sudder Dewanny Adawlat, *Second Report from the Select Committee* (P.P. 1857–8, VII, pt. I), p. 119.

[74] Did the Indian Contract Act (1872) stabilize peasant–manufacturer dealing? It is not possible to test the effect with evidence from the colonial period. In all other cases of industrial crop production, before and after indigo, direct contract between farmers and factories was rare and merchant intermediaries organized procurement. Indigo, in this sense, was a special case.

stemmed from non-delivery of the goods. Both risks increased in the 1850s. The planters mistakenly believed the courts would enforce performance of the contract, so that change in the terms of the contract could be avoided.

The institutional reading of the indigo crisis is superior to political readings because it can explain why the principal form of administrative response to the crisis was a new contract law. The personal law on which the legal system was then founded proved unsuitable for addressing impersonal exchange, and led to the framing of a contract act drawing upon a western model, one that would address the two most important failings of ad hoc contracts: absence of a performance clause and absence of contingency clauses.

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