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What is a tribe?

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A new form of colonialism was born in the second half of the 19th century, largely in response to the Indian Mutiny of 1857. Of its many theorists by far the most influential was Henry Maine, a brilliant historian of jurisprudence, barrister, journalist, colonial civil servant and eventually master of Trinity Hall, Cambridge. Maine made an eloquent case for the historicity and agency of the colonised, as part of an attempt to reconstitute the colonial project on a more durable basis. In doing so, he distinguished the West from the non-West, universal civilisation from local custom and, crucially, the settler from the native, thereby laying the groundwork for a theory of nativism. If the settler was modern, the native was not; if the settler was defined by history, the native was defined by geography; if modern polities were defined by legislation and sanction, those of the native were defined by habitual observance.

Within a few years of the Mutiny, Maine took up a post as legal member of the viceroy's Executive Council. Anyone being groomed for the India Service and, indeed, for the Colonial Service had to read his works. From Lyall in India to Swettenham in Malaya, Shepstone in Natal, Cromer in Egypt, Lugard in Nigeria and Uganda, Harold MacMichael in Sudan and Donald Cameron in Tanganyika, colonial administrators throughout the empire absorbed his arguments – above all those he put forward in *Ancient Law* (1861), the first bestselling book on jurisprudence – and translated them into policies. The result was a reinvention of 'the native', whose agency and legal personality would henceforth be regarded as tribal by colonial scholarship and determined as such by colonial power. Tribalism is reified ethnicity.

It also led to a form of government, incubated in post-1857 India and applied fully in those parts of Africa conquered after the Berlin Congress. Its architects claimed that this mode of rule, which they referred to as 'indirect', was no more than a pragmatic solution to a dearth of resources, making for a weak state with a benign, superficial impact. But indirect rule was a response to stark challenges at the geographical extremes of empire, beginning with the Indian Mutiny and ending with the Morant Bay rebellion in Jamaica in 1865. Together, these events produced a crisis of mission and of justification. The assimilationist project, of which the model was the Roman Empire, was seen to have failed. In the period of reflection that

followed, the colonial mission underwent a change from one of civilisation to conservation, and of progress to order.

Between 1757 and 1857, the inhabitants of two-thirds of the landmass of South Asia had been brought under the rule of the East India Company, either directly as subjects or indirectly as princes under protective custody. The main outlines of the utilitarian and evangelical agendas – the ideological turbines of the colonial project – were clear by 1850: to abolish the Mughal court and to impose British laws and technology, along with Christianity, on India. But in 1857, all but 7,796 of the 139,000 sepoys of the Bengal Army turned on their British masters. Liberal utilitarian ideas had sustained a severe blow and the evangelists were in retreat – largely as the result, in Maine's words, of a failure to understand the nature of 'native Indian religious and social belief'. He called for a shift of focus, away from the Orientalist preoccupation with sacred and secular texts to the study of daily life. The logic of native institutions, he argued, was to be found in local customs and traditions, less prevalent on the coast, where the Orientalists were apt to go looking, than in the hinterlands. 'For it is in the cities of the coast and their neighbourhood,' he argued in his Rede Lecture in Cambridge in 1875,

> that there has sprung up, under English influence, a thirst for knowledge, a body of opinions, and a standard of taste, which are wholly new in India. There you may see universities thronged like the European schools of the later middle age … There you may observe an eagerness in the study of Western literature and science not very unlike the enthusiasm of European scholars at the revival of letters. From this part of India come those most interesting samples of the native race who from time to time visit [Britain]; but they are a growth of the coast, and there could be no greater mistake than to generalise from them as to the millions upon millions of men who fill the vast interior mass of India.

Woe betide the utilitarians, ignorant of this 'real India', who had concluded that 'Indians require nothing but School Boards and Normal Schools to turn them into Englishmen,' or that 'political institutions could be imported like steam machinery, warranted to stand any climate and to benefit every community.' This was a vigorous case for separate development.

While sketching out a justification of indirect rule, Maine was also staking a plausible claim to a new science, as he explained in the Rede Lecture: 'India has given to the world Comparative Philology and Comparative Mythology; it may yet give us a new science not less valuable than the sciences of language and of folklore. I hesitate to call it Comparative Jurisprudence because, if it ever exists, its area will be so much wider than the field of law.'

By 'wider', Maine in fact meant more intimate and local: he called for a far richer account of native institutions, including religion and caste, and reiterated the idea of a 'real India' beyond the India of 'Brahminical theory' embraced by the Orientalists.

A precursor of the great 20th-century ethnographers, Maine was intrigued by the use of kinship as a basis for social order, including what was and was not permissible. Indeed, like the later ethnographers, he took kinship to be the central fact of primitive society. Yet the more attentive he became to the local and the customary, the more he confined the native in a separate conceptual domain, shut off from the world of the settler by a fundamental distinction between stationary and progressive societies. Culture was cloistered and unchanging in the non-West, transformative and progressive in the West. Native tradition, it followed, was a triumph of locality over time. India, from this point of view, resembled a living museum of custom, in which geography had replaced history: 'There is no country, probably, in which custom is so stable as it is in India.' It was not difficult to argue from this position in favour of separate, indigenous, customary law, or to assert that there were two forms of law, one in the West that was culture-free, and another outside it that was culture-bound.

What is Maine's significance today? In *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism*, Karuna Mantena shows the central role of his thinking in the reformulation of justifications for colonial rule.[*] It is this that she has in mind when she writes of an 'alibi'. But his innovations also had significant consequences for the response of the colonised to colonial power. Unlike direct rule, indirect rule aimed at the reproduction of difference as custom, not its eradication as barbarism. The practice of indirect rule involved a shift from the language of exclusion (civilised/not civilised) to one of inclusion (cultural difference): a language of pluralism and difference, born in and of the colonial experience. Law was central to the management and reproduction of difference: the identities of colonised societies were not simply consensual (traditional), they were also enforced from above. In this sense law was not external to consensus, but an instrument with which to shape it. One of the keys to the form of 'governmentality' – to borrow from Foucault – of which Maine was the pioneer is the relationship between law and subjectivity.

Direct and indirect rule were not two cleanly consecutive phases in the development of colonial governance. Though the accent shifted from direct to indirect rule, the two continued in tandem: the civilising mission (assimilation) existed alongside the management of difference (pluralism). As the language of the civilising mission shifted from the evangelical to the secular, the practice shifted from religious conversion to spreading the rule of law. And yet the claims for civil law as the universal marker of civilisation coexisted with the recognition of different systems of customary law. This combination gave rise to regimes of

legal hybridity, to legal pluralism, and to a re-examination of fundamental questions: what is law, what is custom, and what do we mean by customary law?

Direct rule aimed to assimilate elite groups; the ambition of indirect rule was to remake the subjectivities of entire populations. It endeavoured to shape the present, past and future of the colonised by casting each in a nativist mould, the present through a set of identities in the census, the past through the driving force of a new historiography, and the future through an extensive legal and administrative apparatus. In the course of this triple endeavour, a system of internal discrimination came into existence, enforced by the state, which nonetheless claimed the mantle of tradition. The colonised majority was effectively fragmented into so many administratively driven political minorities. In Africa, the political minority was called 'the tribe'.

What is the tribe? It is very largely a creation of laws drawn up by a colonial state which imposes group identities on individual subjects and thereby institutionalises group life. The census provides an illustration. In post-1857 India, the law enforced, the census recorded and history memorialised three group-based political identities among the colonised: caste, religion and tribe. In most African colonies after the Berlin Conference of 1884-85, the census divided the population into two broad groups. One was called 'race', the other 'tribe'. The distinction between race and tribe was vital to the technology of colonial governance, and the census was an important instrument of this technology. When a census-taker entered your name, it was either as a member of a race or as a member of a tribe. The important distinction, in other words, was not between coloniser and colonised, but between native and non-native: the race/tribe distinction cut across the single category of the colonised. Races were said to comprise all those officially categorised as non-indigenous to Africa, whether they were indisputably foreign (Europeans, Asians) or whether their foreignness was the result of an official designation (Arabs, Coloureds, Tutsi). Tribes, by contrast, were all those defined as indigenous in origin. When the state officially distinguished non-indigenous races from indigenous tribes, it paid heed to one single characteristic, origin, and totally disregarded another, residence.

The race/tribe distinction had a direct legal significance. How a person was defined determined the kind of law under which that person would live. All races were governed under a single law, civil law, while tribes were governed under customary law. There were as many sets of customary laws as there were said to be tribes. It was thought that natives must be acknowledged first and foremost as belonging to separate tribes, with each governed by laws reflecting its own tradition. Yet most would have agreed that the cultural difference between races – such as whites and Asians – was greater than that between different tribes. Different races spoke different, mutually unintelligible languages. Often, they practised

different religions. They also came from different parts of the world, each with its own historical archive. No matter how different they appeared, tribes were neighbours and usually spoke languages that were mutually intelligible; their histories were at times shared, at other times overlapping.

Nevertheless, for the races, however different they might be, it was one body of law, modified from European law to suit the colonies, and enforced by a single administrative authority. In the case of tribes cultural difference was emphasised, exaggerated and enshrined in a multitude of different legal systems, each enforced by a separate administrative and political authority. In a nutshell, different races were meant to have a common future, at this or that level on the scale of civilisation; different tribes were not.

The two legal systems were entirely different in orientation. The difference is illuminated by the contrast between English common law and colonial customary law. English common law was presumed to evolve as circumstances changed over time; it was susceptible of different interests and interpretations. Customary law in the colonies, by contrast, was presumed to be unchangeable, inasmuch as the circumstances of the natives, rooted in the traditions assigned to them under the new dispensation, were thought to be timeless. Any change in customary law was regarded with suspicion and considered prima facie evidence of corruption. The invention of native traditions was a precondition of indirect rule, colonial powers being concerned to establish the credentials of their native allies as 'traditional' and 'authentic'. In any given district the priorities were to define, locate and then anoint a single traditional authority. Unlike Europe, precolonial Africa did not have a history of the absolutist state: authorities were always in the plural, legislating conventions in various domains of social life – clan committees, women's groups, age cohorts, craft guilds and so on.

Once a single chief – always a male and an elder – was exalted as the sole traditional authority, it was a short step to define tradition, too, as unitary, non-contradictory and binding. Having identified and appointed local allies in the project of 'indirect rule' and determined their role as 'customary', the colonial state became both the custodian and the enforcer of tradition. In this sense colonialism enacted one of the first 'fundamentalisms' of the modern period, advancing the proposition that every colonised group had an original and pure tradition, whether religious or ethnic, and should return to that condition as a matter of course or be obliged to do so by law.

The two aspects of colonial law reproduced a double division among the colonised by institutionalising discrimination in colonial society: racial in civil law and tribal in customary law. In attaching the language of rights to civilisation, civil law created a hierarchy of entitlements for different races thought to occupy higher or lower rankings on the ladder of

progress. It discriminated in favour of the colonising master-race (Europeans) and against the colonised subject races (Asians, Arabs, Coloureds and so on). Customary law, in turn, distinguished between two kinds of tribe and tribesperson, native and non-native. It grounded rights – and thus discrimination – in a discourse of origin (nativism). Unlike race, which was taken to mark a civilisational hierarchy, tribe was a marker of cultural diversity. Natives were said to be tribal by nature; the practice of governing them was called native administration. At the heart of native administration was a distinction between 'native' and 'non-native' tribes. Non-native tribespeople were identified as such no matter how many generations had lived in a given area, since no amount of time could erase the difference of origin. Every colony was divided into so many tribal homelands, each homeland identified with a tribe administratively tagged as 'native'. Immigrants with different tribal designations wanting access to land could only do so as 'strangers' who had to pay a specified tribute to chiefs in the native authority. Colonial customary law acknowledged only one form of stable land tenure: the customary right of use – as opposed to ownership – in the tribal homeland.

The native tribal identity conferred three distinct privileges unavailable to the non-native. The first was right of access to land. The second was the right to participate in the administration of the native authority. Chiefs in the native authority could only be appointed from among those identified as native to the tribal homeland. (It was only at the lowest level of administration – the lowest tier of the native authority – that one could find village headmen from resident non-native tribes.) The third pertained to the settlement of disputes, which every native authority approached on the basis of 'customary laws' that favoured natives over non-natives.

This regime of inequality between supposedly original residents and subsequent immigrants led to mono-tribal administrations ruling over multi-tribal societies. With all key rights defined as group rights and reserved for members of the native tribe, it was only a matter of time before an explosive confrontation developed between two kinds of resident in every native authority: those defined as native and those not. A mono-tribal administration overseeing a threefold tribal monopoly – in land distribution, governance and disputes – institutionalised tribal discrimination.

Tribal identity tended to coincide with what anthropologists call ethnic identity – by which they usually mean language-based, cultural identity – but this was not always the case. In some instances, the same ethnic group was divided into several administrative tribes. In others, tribes were designated arbitrarily – or 'invented', as Eric Hobsbawm and Terence Ranger meant the term in *The Invention of Tradition* (1983). The common aspect of all these cases is that tribe was everywhere an administrative unit during the colonial period, and tribal identity an officially designated administrative identity. The system of native

administration and indirect rule transformed cultural identity into political identity, and ethnicity into tribe.

When the British defeated the Mahdiyya in Sudan in 1899, the Sultanate of Dar Fur became a de facto British protectorate, more or less in the fashion of many of the princely states in India. When they went on to establish direct control in 1916, they made the province a centrepiece of their strategy in Sudan. The thrust of British policy in Darfur can be summed up in one word: tribalisation, the bedrock of native administration and indirect rule. It was intended as the antidote to Mahdism.

The province was parcelled into a series of homelands, or dars, each identified with a tribe administratively tagged as native. The dar was considered to be the homeland of its native tribe. No matter for how many generations non-natives had been in one or another part of Darfur, they qualified as immigrants and could only access land as 'strangers', which in turn required them to pay a tribute to the native authority. Now that all African land tenure was identified as tribal, all other forms of tenure, including the individual land-holding introduced during the sultanate – the 'hakura of privilege' – were rendered obsolete. The hakura system that exists today in Darfur is not a continuation of the land system from the days of the sultanate: it dates from the introduction of tribalisation by the British. Though the word 'dar', or 'home', still evoked customary usage, its meaning was subverted. Previously, it had signified any of several concentric locations, starting with one's immediate dwelling and extending outwards. As a colonial administrative unit, however, dar became the territory – tribal homeland – where one's group was considered to be native. Inasmuch as it defined a person's rights and status, native identity gave rise in practice to native agency.

As in Darfur, so in every African context that I have encountered, from Eastern Africa to Nigeria, and from Sudan to South Africa, with one exception: Rwanda. In Sudan, Britain combined a racialised historiography with tribalised administration, land tenure and settlement of disputes, whereas in Rwanda everything – the historiography, the land tenure system, the local administration and the process of resolving disputes – was racialised: every institution privileged Tutsi over Hutu.

One distinctive feature of the colonial experiment in Darfur was that the native authority system tended to widen inequalities between peasant and pastoralist tribes, creating a three-tier society of peasants, semi-nomads and nomads. The consequences became clear in 2003, when the simmering conflict in Darfur turned into a long and terrible war. Colonial decisions in Darfur were driven predominantly by the realisation that sedentary peoples were more easily controlled than pastoralists. This is the main reason peasant tribes were assigned to tribal homelands that coincided more or less with their areas of settlement at the time of

colonisation, while in the south the diminished dars of the semi-nomadic cattle tribes (the baqqara) coincided more or less with their areas of settlement but did not always include all their grazing areas. In the north the fully nomadic camel tribes (the abbala), who had no settled villages and moved around all year, received no dars. Not only would the need to graze their livestock bring nomads under the administrative authority of semi-sedentary or sedentary tribes, the encounter was sure to generate pressure to settle down over the longer term.

Did tribes exist before colonialism? If by 'tribe' we understand an ethnic group with a common language, the answer is yes. But tribe as an administrative entity, which discriminates in favour of 'natives' against 'non-natives', most certainly did not exist before colonialism. One might equally well ask: did race exist before racism? As regards differences in pigmentation, or in phenotype, the answer is yes. But as a fulcrum for group discrimination based on 'racial' difference, it did not. The consensus among contemporary scholars is that while race does not exist, racism – based on the perception or conviction that race is real – does. Like race, tribe became a single, exclusive identity only with colonialism. Above all, tribe was a politically driven, totalising identity. As such, it looks very much like a subset of race.

Maine was a keen admirer of the Roman Empire, which endured for six hundred years; Britain's empire was shorter-lived. The British and other European empires were organised quite differently from the Roman Empire. Not only was there no physical contiguity between modern European empires and their colonies, but most natives were encouraged to stay where they were. Rome expanded by contiguous conquest and the tendency was for subjects in the ever-extending colonies to lose their identity as 'peoples' as elites became Roman citizens of one form or another. When provincial elites emulated Roman culture and demanded corresponding political rights, it was rare for Rome to rebuff them. In modern Western empires, by contrast, colonial subjects were politically conscious, active and disaffected.

In *Roman Imperial Themes* (1990), Peter Brunt reminds us that 'in the very century when Roman rule was to vanish in Gaul, a Gallic poet celebrated Rome as the city which had unified the world by giving the conquered a share in rights.' Brunt adds: 'What a contrast with the jubilation that marks the independence days of British colonies!' In the West at least, 'Romans left behind them not memories of discontent but a continuing aspiration for European unity, and as Christianity took on a Roman colouring, for Christian unity.'

If there is a parallel with the capacity of imperial Rome to absorb as it expanded – in the process turning the metropolis itself into a multicultural centre – it is provided by the

Ottoman Empire, not the modern empires of Britain or France. The policy of direct rule in pre-1857 India, informed by the utilitarian vision of an anglicised, assimilated Indian elite, is the closest Britain came to Rome. In the hundred years that followed the Mutiny, the British Empire moved away from assimilationism to a mass-based culturalist policy. The point was no longer to civilise the elites, but to shape the very identity of millions of colonial subjects. The enterprise known as indirect rule was vastly more ambitious than anything the Romans had imagined.

[*] Reviewed by C.A. Bayly in the LRB of 14 July 2011.

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