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Chapter 11

The Modernization of Law

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In the past two centuries, the whole legal landscape of the world has altered dramatically. Throughout the world, there has been a proliferation of governmental responsibility and a growth of new areas of law; social life is regulated increasingly through law, rather than through market pressure, custom and informal controls, fiat, or force. During this period, the industrializing nations of the West have developed and consolidated unified national legal systems of a kind not known before. And in the poorer parts of the earth, the nineteenth and early twentieth centuries have seen an influx of foreign law unprecedented in scope (even by the acceptance of Roman law in medieval Europe). The incorporation of large blocs of civil and common law in the nineteenth century has been followed, since World War II and the end of Western dominance, by the reception of new constitutional models and by a postindependence wave of reform and rationalization.

In both older and newer nations, the development, expansion, and consolidation of these national legal systems seem to involve certain common directions of change. Laws are applied

over wider spatial, ethnic, and class areas; personal law is replaced by territorial law, special law by general law, customary law by statute law. Corporate rights and responsibilities are replaced by individual ones. Religious sanctions and inspiration are replaced by secular motives and techniques; moral intuition is replaced by technical expertise. Law making and law applying move from authorities with local accountability and diffuse responsibility to specialized professionals representing central national power.

In speaking of modern law, one may mean many things. The term "modern" is used here to refer to a cluster of features that characterize, to a greater or lesser extent, the legal systems of the industrial societies of the last century. Many of these features are to be found elsewhere; some of them are absent to some degree in one or another advanced industrial society. However, I am putting forth, not a description, but a model. Modern legal systems differ in many important respects. This model attempts to isolate their common salient features.

Let us begin by considering the kinds of legal rules.

First, modern law consists of rules that are uniform and unvarying in their application. The incidence of these rules is territorial rather than "personal"; that is, the same rules are applicable to members of all religions, tribes, classes, castes, and localities and to both sexes. The differences among persons that are recognized by the law are not differences in intrinsic kind or quality, such as differences between nobles and serfs or between Brahmans and lower castes, but differences in function, condition, and achievement in mundane pursuits.

Second, modern law is transactional. Rights and obligations are apportioned as they result from transactions (contractual, tortious, criminal, and so on) between parties rather than aggregated in unchanging clusters that attach to persons because of determinants outside the particular transactions. That is, legal rights and duties are not determined by factors such as age, class, religion, sex, which are unrelated to the particular transaction or encounter. Such status clusters of rights and obligations as do exist are based on mundane function or condition (for exam-

ple, employer, a business enterprise, wife) rather than on differences in inherent worth or sacramental honor.

Third, modern legal norms are universalistic. Particular instances of regulating are devised to exemplify a valid standard of general applicability, rather than to express that which is unique and intuited. Thus the application of law is reproducible and predictable. Cadi justice is replaced by Kant's Categorical Imperative.

Now let us consider the kind of institutional arrangements and techniques for administering these rules.

Fourth, the system is hierarchical. There is a regular network of courts of first instance to apply this law and a regular structure of layers of appeal and review to ensure that local action conforms to national standards. This enables the system to be uniform and predictable. This kind of hierarchy, with active supervision of subordinates, is to be distinguished from hierarchic systems in which there is a delegation of functions to subordinates who enjoy complete discretion within their jurisdictions. Independent legal fiefdoms are transformed into provinces.

Fifth, the system is organized bureaucratically. In order to achieve uniformity, the system must operate impersonally, following prescribed procedures in each case and deciding each case in accordance with written rules. In order to permit review, written records in prescribed form must be kept in each case.

Sixth, the system is rational. Its procedures are ascertainable from written sources by techniques that can be learned and transmitted without special nonrational gifts. Rules are valued for their instrumental utility in producing consciously chosen ends, rather than for their formal qualities. Theological and formalistic techniques, for example, in the field of evidence are replaced by functional ones.

Seventh, the system is run by professionals. It is staffed by persons chosen in accordance with testable mundane qualifications for this work. They are full-time professionals, not persons who engage in it sporadically or avocationally. Their qualifications come from mastery of the techniques of the legal system itself, not from possession of special gifts or talents or from emi-

nence in some other area of life. The lord of the manor and religious dignitaries are replaced by trained professional jurists, by police, examiners, and other enforcement specialists.

Eighth, as the system becomes more technical and complex, there appear specialized professional intermediaries between the courts and the persons who must deal with them. Lawyers replace mere general agents.

Ninth, the system is amendable. There is no sacred fixity to the system. It contains regular and avowed methods for explicitly revising rules and procedures to meet changing needs or to express changing preferences. Thus it is possible to have deliberate and measured innovation for the achievement of specific objectives. Legislation replaces the slow reworking of customary law.

Finally, let us consider the relation of law to political authority.

Tenth, the system is political. Law is so connected to the state that the state enjoys a monopoly over disputes within its cognizance. Other tribunals for settling disputes, such as ecclesiastical courts and trade associations, operate only by the state's sufferance or in its interstices and are liable to supervision by it.

Eleventh, the task of finding law and applying it to concrete cases is differentiated in personnel and technique from other governmental functions. Legislative, judicial, and executive are separate and distinct.

By modernization I mean the development of the features mentioned above or sustained movement toward these features. Such a movement may be discerned in Europe as far back as the reception of Roman law, beginning in the eleventh century. But the development of national legal systems of this kind gathered momentum in Europe at the very end of the eighteenth century and spread over most of Europe in the early part of the nineteenth century. The foundations of such systems were laid in many other parts of the world in the nineteenth century. Thus, the "modern" legal experience in most of the world began only a short time after the European. Although in many non-European nations modernization has been intimately connected with the importation of European law, developments in Europe and elsewhere should be seen as phases in a world-wide transformation to legal

systems of this "modern" type. This sort of modernization continues today in both new and old states.

It must be emphasized that this process of modernization is still going on in the West. There is no shortage of examples in the contemporary United States: the abolition of racial classifications in the law, the persistent trend to bring state law into line with federal standards in racial matters and in criminal procedure; the movement to make state laws in commercial fields uniform; the movements toward professional judges at the lower levels of the legal system. In the newer nations, the process goes on even more rapidly, more visibly, and often more painfully. But the point is that all legal systems are comprised of these "modern" features in uneven mixtures with traditional ones, just as modern and traditional features are interwoven throughout almost every society.

Our model of modern law emphasizes its unity, uniformity, and universality. Our model pictures a machinery for the relentless imposition of prevailing central rules and procedures over all that is local and parochial and deviant. But no actual legal system is really so unified, regular, and universalistic. Let us look, then, at the sources of diversity, variety, irregularity, and particularism in legal systems.

Every legal system that embraces a diverse population faces the problem of accommodating local norms and giving expression to local concerns while securing uniformity. Again, any legal system that extends over a wide area must be multilevel. It must have at centers of political power some superior agencies that are acknowledged to be authoritative and are engaged in formulating and elaborating important social norms. But it must also have a multitude of lesser and local agencies to apply this law to everyday occurrences in many places. Finally, any legal system must take account of the fact that at any given time there is inevitably a discrepancy between the highest normative standards that are embodied in the law and the going usages of officials, lay people, and legal professionals themselves.

Thus we come to the basic sources of diversity and discrepancy between the law in books and the law in action—the multiplicity of legal agencies themselves, the necessity of accommodating local interests and concerns, the necessity of accommodating

values and interests that are not explicitly acknowledged by the legal system. These basic sources of diversity and deviance may be handled very differently by different legal systems. What we have characterized here as modern law can be thought of as one fairly distinct style of balancing unity and diversity, the center and the periphery, the legitimate and the disapproved.

So far, we have talked lawyers' law—the law on the books. But we know that there is no exact correspondence between the law on the books and the law in action. To understand how this modern system works and how it is really different from earlier legal systems, we must ask what happens when we put it in context—where this official lawyers' law is juxtaposed with local legal tradition, deviant practices, and divergent popular attitudes.

The lawyers' law is not the whole of the law. By lawyers' law I refer to those elements of the legal system that are national, formal, impersonal, written, refined, and elaborate, articulated and applied by specialists arranged in a hierarchic network of communications and involving reference to universal norms and independently verifiable facts. On the other hand, the going practice of any legal agency or locality involves local standards and understandings, informal relations, and personal judgments. There are some legal systems that are so simple that no such lawyers' law is differentiated as a distinct and recognizable entity from going practice; for example, the self-contained traditional communities studied by students of primitive law. On the other hand, there are legal systems in which this official lawyers' law has in the main absorbed and effaced the local law traditions. In both of these situations, "official" law is well integrated with popular attitudes about legality; lawyers' law is indistinguishable from local law. Most theories of law, strangely to me, are based on the assumption of a high degree of unity of this kind. Law is said to be the command of the sovereign or the expression of the jural postulates of the society.

But these highly unified legal situations are extreme or ideal types. Plainly there is an intermediate type in which there is an unresolved tension between the national and local, the formal and the informal, the official and the popular. The clearest instance of this is when a colonizing power superimposes uniform law over a

territory formerly governed by a diversity of legal traditions. But it is important to recognize that this kind of legal colonization may come from within as well as from without, as it did in Japan in the nineteenth century and Turkey in the twentieth century and as it proceeds today in the reforms instituted in many new nations or in the United States. We may call this intermediate type the dualistic legal situation.

In a relatively homogeneous society, one may visualize law as the expression of shared social norms. But in a heterogeneous society (differentiated horizontally by culture or region or vertically by caste or class), the law expresses primarily the aspirations, not of "the society," but of the groups and strata that promulgate, formulate, and apply the law. The official law embodies norms and procedures that are congenial to the governing classes and may be more or less remote from the attitudes and concerns of many of the people ruled by it. As an astute Nigerian lawyer recently observed, "The law and the constitution of a people are an expression of the social consciousness of their leaders." [1]

A gap between official law, on the one hand, and popular or local law on the other, is not a rare phenomenon. It is probably typical of most large political entities or those with intensive social differentiation. This dualistic legal situation is present with special intensity in the newer states, but it obtains in most modern societies to a greater or lesser degree.

This multilayered legal situation is not new; it long antedates modern systems of law. What is distinctive is how modern law deals with this situation and the processes of change that it sets in motion. There is a striking contrast between modern and premodern law in the way in which the higher and most authoritative elements in the legal system address themselves to the local and discordant elements.

Take the example of India, where there has been and continues to be legal pluralism on the most massive scale. In the Hindu law system, before the coming of the British, law was for the most part a local matter. Besides the courts of kings, there were innu-

[1] H. O. Davies, "The Legal and Constitutional Problems of Independence," in Peter Judd, ed., *African Independence* New York: Dell, 1962, p. 328.

merable tribunals, formal and informal, applying myriad bodies of customary law to their respective castes, localities, and guilds. There was classical Hindu law or *dharmaśāstra,* a widespread and prestigious system of law. But in spite of the plenary power of the kings' courts, official or higher law did not operate to override and displace local law. *Dharmaśāstra* itself incorporated the widest tolerance for local law. The king was instructed to recognize the binding authority of these lesser bodies of law. The fact that *dharmaśāstra* was the only body of law that was written, studied, and systematically cultivated combined with the prestige of its Brahman expositors, the patronage of royal authority, and the striving of many groups for social advancement to spread this "higher" law to more groups on more topics of law. But this was by absorption and acceptance, not by imposition. At the same time that custom was gradually aligned in some respects with śāstric standards, the textual law itself was continuously reinterpreted to accommodate a variety of going usages.

Thus, in the Hindu system, the existence of royal courts and a refined and respected system of written law did not serve to unify the system in the way that national law did in the West. In Europe and America, local law was absorbed into and gradually displaced by law promulgated by state authorities. But Hindu law did not visualize the respective authoritativeness of its governmental, śāstric, and local components in a way that supplied either the techniques or the ideology for the ruthless suppression of local law. 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. It was perhaps closer to the relations that obtain between Paris designers and American department-store fashions, or between prestigious universities and smaller colleges, than to anything in modern legal experience. Instead of systematic imposition, there is a general diffusion by example and persuasion, by the filtering down (and up) of ideas and techniques, by some conscious imitation and imitation of imitations.

Hindu law, then, is the prime example of the ancient maxim that "special law prevails over general law." Let us take another premodern example: that of Muslim law. Here, too, we find a

body of authoritative and universal legal norms worked out in an elaborate and refined legal literature. But here, too, we find that the local, the particular, the deviant, the customary, are accommodated, not, as in the Hindu system, by simply absorbing them and conferring legitimacy on them, but rather by an elaborate series of technical devices to make the law comport with going practice and by a delimitation of spheres by which troublesome matters were left to custom or to royal prerogative.

In modern law, the relatively stable and slowly changing balance between higher and local components in a legal system is shattered beyond repair. In earlier systems, there was a mutual influence and interchange between higher general law and special local law. The higher law might deflect the local and might be deflected by it. They might coexist without much friction. Now, as we shall see, there is an end to the possibility of coexistence and there is an acceleration of the rate of influence in one direction and an inhibition of influence in the other.

In a modern system, there is a strong and persistent tendency toward the replacement of local and popular law by official lawyers' law. The most powerful agency of dissemination is a hierarchical system of courts. The nationwide rules and standards propounded at the upper reaches of the hierarchy are applied by local courts. The decrees of these courts can be enforced by compulsory process, independently of local opinion. Even where official courts attempt to apply indigenous law, the latter is transformed in the process. Hindu or Moslem law, applied in courts with different rules of procedure and by judges with different training, preconceptions, and traditions, takes on a new character. And this even more so with unwritten customary law. From an orally transmitted body of precepts and precedents, subject to variable interpretation and quasi-legislative innovation at the discretion of village notables, it becomes a body of fixed written laws to be applied by a professional court. Variable sanctions imposed with an eye to the total situation of the parties are replaced by the compulsory and drastic execution of the decree of the official court.

This process of modernization is accompanied by characteristic discomforts. In nineteenth- and twentieth-century India, we

hear complaints that are strikingly reminiscent of those in medieval Germany at the time of the reception of Roman law, applied by professional judges—judges unfamiliar with local customs, delay, expense, unnecessarily complicated procedure.

In this process, the official law does not remain static. If official law is borrowed, it is refined more or less to distill out some of the localisms of its original historic embodiment, as the common law, in being transplanted to India, was stripped of technicalities and historical anomalies and rendered symmetrical and orderly. Again, the lawyers' law must be elaborated to assimilate new kinds of persons and transactions, as the English law of crimes had to deal with new kinds of offenses and new kinds of property in India and Africa. The dissemination of lawyers' law is not wholly a one-way process. But official law is limited and contained by the very conditions of its success. The law on the books does not represent the attitudes and concerns of the local people. The demise of traditional law does not automatically bring the demise of traditional society. People learn to manipulate it for their purposes, to make it express their concerns and serve their ambitions. They devise new patterns of avoidance and evasion of the rules promulgated at the upper reaches of the system. The law in operation is always a compromise between lawyers' law and parochial notions of legality.

Every legal system purports to cover everything under the mantle of elevated general standards. But it always has pockets in which to accommodate local and parochial interests and attitudes. In premodern systems, the smaller groups enjoyed autonomy in their own law work, and the government tended to absorb and apply local standards. Under a modern system, these methods are no longer available.

A modern system breaks the tie of law with local and group opinion; this can be liberating for the dissenter and the deviant. The individual is freed from the prescriptive usage of the local group; the group itself must now be responsive to norms of a much wider collectivity. Local attitudes and concerns can no longer find direct embodiment in law. They become law only when mediated through ideas of remote lawmakers and the tech-

niques of professional judges. The legal world is transformed from congeries of more or less independent chapels into a few hierarchic churches.

In this new dispensation, parochial interests and concerns find expression in new ways. Federalism, limitations on government, rules of contract, and voluntary association all provide enclaves; influence through representation at the law-making centers makes official law responsive. Devices like juries, and locally elected judges and prosecutors, permit differences under the veneer of uniformity. Selective nonenforcement, planned inefficiency, *sub rosa* compromise, tolerated evasion, and, finally, corruption—all these permit the local, the particularistic, the deviant, to assert themselves while maintaining the fiction that the law is uniform and unvarying.

In spite of its discomforts, there seems to be a certain irreversibility in this process of forming a modern legal system. Schemes to revive the "simplicity" of local customary law by reconstituting village courts cannot put together the broken vessel of traditional law. Legal revivalist movements such as those in Ireland, Pakistan, and Israel, whatever their limited success in changing substantive norms, seem similarly doomed to have little effect on the basic character of the legal system.

It is instructive to compare the fate of colonial law with that of colonial languages. While the languages of the colonizing powers sometimes recede from their former pre-eminence as a medium of public business and public life, the tide of modern law that colonization brought in its train continues to advance. For modern law includes techniques for eroding away and suppressing local law by official law; it accomplishes its own imposition, even inadvertently. And this imposition seems to be enduring in a way that language is not. An official language does not become a household language; each generation must undergo anew the process of estrangement. But the official language does not necessarily gain at the expense of household languages. On the contrary, we find in India, for example, an enrichment and development of indigenous languages during British rule. However, official law of the modern type does not promote the enrichment

and development of indigenous legal systems. It tolerates no rivals; it dissolves away that which cannot be transformed into modern law and absorbs the remainder.

But it should be emphasized that the process of modernization does not continue relentlessly until it produces a legal system that corresponds to our model in every detail—that is, completely unified, uniform, hierarchic, and so on. As society becomes modernized in all spheres, new kinds of diversity and complexity are generated. Intense concentrations of population, mobility, occupational specialization, mass media of communication—all create counter pressures that demand differentiation, responsiveness, and flexibility in the law. So the very factors that encourage modernization of law and are encouraged by it finally impede and undermine it.

Modern societies develop new devices to blunt and deflect the drive toward modernization of law—new techniques of local autonomy through federalism, voluntary associations, and contractual undertakings; new methods of making law flexible and responsive, such as we find in juvenile courts, administrative agencies, and arbitration. Modern law as we have depicted it in our model is not a destination, but rather a focus or vector toward which societies move. But the very forces that support this movement and are released by it deflect it from its apparent destination.

This should warn us that our model does not represent a goal to be pursued for its own sake: these features of a modern legal system are not necessarily a good thing per se.

Law is in its nature a halfway thing—part principle and part power—and the problem is to get an acceptable combination: that is, to get a principle that is acceptable to the people concerned and to the wider collectivity and is supported by the power of that collectivity. The classic problem of traditional law was that where matters were decided locally, there might be either no power to secure enforcement or no principle, but only force. Where decided by a remote political authority, there was sufficient power, but it might be unconnected to any principle that commended itself to those concerned. The modern legal system attempts to combine power and principle in a new way: by

making the local decision maker responsive to the wider society, rather than to local power. This gives modern law an unprecedented but not unlimited power to shape opinion and deflect practice. But this can be successful only when that law is responsive to the concerns and interests of the diverse groups that make up a modern society. This has tended to be a difficult problem because of the close association in modern law of the moral authority of the law with its universality and uniformity.

But, as we have seen, no legal system can be entirely uniform and unvarying in operation. Each society must find for itself an appropriate balance between unity and diversity. In part, this is a problem of ensuring feedback through responsive representative institutions so that the law does not move too far ahead or lag too far behind opinion. Beyond this, it requires realistic assessment of human diversity and imagination in fashioning the law so that the inevitable disuniformities of the legal system correspond to those desirable disuniformities of human behavior.