

**The Displacement of Traditional Law
in Modern India**

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Contemporary Indian law is, for the most part, palpably foreign in origin or inspiration and it is notoriously incongruent with the attitudes and concerns of much of the population which lives under it. However, the present legal system is firmly established and the likelihood of its replacement by a revived "indigenous" system is extremely small. The modern Indian legal system, then, presents an instance of the apparent displacement of a major intellectual and institutional complex within a highly developed civilization by one largely of foreign inspiration. This paper attempts to trace the process by which the modern system, introduced by the British, transformed and supplanted the indigenous legal systems—in particular, that system known as Hindu law.

The Foundation of the Modern Legal System

One of the outstanding achievements of British rule in India was the formation of a unified nationwide modern legal system. The word "modern" is used here to refer to a cluster of features which characterize, to a greater or lesser extent, the legal systems

*This paper is part of a larger study of the development of the modern Indian legal system.

of the industrial societies of the past century. Many of these features have appeared and do appear elsewhere; some of them may be absent to some degree in one or another industrial society. The salient features of a modern legal system include uniform territorial rules, based on universalistic norms, which apportion rights and obligations as incidents of specific transactions, rather than of fixed statuses. These rules are administered by a hierarchy of courts, staffed by professionals, organized bureaucratically and employing rational procedures. The system contains regular and avowed methods for explicitly revising its rules and procedures. It is differentiated in tasks and personnel from other governmental functions; yet it enjoys a governmentally-enforced monopoly over disputes within its cognizance, permitting other tribunals to operate only in its interstices and subject to its supervision. The system requires (and is supported by) specialized professionals who serve as intermediaries between the courts and those who deal with them (Galanter, 1966b).¹

In PreBritish India . . .

In preBritish India there were innumerable, overlapping local jurisdictions and many groups enjoyed one or another degree of autonomy in administering law to themselves (on this period see Altekar, 1958; Cohn, 1961; Derrett, 1965, 1961a, 1964a; Gune, 1953; Kane, 1930-1941, 1950; Mookerji, 1958; Sarkar, 1958). The existence of *Dharmasastra*, 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, local law was absorbed into, and gradually displaced by law promulgated by state authorities. Hindu law did not enjoy the political conditions for unification. But it was not only the fragmentation of jurisdictions—and the extensive delegation to local authorities that obstructed development of a modern legal system. The relative absence of written records, of professional pleaders and of appeals made even local unification difficult. Furthermore, the respective

¹“Modernization” here refers only to the development of the features mentioned above or the sustained movement toward these features. Although, in many cases, the importation of “Western” law seems to serve as the stimulus for such development, it does not imply “Westernization”. Nor do I mean to imply that the processes of modernization proceed relentlessly until they produce a legal system which corresponds to the model in every detail. As society becomes modernized in other spheres, new kinds of diversity and complexity generate pressures for differentiation and flexibility in the law. Modern societies develop new methods of making law flexible and responsive—e.g., administrative agencies, arbitration, juvenile courts. Modern law as depicted here is not a destination, but a focus or vector toward which societies move. But the very forces which support this movement and which are released by it deflect it from its apparent destination.

authoritativeness of governmental, *sastric*, and local components was not visualized in a way to provide either the techniques or the ideology for the ruthless supersedure of local law. The system allowed for change, but did not impose it; it allowed the old to remain alongside the new. 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 our most prestigious universities and our smaller colleges than to anything in our own legal experience. Instead of systematic imposition, of "higher" law on lesser tribunals, there was a general diffusion by the filtering down (and occasionally up) of ideas and techniques, by conscious imitation and by movement of personnel.

The Moghuls and other Muslim rulers had, in cities and administrative centers, royal courts which exercised a general criminal (and sometimes commercial) jurisdiction and also decided civil and family matters among the Muslim population (on this period, see Ahmed, 1941; Sarkar, 1958). These courts operated according to Muslim law—at least in theory, for the application of *Shari 'ah* was qualified by custom and royal decree, by corruption and lack of professionalism, and by arrangements allowing considerable discretion to the courts of first instance. While a hierarchy of courts and a right of appeal existed, it seems that the activity of these higher courts fell short of any sustained and systematic supervision of the lower courts. Hindus were generally allowed their own tribunals in civil matters. Where these matters came before royal courts, the Hindu law was applied. The government's courts did not extend very deep into the countryside; there was no attempt to control the administration of law in the villages. Presumably, the Hindu tribunals proceeded as before Muslim rule, except that whatever ties had bound these tribunals to governmental authority were weakened; there was no appeal to the royal courts.

The "Expropriation" of Law . . .

In undertaking to administer the law in the government's courts, staffed with government servants (rather than to exercise a merely supervisory control over administration of law by non-governmental bodies), the British took the decisive step toward a modern legal system,² initiating a process that might be called

²The alternative is exemplified not only by earlier Indian Law, but by such arrangements as the *millet* system of the Ottoman empire, under which each religious community was required to administer its own law to itself—a system which continues in some degree in parts of the Middle East today.

the "expropriation" of law (Weber, 1958, 83). This expropriation, which made the power to find, declare and apply law a monopoly of government, came about in slightly different ways and at different times in different places. But the general movement was the same. Three distinctive, if overlapping, stages can be discerned in the development of the modern Indian legal system. The first, the period of initial expropriation, can conveniently be dated from Warren Hastings' organization in 1772 of a system of courts for the hinterland of Bengal (Misra, 1961, 1959, ch. 5, 6; Patra, 1961). This period was marked by the general expansion of government's judicial functions and the attrition of other tribunals, while the authoritative sources of law to be used in governmental courts were isolated and legislation initiated. The second period, which began about 1860, was a period of extensive codification of the law and of rationalization of the system of courts, while the sources of law became more fixed and legislation became the dominant mode of modifying the law. This period lasted until Independence, after which there was a further consolidation and rationalization of the law and the development of a unified judicial system over the whole of India.

The Law Before 1860 . . .

The law applied in the courts before 1860 was extremely varied. Parliamentary charters and acts, Indian legislation (after 1833), Company Regulations, English common law and ecclesiastical and admiralty law, Hindu law, Muslim law, and many bodies of customary law were combined in a bewildering array (Morley, 1850, Vol. I, lxii, xcvi; Rankin, 1946, ch. 10, 11; Patra, 1961, ch. 8; Ilbert, 1907, ch. 3). It was a fundamental and persisting British policy that, in matters of family law, inheritance, caste and religion, Indians were not to be subjected to a single general territorial law. Hindus and Muslims were to be governed by their personal law, i.e., the law of their religious group. In other cases, the judges were instructed to decide "according to justice, equity and good conscience". This puzzling formula, whatever its original meaning (Derrett, 1963a) was the medium for the uneven application of some indigenous law and for the importation, sometimes uncritical, of a great deal of English law.

There were, prior to 1860, numerous attempts to reorganize and reform the courts and to systematize and reform the law (Morley, 1850, vol. I, intro.; E. Stokes, 1959, ch. 3; Desika Char, 1963, 278-92) including some reforms which changed Hindu law. However, there was no major progress toward simplifying and systematizing the law until the Crown took over the governing of India from the East India Company in 1858. The quarter of a

century following the takeover by the Crown was the major period of codification of law and consolidation of the court system. During this period a series of Codes, based more or less on English law and applicable, with minor exceptions, throughout British India, were enacted. By 1882, there was virtually complete codification of all fields of commercial, criminal and procedural law (W. Stokes, 1887-88; Acharyya, 1914). Only the personal laws of Hindus and Muslims were exempted. While Hindu and Muslim laws previously had been applied to a variety of topics besides the listed ones, they were now confined (with minor exceptions) to the personal law matters (family law, inheritance, succession, caste, religious endowments). The Codes themselves do not represent any fusion with indigenous law (Bryce, 1901, 107, 117); there is no borrowing from Hindu, Muslim or customary law, although there is occasional accommodation of local rules and there are adjustments and elaborations of the common law to deal with kinds of persons and situations and conditions found in India (Lipstein, 1957, 92ff).

The Transformation of Indigenous Law

What happened to indigenous law as a result of the formation of the modern legal system? First, its administration moved from "informal" tribunals into the government's courts; second, the applicability of indigenous law was curtailed; third, the indigenous law was transformed in the course of being administered by the government's courts.

The most striking impact of the provision of governmental courts was the shift of dispute-settlement from local tribunals (and local notables) to the government's courts. Nineteenth-century (and later) observers speak of a flood of litigation, sometimes with the implication that these disputes would have been peaceably settled or indeed would never have arisen without the availability of official courts. In the absence of information about the quantity of disputes and litigation in traditional India, it seems reasonable to regard most of this litigation as the mere transfer of old disputes to new tribunals.³ These new tribunals and their strange methods had a powerful allure. Maine speaks of the "revolution of legal ideas" inadvertently produced in the very course of attempting to enforce the usages of the country. This revolution, he found, proceeded from a single innovation—"the mere establishment of local courts of lowest jurisdiction" in

³This supposition is compatible with observations of more recent instances of disputes moving from traditional to governmental tribunals. See Cohn, 1955; Beals, 1955. Cf. the observations of Frederick John Shore, that in fact British rule *decreased* the number of tribunals available (1837, Vol. II, 189).

every administrative district (Maine, 1895, 70-71). The availability of these courts, with their power to compel the attendance of parties and witnesses, and, above all, with their compulsory execution of decrees, opened the way for "the contagion . . . of the English system of law (Maine, 1895, 74; Cf. Derrett, 1961a, 18).

The common law courts undertook to deal with the merits of a single transaction or offense, isolated from the related disputes among the parties and their supporters. The "fireside equities" and qualifying circumstances known to the indigenous tribunal were excluded from the court's consideration. In accordance with the precept of "equality before the law", the status and ties of the parties, matters of moment to an indigenous tribunal, were deliberately ignored. And, unlike the indigenous tribunals which sought compromise or face-saving solutions acceptable to all parties, the government's courts dispensed clear-cut "all or none" decisions. Decrees were enforced by extra-local force and were not subject to the delays and protracted negotiations which abounded when decisions were enforced by informal pressures. Thus "larger prizes" were available to successful litigants and these winnings might be grasped independently of the assent of local opinion. The new courts not only created new opportunities for intimidation and harassment and new means for carrying on old disputes, but they also gave rise to a sense of individual right not dependent on opinion or usage and capable of being actively enforced by government, even in opposition to community opinion (Cohn, 1959; Rudolph and Rudolph, 1965).

Traditional Tribunals

Traditional tribunals still functioned, though certain subjects (e.g., criminal law) were withdrawn from their purview. On the whole, these tribunals lost whatever governmental enforcement their decisions had previously enjoyed. The caste group was now treated as a private association. While it thus enjoyed an area of autonomy, it no longer could invoke governmental enforcement of its decrees. At the same time, the sanctions available to the indigenous tribunals declined in force. The new opportunities, for mobility, spatial and social, provided by British rule not only increased transactions between parties beyond the reach of traditional sactions, but also made outcasting and boycott less fearsome. With their own sanctions diminished, their ability to invoke governmental support limited and the social relations necessary for their effectiveness disrupted, the indigenous tribunals declined as the government courts flourished.

The movement of disputes into the government courts in India has not been definitely charted. We might visualize it, borrowing Bailey's term, as a "moving legal frontier" (1957, 4-5). At first the village lay beyond the reach of the modern legal system, ruled by its traditional tribunals according to its customary rules (Marriott, 1955, 186ff). With the impingement of new regulations and the arrival of new forms of wealth and power from the outside, sooner or later some party in the village found it both feasible and advantageous to resort to the government's courts for what it could not obtain from village justice (Bailey, 1957, 262ff; Cohn, 1955, 66; Beals, 1955, 90; Woodruff, 1953, 298). Other parties were obliged to defend themselves in court. As more learned to use the official courts, the authority of village tribunals was displaced. Over time the modern system encroached on the traditional system: court law replaced village law on more topics of law for more groups over more territory.⁴ With this "expropriation" of independent legal "estates", the government's monopoly on making, finding and applying the law was extended.

The Search for Indigenous Law . . .

It was early acknowledged that Indians should be ruled by their own laws. Hastings' plan, which provided the model for the other *mofussil* systems, set out to apply indigenous law. The British assumed that there was some body of law somehow comparable to their own, based on authoritative textual materials to be applied by officials according to specified procedures to reach unambiguous results. However, there was no single system in use, but a multiplicity of systems; and within these there was often no fixed authoritative body of law, no set of binding precedents, no single legitimate way of applying or changing the law. Yet these British assumptions and expectations about Hindu law had a powerful effect upon it and ultimately proved to be self-fulfilling prophecies.

The "Sastra", Custom and British Law

In their search for authoritative bodies of law, the British made collections and translations of ancient texts and recent commentaries. However, Indian law proved strangely elusive (Hunter, 1897, 371). Maine speaks of the "vast gaps and inter-spaces in the Substantive Law of India" (Maine, 1890, 209,

⁴This does not imply that traditional norms and concerns are displaced by official ones. On the contrary, it appears that these traditional attitudes outlast traditional legal practice and are responsible for the inspired manipulation of "modern" law for purposes foreign to the law. Cf. the observation that most Indian court cases are "fabrications to cover the real disputes" (Cohn, 1959, 90).

"Minute of 1st October, 1868"). India was "a country singularly empty of law" (Maine, 1890, 225, "Note of 17th July, 1879"). In the written *sastra* "large departments of law were scarcely represented" (Maine, 1895, 51; Derrett, 1959a, 48ff, and 1964a, 109-10). It was soon recognized that *sastra* was only part of the law and that in many matters Indians were regulated by less formal bodies of customary law. But even the customary law was not sufficient. For when custom was recorded and the quasi-legislative innovative role of the tribunals that administered it was restricted, it did not supply "express rules in nearly sufficient number to settle the disputes occasioned by the increased activity of life and the multiplied wants which result[ed] from . . . peace and plenty. . . ." (Maine, 1895, 75). The need to fill the felt gaps was ultimately to lead to statutory codification on the basis of English law. But, in the meantime, courts, empowered to decide cases in accordance with "justice, equity and good conscience", filled the interstices of *sastra* and custom with "unamalgamated masses of foreign law" (Maine, 1895, 76). Although there was some attempt to draw the most suitable rule from other sources (Derrett, 1959b), in most cases the judges were inclined to assume that English law was most suitable (Legal Cases, 16; Twining, 1964).

Even where Indian rules were available, their application by the British transformed them (Derrett, 1961a, 20, 21-22). Mere restatement in English legal terminology distorted the Hindu and customary rules (Derrett, 1961a, 41). English procedure curtailed some substantive rights and amplified others (Derrett, 1961a, 40). The British insisted upon clarity, certainty and definiteness of a kind foreign to Hindu tradition (Derrett, 1961b, 112). Neither the written nor the customary law was "of a nature to bear the strict criteria applied by English lawyers." (Maine, 1895, 37). Rules seemed vague and requiring of definition, and this was accomplished by English methods. The mere process of definition had the effect of creating rights of a kind that did not previously exist (Maine, 1895, 167). Comparing the effect of English legal method in the Supreme Courts and the *Sudder Courts*, Maine observed that:

At the touch of the Judge of the Supreme Court, who had been trained in the English school of special pleading, and had probably come to the East in the maturity of life, the rule of native law dissolved and, with or without his intention, was to a great extent replaced by rules having their origin in English law-books. Under the hand of the judges of the *Sudder Courts*, who had lived since their boyhood among the people of the country, the native rules hardened and contracted a rigidity which they never had in real native practice (Maine, 1895, 45).

Elevation of Textual Law over Customary Law

One of the remarkable and unanticipated results of the British administration of Hindu law was the elevation of the textual law over lesser bodies of customary law. The sources of personal law were assumed to be not the customary law that prevailed among most Hindus (and Muslims) on most matters, but the highest and most authoritative bodies of textual law. It was assumed that the Hindu law could be ascertained from sacred books. Hastings' plan "took Orthodox Brahmanic learning as the standard of Hindu law" (Derrett, 1961b, 80). It was later acknowledged that according to the Hindu law, where there was a conflict between custom and *sastra*, the custom overrode the written text (Legal Cases, 17); nevertheless, the texts were elevated to a new supremacy over custom. While some more widespread and longstanding customs gained recognition, "the most distinct effect of continued judicial construction . . . has been . . . greatly to extend the operation of semi-sacred collections of written rules . . . at the expense of local customs which had been practiced over small territorial areas" (Maine, 1895, 208; Derrett, 1961b, 101; Gledhill, 1954, 578).

While the British courts may have strengthened some customs by impeding the traditional methods by which orthodox standards spread to new groups (Derrett, 1956, 237), the rules of evidence provided the mechanism for the disappearance of legal effectiveness of much customary law. Custom was unwritten and therefore difficult to prove in court. Yet the British courts, with their heritage of common-law hostility to local customs, applied requirements for proving the existence of a custom that were onerous to Indian litigants. To prevail over the written law a custom must be "proved to be immemorial or ancient, uniform, unvariable, continuous, certain, notorious, reasonable (or not unreasonable), peaceful, obligatory and it must not be immoral nor opposed to an express enactment . . . or to public policy" (Kane, 1950, 44; For the courts' treatment of custom see Kane, 1950, 22-26; Roy, 1911; Jain, 1963). The difficulties in meeting these requirements combined with the general assumption that Hindus were ruled by *dharmasastra* to extend the *sastric* rules to many groups which had previously been ruled by their own customs.⁶

⁶The most striking elaboration of this view is found in the works of J. H. Nelson (1877; 1880; 1886). See also J. D. M. Derrett, 1961c. Similar developments in the elevation of Roman over customary law in Europe are described in Smith, 1927, 35; on the similar role played there by rules of evidence, see Bryce, 1901, 106. While the number of topics ruled by Hindu Law has been restricted, the portion of the population ruled by it continues to increase even today under the rubric of "Hinduization of tribals" (Legal Case 3).

Even where an explicit attempt was made to preserve customary law, the *sastric* law advanced over it (Derrett, 1961a, 29). Custom recorded for the purpose of applying it in the courts, was changed in the process of recording it.⁶ From a body of orally transmitted percepts and precedents, subject to variable interpretation and quasi-legislative innovation at the discretion of village notables or elders, it became a body of fixed law to be construed by a professional court. Variable sanctions, imposed with an eye to the total situation of the parties, were replaced by the compulsory and drastic execution of the court's decrees. Judicial enforcement of custom rigidified it and stripped it of its quasi-legislative character (Lawson, 1953, 19); official courts were and are reluctant to permit the creation of new binding custom (E.g., Legal Cases, 4, 12).

Sastric Law was Rigidified

Customary law then, was rigidified, restricted in scope and replaced by *dharmasastra*.⁷ What was the effect of the courts on *sastric* law? To ascertain the Hindu and Muslim law, the courts appointed law officers—Muslim *moulavis* and Brahmin *pundits*—to select and interpret the relevant portions of the Hindu and Muslim law for the English judges. At the same time, the British set about collecting and translating authoritative books in the hope of making the Hindu law more accessible and certain. Dissatisfaction with the work of the law officers, the growth of a body of translated texts, digests and manuals prepared by the British, as well as a growing body of precedent from the courts themselves, led eventually to the elimination of the law officers as intermediaries between the courts and the Hindu law. With the general reorganization of the legal system in the 1860's, the posts of the law officers were abolished and the common-law judges undertook to administer the law directly from the existing corpus of materials. Derrett observes that "the *dharmasastra*, as a living and responsible science died when the courts assumed full judicial knowledge of the Hindu law in 1865 . . ." (Derrett, 1961b, 94).

Derrett tells us that the "death-sickness" began when, in their quest for "clarity, certainty and finality in terms foreign

⁶In the Punjab, custom was regarded as the primary rule of decision on certain specific matters (Rattigan, 1953). But even here, custom was recorded and its administration becomes almost indistinguishable from statute and case law (Legal Case 8). On the method and impact of recording, see Alan Gledhill, 1960.

⁷For an account of parallel development within Muslim personal law, Rankin, 1940; Ali, 1938. The elevation of textual law over custom culminated in the Muslim Personal Law (Shariat) Application Act, 1937 (Act XXVI of 1937), which abrogated custom with specified exceptions (Fyzee, 1955).

to Hindu tradition", (*ibid.*, 112) the British attempted to treat Hindu law as if it could be made to assume a fixed form. They insisted on a certainty and consistency alien to Hindu jurisprudence, which depended on expansive judicial discretion. ". . . [T]he *sastra* . . . offered the judge discretion, not only in choice of a rule of law from permissible alternatives, but also in manipulating the judicial procedure, e.g., in the admission of witnesses, etc." (*ibid.*, 76). But while such discretion and flexibility were necessary to the working of the traditional system, they constituted an intolerable deficiency to the British, who "had no means of inserting themselves into the tradition which would have enabled sound discretion to be exercised" (Derrett, 1961b, 76; Derrett, 1961a, 33; Morley, 1850, clxxvii ff).

In their effort to make Hindu law more uniform, certain and accessible to British judges and to check the discretion of the *pandits*, the courts relied increasingly on translations of texts, on digests and manuals, and on their own precedents. Regard for precedent as such was foreign to the Hindu system (Derrett, 1961b, 83). Introduction of the rule of *stare decisis* diminished the flexibility of Hindu law by ruling out innovations to meet changes in community sentiment (Derrett, 1961a, 48).

Earlier, *sastra* had changed and developed by successive commentaries and had maintained its flexibility by its complex and discretionary techniques of interpretation. British administration not only dissipated these techniques but also narrowed the selection of authoritative texts. Courts were not to consult the whole of *sastric* science, but only those commentators accepted in the locality, a view which led to the elaboration of partially artificial "schools" of Hindu law. Any further development by commentary and reaction was impeded (Maine, 1895, 46-7).

[A]s the influence of the *pandit* gradually wanes in the courts we see the latter coming to rely more and more on the older, more narrowly defined *dharmasastra* works and less and less on the miscellaneous and more recent works which the good *pandit* would frequently rely upon. The *pandit* as a professor of a living science was rejected for the more or less dead treatises which would head the *pandits'* list of references (Derrett, 1961b, 99).

With its innovative technique stripped away, *sastric* law, like customary law, became more rigid and archaic^a as well as

^aA striking instance of this is to be found in the increased emphasis on the *varnas*, or four great classes into which Hindu society is theoretically divided by the *sastric* texts. *Varna* distinctions received scant attention from the courts during the early years of British rule, but became a major factor in the administration of Hindu law after the courts undertook to administer it without intermediaries and directly from the texts.

more uniform and certain. Yet judicial precedent and legislation provided new means of growth and development (Sarkar, 1958, 366-90; Gledhill, 1954).

The Impact of the Modern Legal System

Let us consider some of the effects on Indian society of the modern legal system with its regular hierarchies of courts applying codified English law and rationalized indigenous law. We noted before the spread of a sense of individual right independent of local usage or opinion and enforceable by reference to standards and agencies beyond the locality of the group. The new system provided new avenues of mobility and advancement within Indian society (Kumar, 1965; Cohn, 1960). On speculation in lawsuits see Report 1925, ch. 43). There were new methods for conflict, acquisition and pursuit of status (Legal Case 15). Powerful persons and groups on the local scene possessed new weapons for intimidating and harassing their opponents. But the local underdogs could now carry the fight outside the local arena by enlisting powerful allies elsewhere. Persons and property were freed from hereditary prescriptions, making possible a wider range of "market" transactions.

The legal system also provides new channels for the dissemination of norms and values from governmental centers to towns and out to villages. The legal system is a hierarchical network, which radiates out from the cities and through which authoritative doctrine flows outward from governmental centers. By the prestige of urban and official centers, and by the disposition of governmental power in their enforcement, elements of this doctrine might be powerfully recommended. New methods of group activity and new images of social formation are presented (McCormack, 1963, 1966; Conlon, 1963; Maine, 1895, 9, 38).

Modern Law: A Unifying Element

The modern legal system may be viewed as an important unifying element. While previously there were wider networks of marriage, ritual activity, pilgrimage and economic and military activity, until the advent of the modern system, law and justice were in good part purely local concerns (Cohn, 1959, 88). Today, while India has no single nationwide system of caste, kinship, religion or land-tenure, there is an all-India legal system which handles local disputes in accordance with uniform national standards. This legal system provides not only a common textual tradition but also a machinery for insuring that this tradition is applied in all localities in accordance with nationally pre-

scribed rules and procedures rather than dissolved into local interpretations.

With this system goes what we might call an all-India legal culture. Its carriers are all persons who are connected with the courts, but primarily the numerous lawyers.⁹ With their skills in manipulating the legal system, they serve as links or middlemen between official centers and rural places, disseminating official norms, rephrasing local concerns in acceptable legal garb, playing important roles in devising new organizational forms for forwarding local interests (e.g., caste associations, political parties, economic interest groups).¹⁰ In spite of differences of region,

⁹(*Report of the All-India Bar Committee*, 1953; Cohn, 1961, 625ff). Lawyers are not the only intermediaries who carry official law to the wider society; there are also social workers, administrators, police, etc. And, of course, the petition-writers, clerks and touts, who often act as intermediaries between villagers and urban lawyers (Mack, 1955; Srinivas, 1964, 94; Chattopadhyay, 1964, 81ff; Law Commission of India, 1958, Vol. I, 577ff; Cohn, 1965, 103).

In absolute numbers, India has the second largest legal profession in the world (after the United States). In proportion to its population, there are fewer lawyers in India than in Western common-law countries, but many more than in other new states. The Indian figures are in the same range as many continental civil-law countries. (In these comparisons the Indian figures are somewhat understated, since the proportion of children is higher in the population of India than in those of the wealthier countries.) But a rough idea may be gathered from the following figures, which represent the number of persons per lawyer in selected countries:

United States (1960)	728
Canada (1961)	1,366
Italy (1957)	1,601
Great Britain (1959)	2,105
West Germany (1958)	3,012
India (1952)	4,920
Egypt (1964)	5,768
France (1958)	5,769
Japan (1960)	14,354
Nigeria (1964)	22,765
Indonesia (c.1960)	c.100,000

The figures for the United States, Canada, Italy, Great Britain, West Germany, France and Japan are taken from T. Hattori (1963). The Indian figures are based upon the Report of the All-India Bar Committee (1953). Figures for Egypt and Nigeria were supplied by the Commonwealth Library of the American Bar Foundation. The Indonesian figure is a calculation based upon Lev (1965, 183, 189).

¹⁰Sir Ivor Jennings, observing that the Constituent Assembly was dominated by lawyers, contends that "the lawyer-politician has . . . played a more important part in Indian politics than in the politics of any country in the world" (Jennings, 1955, 24). In 1953, lawyers comprised 26 per cent of the Lok Sabha (Lower House) and 29 per cent of the Rajya Sabha (Upper House.) Cf. approximately 60 per cent of the U.S. Congress (85th Congress); 20 per cent of the British House of Commons (1955); 14 per cent of the French National Assembly (1951); 11 per cent of the West German Bundestag (1957) (McCloy, 1958, 5-6).

language, caste and religion, they share a common legal culture and they are able to put this culture at the service of a wide variety of local interests. In a situation where local concerns and interests get expression by representation at centers of power, rather than in the traditional way of enjoying a sphere of autonomy, the lawyers are crucial agents for the expression of local and parochial interests at the same time that they rephrase these interests in terms of official norms. Thus the modern legal system provides both the personnel and the techniques for carrying on public business in a way that is nationally intelligible and free of dependence on particular religious or local authority. It thus provides one requisite for organizing Indian society into a modern nation-state.

Constitutionalism

The formation of an independent Indian nation provided a basis for further integration and consolidation of the modern legal system. With the coming of Independence, enclaves previously outside the legal system were integrated into it. A layer of constitutionalism was superimposed on the existing legal system and structure of government. The Constitution (1950) established India as a secular federal republic with a parliamentary system in the British style and a strong central government. The framers of the Constitution rejected the various proposals to construct a government along "indigenous" lines.¹¹ The Constitution established powerful legislatures at the center and in the states. It also established a unified judiciary covering the whole of India under a Supreme Court as a court of final appeal in all cases.

The Constitution includes a bill of Fundamental Rights, which are enforceable by the judiciary (Constitution of India, Part III; Cf. Art. 32 and 226 on the wide judicial powers in this area) and to which all governmental regulation and all laws in every part of India must conform. Government is enjoined by

¹¹The proponents of "indigenous" systems of government (of both orthodox and Gandhian persuasions) were severely disappointed with the Constitution, which did little to dismantle complex bureaucratic government, to re-assert the virtues of village autonomy or to express dedication to a life of purity in Hindu terms. The whole effort managed to deposit only three provisions in the Constitution, all in the chapter on Directive Principles: prohibition, an item of uplift with religious overtones that had long absorbed social reformers (Art. 47); a commitment to laws abolishing cow-slaughter (Art. 48); and, most important, a promise to organize self-governing village *panchayats* (Art. 40). On the constituent assembly's choice, generally, see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (1966). On schemes and pleas for "indigenous" alternatives, see *Panchayat Raj as the Basis of Indian Polity*, 1962; Agarwal, 1946; Sharma, 1951).

these provisions to be indifferent to particularistic and ascriptive characteristics (e.g., race, religion, caste, place of birth, and sex) in its dealings with citizens, whether as electors, employees or subjects (Constitution of India, Part III, Cf. Art. 325; Legal Cases, 14, 11, 9). A wide range of private conduct, involving the assertion of precedence or the imposition of disabilities—including venerable usages which had previously enjoyed religious and sometimes legal sanction are outlawed (Constitution, Arts. 17, 15[2], 23[1]). Governmental enforcement of rights based on caste position, heredity, vicinage and the like is forbidden (Legal Cases 5, 2, 1; Constitution Arts. 25, 26; Subramanian, 1961).

To serve as a guide to the legislatures, the Constitution contains a set of non-justiciable "Directive Principles of State Policy" (Constitution of India, Part IV), which call for the reconstruction of Indian society and government along the lines of a modern welfare state. Accordingly, the central legislature and the legislatures of the several states have released a flood of legislation aimed at economic development and social reform, extending governmental regulation to many areas of life previously immune from official control.¹² Extensive regulation of landholding, religious endowments, caste practices and family law by central and state governments has supplanted governmental recognition of local rules of unofficial or parochial provenance.

The Hindu Code

The extension and consolidation of the modern features of the legal system can be observed in the treatment of two basic institutions of Hindu society—the family and the caste. Among the Directive Principles is a commitment that the State "secure to the citizens a uniform civil code throughout the territory of India" (Constitution, Art. 44), which contemplates the complete abandonment of the personal-law system. Although no such unification of the laws of Hindus and Muslims has yet been undertaken, the Parliament in 1955-56 passed a series of Acts known collectively as the Hindu Code, which effect a wholesale and drastic reform of Hindu law (Derrett, 1963b, 1957, 1958; Levy, 1961). Where earlier legislation introduced specific modifications into the framework of *sastric* law, the Code entirely supplants the *sastra* as the source of Hindu law. Hindu social

¹²In the Constitution's first eight years, some 600 Acts were passed by the Central Parliament (in addition to 89 Ordinances, 21 Regulations and 62 Presidential Acts). During the four years 1953-56, the State Legislatures passed 2,527 Acts, of which 275 dealt with land reform (Law Commission of India, 1958, note 114 at Vol. I, 30).

arrangements are for the first time moved entirely within the ambit of legislative regulation; appeal to the *sastric* tradition is almost entirely dispensed with. The Code turns away from the *sastra* by abandoning *varna* distinctions and indissoluble marriage, the preference for the extended joint family and for inheritance by males only and by those who can confer spiritual benefit. It favors instead greater individualism, emphasis on the nuclear family, divorce and equality of *varnas* and sexes. Very few rules remain with a specifically religious foundation.

The Code marks the acceptance of Parliament as a kind of central legislative body for Hindus in matters of family and social life. The earlier notion that government had no mandate or competence to redesign Hindu society has been discarded. For the first time, the bulk of the world's Hindus live under a single central authority that has both the desire and the power to enforce changes in their social arrangements. It has been pointed out that, throughout the history of Hinduism, no general and sweeping reforms were possible, just because of the absence of centralized governmental or ecclesiastical institutions (Pannikar, 1961, 72, 79ff). Reformers might persuade others and they might gain acceptance as a sect; but there was no way for them to win the power to enforce changes on others. They could supplement existing practice but they could not supplant it, because there were no levers which could be grasped to accomplish across-the-board changes. The modern legal system has made possible enforcement of changes among all Hindus by a powerful central authority.

The Code subjects Hindus to a degree of uniformity unprecedented in Hindu legal history. Regional differences; the schools of commentators; differences according to *varna*; customs of locality, caste and family; many special statuses and estates, and (largely) distinctions of sex have all fallen by the wayside. Some narrow scope is allowed for custom, but for the first time a single set of rules is applicable to Hindus of every caste, sect and region.

Reform and Unification

Much the same might be said of constitutional provisions and legislative enactments regarding caste (Galanter, 1961, 1963, 1966a). Here, too, there is the assertion of broad regulative power by the government and curtailment of the autonomy of the component groups within Hinduism. This power is exercised to eliminate disparities of law and custom and to impose uniformity of rights and equality of opportunities. *Sastric* notions and legal categories (*varna*, pollution) are discarded and Western or modern

categories substituted. In both instances emphasis falls on eradicating the barriers within Hinduism and promoting an integrated Hindu community—and eventually a non-communal society. Finally, in both instances, we have the Western-educated elite using the law to impose its notions. As in many areas of Indian life, the law in regard to the family and caste does not represent a response to the felt needs of its clientele or an accommodation of conflicting interests and pressures. Rather the law is the expression of the aspirations of the most articulate and “advanced” groups, which hope to use its educational as well as its coercive powers to improve the unenlightened. Deliberate social change was not unknown before the coming of the British. On the contrary, Hindu law contained its own techniques for deliberate and obligatory innovation and these continued to be used into the early part of the British period. The revolutionary principle fostered by British rule was not the notion of deliberate social change, but rather the notion of the unit which might legitimately introduce and be the subject of such changes. The recent legislation visualizes a single national community—or at least a community embracing all Hindus, transcending divisions of region, caste and sect.

Thus the present legal system provides a unifying element in India in a way that neither Hindu nor Muslim law ever did. Muslim law never went deep enough; it was never applied to disputes among Hindus. *Dharmasastra* tolerated diversity, preferring unification by example, instruction and slow absorption rather than by imperative imposition. Change was piecemeal rather than comprehensive. In contrast, the new legal system provides machinery (and the ideology) for legislation to be enforced throughout the society. Such a system, along with mass communications, makes possible unprecedented consolidation and standardization of Hinduism, as well as of Indian society generally.

Traditional Law in the Modern System

What, then, is the role of Hindu law in the Indian legal system today? The *dharmasastra* component is almost completely obliterated. While it is the original source of various rules on matters of personal law, the *sastra* itself is no longer a living source of law; these rules are intermixed with rules from other sources and are administered in the common-law style, isolated from *sastric* techniques of interpretation and procedure. In other fields of law, *sastra* is not used as a source of precedent, analogy or inspiration. As a procedural-technical system of law—a cor-

pus of norms, techniques and institutions—it is not longer functioning. There seems to be little nostalgia to revive particular *sastric* rules.¹³ (which would, in any event, be administered in the common-law style); the pleas for an “indigenous system” are for the directness, cheapness and simplicity of local law, not for the complexities of *dharmasastra*.

The local customary component of Hindu law is also a source of rules at a few isolated points, but it, too, has been abandoned as a living source of law. There is but one significant attempt to promote such indigenous law, by devolving certain judicial responsibilities to the local elective village *panchayats* (Law Commission, 1958, Vol. II, 874–925; Malaviya, 1956; *Report*, 1962). But these elective *panchayats* are quite a different sort of body than the traditional *panchayat* (Retzlaff, 1962, 23ff; Luchinsky, 1963a, 73; Robins, 1962). It is suggested that rather than inspiring a resurgence of local law, they may instead effect a further displacement of local law by official law within the village (Legal Cases 7, 9, 11).

The traditional method of relating the authoritative “official” law to local customary law has definitely been supplanted. The Indian legal system is now equipped with machinery for bringing local law into line with national standards.¹⁴ Once such a mechanism is present, local law can survive only by taking on the character of modern law—it must become certain, definite, consistent, obligatory rather than discretionary or circumstantial.

The Gap Between “Higher Law” and Local Practice

Every legal system faces the problem of bridging the gap between its most authoritative and technically elaborate literary products at the “upper” end of the system and the varying patterns of local practice at the “lower” end. It must decide on allowable leeways—how much localism to accommodate, how to deflect local to general standards. Hindu law solved these problems by willingly accommodating almost unlimited localism; it was willing to rely on acceptance and absorption through per-

¹³Very considerable portions of *sastra*, with their emphasis on graded inequality, would fail to meet present constitutional requirements and would hardly be likely to appeal to India’s present rulers.

¹⁴It should be noted that this machinery is more insistent in India than in, say, the United States, where juries and locally elected prosecutors and judges introduce a check on uniformity and provide enclaves for localism. Again, the unified judiciary, the competence of the Indian Supreme Court in matters of state law, the high estimation put on its *dicta* as well as its holdings, litigants’ direct access to higher courts, the frequency of appeals, and the practice of higher courts entering their own orders instead of remanding—all of these incline the system to a high degree of centralization.

suasion and example. These methods are too slow and irregular to appeal to a ruling group which aspires to transform the society radically and to build a powerful and unified nation. Even where specifically Hindu norms are made the basis of legislation—e.g., in prohibition and anti-cow slaughter laws—these norms are not implemented by the old techniques. Enforcing these matters by legislation, courts and the police stands in striking contrast to allowing them simply to be adopted gradually by various groups in the society. Such change still takes place, but it operates outside the legal system. While the harsher British methods have displaced the methods of persuasion and example from the legal system itself, they persist alongside it in the form of propaganda, education and the widespread tendency to imitate urban and official ways (Marriott, 1955, 72).

But the demise of traditional law does not mean the demise of traditional society. Traditional notions of legality and methods of change still persist at a sub-legal level—e.g., in the area of activities protected by the doctrine of “caste autonomy”, in the form of accepted deviance, and in arrangements to evade or ignore the law. The modern legal system may provide new possibilities for operating within traditional society. Official law can be used not only to evade traditional restrictions, but to enforce them (Srinivas, 1964, 90; Siegal and Beals, 1960, 408; Cohn, 1965, 98–99, 101). Traditional society is not passively regulated by the modern system; it uses the system for its own ends. Traditional interests and groupings now find expression in litigation, in pressure-group activity and through voluntary organization.

Two Political Idioms . . .

Morris-Jones (1963) speaks of two contrasting political idioms or styles in contemporary India: the modern idiom of national politics with its plans and policies and the traditional idiom of social status, customary respect and communal ties, ambitions and obligations. He notes that “Indian political life becomes explicit and self-conscious only through the ‘Western’ [modern] idiom. . . . But this does not prevent actual behavior from following a different path” (*Ibid.*, 142). Similarly, all contact with the legal system involves the translation of traditional interests and concerns into modern terms in order to get legal effectiveness. For example, at the touch of the official law, a caste’s prerogatives become the constitutionally protected rights of a religious denomination (Legal Case 13); a lower caste’s ambitions become its constitutional right to equality; property can be made to devolve along traditional lines, and land-reforms can be frustrated by transactions in good legal form (Derrett, 1964b);

Luchinsky, 1963b; Ishwaran, 1964). Traditional interests and expectations are thus translated into suitable legal garb, into nationally intelligible terms.¹⁵ But the process of translation opens new possibilities for affiliation and alignment, new modes of action. If we regard tradition not as a stationary point, a way of remaining unchanged, but as a method of introducing and legitimating change, we can say that the modern legal system has displaced traditional methods within the legal system itself while it has supplemented them outside it.

A Dualistic Legal System

India has what we might call a dualistic or colonial-style legal system—one in which the official law embodies norms and procedures congenial to the governing classes and remote from the attitudes and concerns of its clientele. Such systems are typical of areas in which a colonizing power superimposes uniform law over a population governed by a diversity of local traditions. However, legal colonization may occur from within as well as from without, as in Turkey ("The Reception . . .," 1957), Japan (Takayanagi, 1963) and in India since the departure of the British. The colonial legal situation prevails wherever there is unresolved tension between national and local, formal and popular law.¹⁶ In a relatively homogeneous society, the law can be visualized as the expression of widely shared social norms. In a heterogeneous society (differentiated horizontally by culture, or vertically by caste or class), the law expresses not primarily the aspirations and concerns of the society, but those of the groups that formulate, promulgate and apply the law. A gap between the official law and popular or local law is probably typical of most large political entities with intensive social differentiation. To some extent this colonial legal situation obtains in most

¹⁵"The use of the courts for settlement of local disputes seems in most villages almost a minor use of the courts. In Senapur, courts were and are used as an arena in the competition for social status, political and economic dominance in the village. Cases are brought to harass one's opponents, as a punishment, as a form of land speculation and profit making, to satisfy insulted pride and to maintain local political dominance over one's followers. The litigants do not expect a settlement which will end the dispute to eventuate from recourse to the State Courts" (Cohn, 1965, 105).

¹⁶The colonial legal situation then stands midway between those systems where official law is reflective of, and well integrated with, popular law because it has been precipitated out of that law (or because it has completely absorbed and digested local law); and those where it is reflective of a well integrated with folkways because no remote official law has ever differentiated itself institutionally from folk or popular law.

modern societies (Priestly, 1962, 196-97; Dewey, 1946, 116-117; Maine, 1895, 59-60). But it is present with special force in the so-called new states. In the nineteenth and early twentieth centuries, the poorer parts of the earth were the scene of a reception of foreign law unprecedented in scope (even by the reception of Roman law in medieval Europe). In India, the incorporation of large blocs of common law and civil law in the nineteenth century was followed by the reception of new constitutional models in the twentieth century and by a post-Independence wave of reform and rationalization. This process of borrowing, consolidating and modernizing national legal systems seems to involve certain common trends: application of laws over wider spatial, ethnic and class areas; replacement of personal by territorial law; the breakdown of corporate responsibility and the growth of individual rights; increasing generality and abstraction; greater specialization and professionalism, secularization, bureaucratization and replacement of moral intuition by technical expertise. In almost all of the newer countries, the legal system is comprised of these modern elements in uneven mixtures with traditional ones and the discrepancy between the different components of the legal system is strongly felt. This multi-layered legal situation involves common processes of the displacement of local by official law and seems to be accompanied by common discomforts (Smith, 1927, 35-6).

Failure of Revivalism

A certain irreversibility in this process of forming a modern legal system, even where it is based upon foreign sources (at least as long as a unified political power retains control of the law), seems indicated by other instances of the reception of complex law based upon foreign sources, as in the reception of Roman law in Western Europe or the massive borrowing of civil law in nineteenth-century Japan. This irreversibility is confirmed by the very limited success of revivalist movements. Attempts to purify and reconstruct Irish law (Moran, 1960, 31-35, esp. 33; Takayanagi, 1963, 31) fared no better than present attempts in Pakistan (Maududi, 1960, esp. Part I; Coulson, 1963) and Israel (Kahana, 1960; H. Cohn, 1958; Yadin, 1962) which have so far not succeeded in bringing about any fundamental changes in their respective legal systems. In Ireland, Israel and Pakistan, there is, if anything, more common law in the broad sense, i.e., law of the modern type, than before independence. In India, where the proponents of indigenous law are less attached to *dharmaśāstra* than nostalgic for the "simplicity" of local-customary law and where they tend to be persons who find detailed consideration

of the law uncongenial—any change in this direction is even more unlikely.¹⁷

One may compare the fate of British law with that of the English language as a medium of public business and civil life. In general, colonial languages appear to recede from their former preeminence, while the tide of law continues to advance. Strangely, the law seems more separable from its origin, relatively easy to borrow and hard to discard. Bryce found in the spread of Roman and British law “a remarkable instance of the tendency of strong types to supplant and extinguish weak types in the domain of social development” (Bryce, 1901, 122). But what made British law a “strong type” was not the superiority of the norms it embodied or the elegance with which the system was elaborated. It should be noted that, unlike the civil law which spread widely by voluntary adoption, common law spread only by settlement or political dominion.

“... the spirit of English law which settled down on our legislative centres [in India] was that of a period when the law itself was the most technical, the least systematic and the least founded on general, equitable and coherent principles, that the world has ever seen” (Baden-Powell, 1886, 372).

The “strength” of British law lay in its techniques for the relentless replacement of local law by official law, techniques by which it accomplished its own imposition half 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 recapitulate the painful process of estrangement. The official language does not necessarily gain at the expense of the household languages; on the contrary, we find in India 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; it creates a numerous class of professionals who form the connecting links of the nation-state and a vast array of vested rights and defined expectations which disincline those holding them to support or even conceive drastic changes.

¹⁷It should be recalled that the similar distaste for the law of former colonial rulers found in the early history of the United States is not to be observed in more recent American evaluations of our common law heritage. As India feels safely distant from her colonial past, a similar embrace of her legal heritage is at least a possibility.

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