“You have given India,” Secretary of State Sir Samuel Hoare once told his officers, “justice such as the East has never known before.” For most Englishmen, having established the “rule of law” on the Indian subcontinent was probably the proudest achievement of the British raj. They believed that they had substituted legal security for disorder, predictability for uncertainty, and impartiality for whim and nepotism. “Under the old despotic systems,” James Fitzjames Stephen told his readers, “the place of law was taken by a number of vague and fluctuating customs, liable to be infringed at every moment by the arbitrary fancies of the ruler.” Indian nationalists and Englishmen with a certain kind of cultural sensibility held the contrary view, that law had become less meaningful and useful because of its distance, expense and impersonality. These opposing judgments highlighted moral differences concerning the appropriate procedures to be used in settling disputes, maintaining order, and fostering social integration, differences that were rooted in the clash between Britain’s more modern and India’s more traditional society.

We are grateful to Arthur von Mehren, Marc Galanter and Harold Levy for reading and commenting upon this article. None of them is, of course, responsible for what we say.


3 “Such agency is too expensive,” wrote Sir Thomas Munro of English justice, “and even if it were not . . . it is in many cases much less efficient than . . . the natives’ . . . I have never seen any European whom I thought competent from his knowledge of the language and the people to ascertain the value of the evidence given before him.” Cited by Phillip Woodruff, The Men Who Ruled India, 2 Vols. (New York, 1954), Vol. 1, “The Founders”, p. 195.

4 Bernard Cohn, “Some Notes on Law and Change in North India”, Economic De-
The introduction of English law and practice over a period of one hundred and fifty years did much to modify and transform Indian society and culture. The values implicit in the procedures employed by the new British courts, while essential to the creation of a modern legal system, were socially and morally profoundly disruptive, depriving the courts which used them of comprehensibility and authority by substituting alien and novel for familiar practices. The British raj, sometimes by design but more often by inadvertence, advanced the law of the upper twice-born castes (dharmastra) at the expense of the decentralized and diverse customary law of the villager even while the use of western values in the law began to supersede Indian legal conceptions and social arrangements. This dual process parallels in the law what M. N. Srinivas has described in the area of social mobility as sanskritization and westernization, that is, lower caste assimilation to high caste norms concurrent with a more diffuse yet socially separate establishment of western values. Both processes served to displace parochial, customary law, substituting in its stead high culture or western law.

The Myth of Procedural Certainty

The elements of procedure — the categorization of cases by kind and degree, the concern for jurisdiction and standing, the rules of evidence, and the elaboration of a court system and a legal profession — which characterized the application of British law in India expressed the universalism and impersonality of modern western legal systems generally. When tribunals are not part of the situation — the village, the caste — in which disputes or crimes arise, the importance of procedural correctness is enhanced; fair play depends upon it rather than on the knowledge available to tribunals embedded in the context of judgment. But the meaningfulness and acceptability of the distant and abstract arrangements involved are affected, at least in part, by the way in which tribunals have been separated from situation. In so far as the Roman and Anglo-Saxon legal systems and their procedures are meaningful and accepted by the people to whom they apply in the West, they are so because they are rooted in historical experience both in their evolution and in their present application. In India, because the procedure of Anglo-Saxon law was evolved in a foreign context and imposed from above and outside in

velopment and Cultural Change, October, 1959, is very helpful for a specific understanding of the problem in the Indian situation. The difference is not merely one between Indian and western approaches; it is as much a shift from traditional to modern methods of settling disputes.

5 Indian legal reformers imply that Indian law might have performed the same function if English legal administration had not petrified high culture law and cut it off from customary law. Jawaharlal Nehru speaks for this critique when he remarks, "The British replaced this elastic customary law by judicial decisions based on the old texts . . . in the way it was done, it resulted in the perpetuation of the ancient law unmodified by subsequent customs." See The Discovery of India (New York, 1946), p. 331.
a relatively short time, the moral and social effects were comparable to those of an ideological and revolutionary regime bent on transforming society by imposing its a priori conceptions. The effect was, in fact, less than revolutionary since the British had neither the means nor the desire to insist on their “ideology”.

Although the British clearly intended to bring justice, their legal system often produced results which were experienced and understood as injustice, not because they desired or intended such a result but because most Indians did not appreciate its morality and logic.6 “I do not hold,” an Indian anthropologist writes of “Rampura”, “that the Justice administered by the elders of the dominant caste is always or even usually more just than the justice administered by the judges in urban law courts, but only that it is much better understood by the litigants.”7 This result is the expression of divergent assumptions concerning legal procedure.

For Englishmen, the law ought to be “blind”, an idea graphically illustrated by the representation of Justice as a classically clad blindfolded lady holding balanced scales who, like Raphael’s “Justice” at the Vatican, adorns the corridors or facades of public buildings in Europe and America. Seeing no differences in men’s condition, Justice holds all equal before the law. For Hindu law, the reverse was true; the differences among men in society were central to their legal identity. This clash between universalism and particularism is of utmost importance for the reception and consequences of British law in India.

Compounding the difficulty were the two other ways in which Justice is blind. In her incarnation as judge or jury, she may have no relations with the litigants, no contaminating ties of blood, opinion or interest to color her evaluation of the facts. Blood ties or opinions formed by reading a newspaper account of the case are cause for rejecting jurymen. They are meant to be tabulae rasaee upon which the adversary proceeding may inscribe its impressions. Like the judge, they have left behind all previous human baggage.

Finally, Justice is blind so that she may be impartial. This is a quality that is highly regarded in the village too; the honor and authority of local notables is closely connected with their reputation for detached evenhandedness.8 But in the intimate little world of the Indian village where judges live among the judged, neither thinks of impartiality in terms of the “anonymity” or impersonality suggested by Justice’s blindfold or even a High Court judge’s “dis-

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BARRISTERS AND BRAHMANS

tance". "Since the khandan (lineage) is localized in part of the hamlet and since there is little that does not take place within earshot of the other households", Bernard Cohn writes in describing a modern Indian village, "the khandan leader (the first judge) is aware of the dispute from its inception." 9

When all the lineage heads, joined by the heads of households and interested persons in a kind of amicus curiae capacity, meet as a tribunal "everyone who attends will have considerable knowledge of the dispute in question and know and be affected by the chain of relations and disputes which lie behind it." 10

If Justice is not to see anything which will lead her to be less than universal, impersonal and impartial in her judgement, she must be protected by a strict concern for relevance. Yet there is something faintly comic in the vision of James Fitzjames Stephen, the most coldly logical and least culturally sensitive law member ever to sit in Council, presenting the Anglo-Indian world in his Introduction to the Indian Evidence Act, 1872 with an elaborate and closely reasoned but irrelevant theory of relevance. Max Gluckman's observation concerning the Barotse is equally applicable to traditional Indian procedure. "There is no refinement of pleadings," he writes, "in Lozi procedure to whittle a suit down to certain narrow legal claims so as to present the judges with a mere skeleton of the facts relevant to those claims." 11 No one objects when it is found that a tribunal, met to settle one dispute, finds itself adjudicating another that lies behind it. 12 It is assumed that the present difficulty has a relevant history. Village tribunals can not, of course, escape making judgments on facts even if they can be less concerned about relevance. They must distinguish between direct and hearsay evidence and catch out "tutored" testimony. 13 Yet ascertaining facts, with which procedural safeguards are particularly concerned, is less of a problem for village tribunals than for "western" courts since most of those involved have direct knowledge of them.

The adversary mode of western procedure not only isolates the "case" and its litigants from their social context but also decides it by declaring that one side has won and the other lost. Village tribunals try to compromise differences so that the parties to a case can go home with the appearance at least

9 Cohn, "Some Notes", p. 82.
10 Ibid., p. 83.
11 Judicial Process Among the Barotse of Northern Rhodesia (Manchester, 1955). As we shall be citing Gluckman's work at several points to bear out the contention that the assumptions of traditional and modern English law differ, it is only fair to point out that Gluckman means to stress the similarities between African and Western law. But he focuses mainly on judicial reasoning, with which we are less concerned here. See especially his chapter 5, p. 224.
12 Cohn, "Some Notes", p. 86. Gluckman in "The Case of the Biased Father", in Judicial Process, p. 37, indicates in detail how the tribunal investigates in full all past relations between the feuding parties.
13 Srinivas, "The Study of Disputes", in Caste in Modern India, p. 115.
of harmony and with their dignity intact. British courts saw a dispute in terms of plaintiff and defendant, one of whom was right, while the traditional Indian tribunal may find both parties at fault. Despite out of court settlements and arbitration, which express the importance of compromise and the concern for consensus in western law, the difference between the two approaches remains significant. The village tribunal, because it resides among the disputing parties and finds its own life touched by their discontents, is less anxious to find "truth" and give "justice" than to abate conflict and promote harmony. If the merits of a case suggest, for example, that the decision should favor a placid defendant who may be satisfied with the appearance of justice and go against an important and aggressive plaintiff capable of stirring up trouble, the tribunal's settlement may take account of these circumstances.14

"In this country," wrote Jonathan Duncan, British Resident at Benares in the late eighteenth century, "the inhabitants have been so long habituated to settle all causes by arbitration, and to terminate all disputes by what they call mutual satisfaction of both parties, that I am persuaded our more decisive and what they would term abrupt mode of administering justice and executing decisions so passed merely upon the proofs exhibited within a certain and fixed time, perhaps by only one of the parties, would not suit the way of thinking of a majority of inhabitants of Benares." 15

This preference for consensus, probably characteristic of small, morally homogeneous communities,16 extends in India well beyond the village to the rhetoric of modern politics.17 The concern for consensus among contemporary political leaders such as Gandhi may express a residue of village attitudes fated to disappear or a deeper philosophical commitment touching microcosm and macrocosm alike which will retain for some time its hold on Indian consciousness. If important differences between Britain and India existed concerning the importance of procedure and the value of consensus, they must be qualified by an appreciation that both traditions recognized the importance of the other's concerns. The high culture writings of classic Indian law givers such as

14 "Eventually a compromise will be suggested, and even though it may be more favorable to one party, as long as it can be defended as a compromise in the rhetorical sense, both parties seem to be satisfied." Cohn, "Some Notes", p. 86.
16 Writing on the first civil officer at Tenasserim in 1825, J. S. Furnival noted: "Mr. Maingy was quite unable to fathom the Burmese judicial system. In his view legal proceedings were meant to ascertain disputed facts and arrive at a logical decision on them according to fixed legal principle; he failed to understand that Burmans went to court to find a man of wisdom and authority who could help them in arriving at an amicable settlement of their disputes..." Colonial Policy and Practice, American ed. (Cambridge, 1957), p. 31. Gluckman reports that judges regularly gave lectures to both sides.
Yajnavalkya contain sophisticated discussions of procedure while in British courts skillful counsel are able to introduce "irrelevant" material on background, character and circumstances. Today, indeed, modern legal innovations, going beyond the consensus oriented procedures of out of court settlement and arbitration, have removed Justice's blindfold for certain social groups and types of defendants. Recognizing all of these qualifications, implicit and explicit differences between British and Indian law with respect to procedure remain of great importance for understanding cultural conflict and social change in India.

The vexations that accompanied the rise of the British system were mainly expense and delay in the administration of justice, the so-called rise in litigation, and the prevalence of false witness. To some extent, these were a consequence of the shift in procedure itself. That hiring a lawyer and getting oneself and one's witnesses to a distant law court — and fifty miles to the District court was and is "distant" in Indian rural life — there to pay the initial costs of registering a complaint and supporting the witnesses, undoubtedly made such courts less appealing than local tribunals. "Justice can be swift and cheap in the village, besides also being a justice which is understood as such by the litigants. The litigants either speak for themselves or ask a clever relative or friend to speak in their behalf. There are no hired lawyers arguing in a strange tongue, as in the awe inspiring atmosphere of the urban state courts." 21

The alleged rise in litigiousness, generally attributed to the change of system, needs closer investigation. It is often alleged that villagers, torn out of their traditional setting and its social and moral restraints, began to harass one another in a spate of legal disputes. There is some question whether this really happened. Anthropological accounts suggest that litigiousness is not peculiarly modern; the villagers quarrel without the aid of modern courts and there is little reason to believe they were different at an earlier stage of history. The fact that the newly established courts of the nineteenth century were swiftly clogged has been taken as evidence of increased litigiousness but need not be. It can as easily be the result of the movement of litigation from

18 For a discussion, see N. S. Gupta in his Sources of Law and Society in Ancient India (Calcutta, 1914).
19 Philip Mason has written a novel which admirably illustrates the problem. Call the Next Witness (New York, 1946).
20 Sir Thomas Munro argued, for example, that the separation of the offices of Collector and Magistrate, rational in terms of separation of function theory, made no sense for the villager's pocketbook, as it forced him to travel twice where once might do. "The vakils (agents)," Derrett observes, "who soon became available to represent clients ousted the parties who had formerly appeared in person or through relations or well-placed patrons. The latter acted gratuitously but the former required to be paid and learnt how to protract litigation." J. D. M. Derrett, "The Administration of Hindu Law by the British", Comparative Studies in Society and History, Vol. IV (1961–62), p. 23.
village tribunals to the new system. A thoughtful magistrate at Midnapore, responding to extensive inquiries by Lord Wellesley concerning the nature of British justice, denied that mere quarrelsomeness lay behind the difficulty:

The complaints of these people [he writes], are seldom or never litigious. I have seen some conspiracies supported by false evidence; but suits simply litigious, brought forward merely from the quarrelsome disposition of the prosecutor, are not common... out of one hundred suits, perhaps five at the utmost, may be fairly pronounced litigious... 22

It seems likely that the “rise” in litigiousness partly reflects the transplanation of disputes to a new location where they were more susceptible of statistical observation.

Frederick John Shore, Judge at Farrukhabad, believed that “litigiousness of the natives” was more of an excuse than an explanation of the courts’ inability to cope with the cases that came before them. A magistrate in the first quarter of the nineteenth century knew that “according to the size of his district, from one-half to even three-fourths of the applicants have no chance of obtaining redress...” 23 Too few courts and too few magistrates rather than “native litigiousness”, he thought, was the cause of the difficulties. Both W. W. Hunter and Sir Thomas Munro perceived a rise in litigation but thought it less a product of the new legal system than a correlate of an increasing man-land ratio and the quarrels arising from it. 24

But there probably remains some residue of truth in the belief that English courts encouraged litigiousness. Some individuals regarded the new courts as a way of circumventing the traditional administration of justice when they surmised that a village tribunal would take an unfavorable view of their plaint. To the extent that people used the new courts to this end, they added to the impression that these courts were devoted to something other than “justice”. Even now, M. N. Srinivas finds “taking disputes to the local elders is considered to be better than taking them to the urban law courts. Disapproval attaches to the man who goes to the city for justice. Such a man is thought to be flouting the authority of the elders and therefore acting against the solidarity of the village. The few men in Rampura who take disputes to the urban court are not respected.” 25

22 In W. K. Firminger, Historical Introduction to the Bengal Portion of the Fifth Report, 2 Vols. (Calcutta, 1917), Vol. 2, appendix 10, p. 592. Strachey, the Midnapore magistrate, provided a more thoughtful and informed reply than the other courts. It represents a very good contribution to the raw materials of legal sociology.


24 W. W. Hunter, in his The Annals of Rural Bengal, 3rd ed. (London, 1868), takes strong issue with the “litigiousness” judgment. “If we consider the innumerable sources of dispute which petit culture, with its minute subdivision of property and multiplicity of tenures, gives rise to... the... number is by no means excessive...” p. 340. For Munro’s ideas, see Major-General Sir Thomas Munro, edited by Sir Alexander J. Arbuthnot, 3 Vols. (London, C. Kegan Paul and Co., 1881), p. 80.

To circumvent the traditional administration of justice may signify mere opportunism, a “gamble” that the modern court will give a favorable decision. It may also mean that those villagers searching for a means to escape the disabilities and coerictions of traditional village society turned to the new courts to escape the consequences of low station or membership in the wrong faction. For them “increase in litigiousness” reflected an effort to unravel themselves from the traditional moral and social order.

False witness in the new courts was the despair of English magistrates. In the traditional setting, witnesses were not always trustworthy either but the village tribunal usually knew enough about the local situation to evaluate what was said. “Ram Singh’s” testimony was judged in the context of his known lineage connections, his long-standing dispute with his brother-in-law’s family, and his past reputation as an upright man. Furthermore, Ram Singh was restrained from undue extravagance in his testimony by his knowledge of the judges’ knowledge. These restraints and checks fell away in the new courts. Puzzlement as to what the sahibs wanted made things worse. The Judges of the Circuit of the second session, 1802, Calcutta, saw the matter clearly: “We cannot,” they wrote, “wonder that the natives are aware of our suspicious and incredulous temper; they see how difficult it is to persuade us to believe a true story, and accordingly endeavor to suit our taste with a false one.” As a result “they . . . consult upon the best mode of making their story appear probable to the gentleman, whose wisdom, it cannot be expected, should be satisfied with an artless tale . . .” Because the court “cannot study the genius of the people in its own sphere of action”, it is weighed down with “a consciousness of inability to judge of what is probable or improbable”.

The prevalence of false witness suggests the strength of kinship relations and the weakness of the impersonal obligations of civic virtue. British procedure disqualifies only the testimony of husbands and wives about each

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26 Harold Levy speaks of a “second strike capacity” in the context of a discussion of how some Punjabis used the British criminal law to threaten disastrous retaliation should the power balance between feuding families be altered by murder. See Harold Levy, Rapporteur, Report of the Conference on South Asian Law held at the University of Chicago, May 31-June 1, 1963 (Chicago, South Asia Area and Language Center, University of Chicago, May, 1964). Mimeo, p. 16.


29 E. M. Forster in Passage to India makes clear that if the stakes were high enough “false witness” could be a two-way street. “. . . at a time like this,” District Superintendent of Police, Mr. McBryde, tells Fielding, “there’s no room for — well — personal views. The man who doesn’t toe the line is lost . . . He not only loses himself, he weakens his friends. If you leave the line, you leave a gap in the line. These jackals [the Indian friends of Aziz, the accused] . . . are looking with all their eyes for a gap.” London, 1947, Pocket Edition, p. 179.
other, recognizing that this tie of sentiment makes truth-telling immoral, while the traditional villager sees the tie of sentiment as much more inclusive.\footnote{The “cheating” scandal at the Air Force Academy in January, 1965 illustrated very nicely the conflict between the moral imperatives of civic virtue and human sentiments by pitting the claims of the Academy’s “honor” system against those of not “ratting” on one’s friends and classmates. One father publicly defended his son for not “ratting” but was denounced for defending the standards of the “underworld”.

\footnote{“At this stage” (from 1772, when Hastings ordered that Hindu and Muslim law be applied in British courts), J. D. M. Derrett writes, “the first misconception obtrudes itself. The relationship between custom and dharmasastra was taken for granted.” The judges were directed to refer only to the dharmasastra. “...Hastings and his contemporaries... were gravely misled... Non-Brahmans admitted that Brahmans were the expounders of law, and that the Hindu religion required obedience to the dharmasastra which the Brahmans alone knew... It was nearly a century before the mistake was generally recognized...” “...Hindu Law...”, pp. 24–25, 28. Elsewhere he observes that Hastings “had obviously been advised that... the law of the Hindus must be ascertained from sastric texts... and no steps were taken to collect evidence of local or caste custom.” J. D. M. Derrett, “Sanskrit Legal Treatises Compiled at the Instance of the British”, Zeitschrift für Vergleichende Rechtswissenschaft, Vol. 63 (1961), pp. 79–80.

\footnote{Cited in Sir Courtney Ilbert, The Government of India, 3rd ed. (London, 1915), p. 355.} Poverty contributed to the prevalence of false witness since for many the choice was between hunger and an often ambiguous truth. Finally, the prevalence of false witness reflects the divergence between the inner sense of justice of traditional witnesses and the alien external standards represented by the court, a divergence which divests false witness of its moral opprobrium.

\textit{The Renaissance of Brahmanic Law}

The introduction of the British legal system affected the balance between divergent indigenous legal traditions as well as procedural assumptions and practice. For the most part, the \textit{raj} disregarded, largely through ignorance, the existence of the orally transmitted customary law of villages, castes and regions. It identified Indian law with the high culture, literary law inscribed in the classic texts and in so doing unwittingly strengthened it at the expense of the “popular” law of the peasant society.\footnote{At this stage} In 1772 Warren Hastings, the East India Company’s first Governor General, took an important step in this direction by directing the Bengal courts to administer the laws “of the Koran with respect to Mohammedans and those of the Shaster with respect to Hindus...”\footnote{Cited in Sir Courtney Ilbert, The Government of India, 3rd ed. (London, 1915), p. 355.} These texts, which the earliest European students of Arabic, Persian and Sanskrit were just discovering, were for the English administrators the visible embodiment of Indian law. Hastings was not aware, for example, that most Muslims in Bengal were Hindu converts who often continued to use local Hindu law rather than Islamic Koranic and traditional law after their conversion. Nor were eighteenth century British administrators always aware that the Hindu texts which Halhed, Sir William Jones and,
later, Colebrooke translated for court use were largely what a later generation would call “Brahmanical” law, that is, law which embodied the morality and interests of the Brahman and other twice-born castes who were the creators and guardians of Hindu high culture.

The idea that there was a dual system of Indian law in the nineteenth century which encompassed the relatively distinct high culture law of the classic texts and the diverse custom of the peasant society, while of the utmost importance, must be qualified by an appreciation of the connection between the two. John Mayne’s classic Treatise on Hindu Law and Usage supposed that the ancient origin of the classic texts was to be found more in the transcription by Brahman pandits of divergent practice than in the imposition of new standards. It was the later rigidity of these codes and the sacredness attributed to them by a religious class that increasingly separated them from local custom. Yet the separation was never complete. Pandits influenced local practice by interpreting it in terms of the classic texts. A comparison, for example, of collections of customary law such as Steele’s Summary of Deccan custom and Borrodaile’s Reports with classic texts reveals broad areas of agreement. Sanskritization too linked them. If local custom was more tolerant of widow remarriage and gave more freedom to women generally it was because the tendency for mobile, lower castes to emulate higher had not yet become widespread.

If the written law of the high culture classic texts was a clearer expression of Indian “civilization”, the orally transmitted custom of local tribunals was more representative of Indian culture. “It is quite true,” Julius Jolly told the Tagore Law Lectures audience at Calcutta in 1883, “that before the estab-

33 As in the idea that a first son’s inheritance was connected with his sacred obligations to his father’s spirit, and his inheritance hence fell into doubt if the son was unable or unwilling to perform these, an idea which Mayne believed to be a Brahmanic embroidery on a secular idea. See A Treatise on Hindu Law and Usage, 9th Rev. ed., ed. by V. M. Coutts-Trotter (Madras, 1922).
34 See Arthur Steele, Summary of the Law and Custom of the Hindu Castes within the Dekhun Provinces (Bombay, 1827). Sir George C. Rankin reports in his Background to the Indian Law (Cambridge, 1946), that other divergencies are to be found: in the great varieties of castes and sects that exist in practice, by contrast with the simplified four Varna system of the classics; the small and irregular punishments enforced by the customary caste assemblies; and significantly, the disregard for legal restrictions as to caste in trade and taking interest, p. 148.
35 For the development of the idea of Sanskritization see M. N. Srinivas, “A Note on Sanskritization and Westernization”, in Caste in Modern India.
36 Marc Galanter puts the relationship very nicely when he observes that it is “not that of superior to subordinate in a bureaucratic hierarchy. It is 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 legal experience.” “Hindu Law and the Development of the Modern Indian Legal System”, Paper delivered at the Annual Meeting of the American Political Science Association, Chicago, Illinois, September 9-12, 1964. Mimeo. p. 7.
37 Outlines of an History of the Hindu Law of Partition, Inheritance and Adoption (Tagore Law Lectures, 1883) (Calcutta, 1885), p. 32.
lishment of British rule in India customary law used to be given more weight in deciding law suits than the Mitakshara, Dayabhaga [the two most significant high culture law texts applied by British courts] or any other digest. Most quarrels did not come within the cognisance of the Courts at all, but were decided by private arbitration.” By “private” arbitration he meant the *ad hoc* caste and village tribunals of the peasant society. It was only when they failed to settle a matter that appeals were made to local notables or rulers who, by using Brahman pandits as jurisconsults, explicitly brought high culture prescriptions to bear on village practice. It was as much by creating a modern court system and extending its influence into the countryside as it was by bringing western law to India that the British undermined local tribunals and their law.

The new tribunals, innocent of Indian law generally, remedied the situation by surrounding themselves with the classic texts.38 The *Manusmriti* (the laws of Manu), a compilation, was duly translated. So too were more recent glosses and digests based on Yajnavalkya and other ancient law texts. The *Mitakshara*, a digest of Yajnavalkya’s work composed in the eleventh and twelfth centuries,39 provided throughout India the main textual authority for Hindu law. It was supplemented in different areas by various other texts and superseded in Bengal by the *Dayabhaga*.40 Custom was neglected.41 The Bengal Regulations of 1793, the foundation of the legal system introduced by Britain, did not expressly provide for it and until 1873 it was legally unclear in Madras whether custom had any standing.42

Until 1864, when their offices were abolished, *Maulvies* and *Pandits*, Muslim and Hindu authorities on the classic texts, were attached to new courts to tell judges what the law was. They were encouraged to support their views with citations from the texts. As literary men, their inclination was in any case to consult and stress texts rather than custom.43 Still, because they were

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41 Elphinstone in western India tried not to ignore custom when in the early nineteenth century he assumed administrative responsibility for Britain’s recently acquired possessions there. “Yet even in Bombay,” Derrett writes, “the *sastra* under the British made advances over custom, despite explicit protection of the latter.” Jonathan Duncan in Malabar also tried to advance custom over the sacred texts of the high culture in the administration of the law. “. . . he believed Brahman pandits of value only in matrimonial and caste cases, and that Codes of *dharmasstra* were useful for checking reports of custom.” See J. D. M. Derrett, “. . . Hindu Law . . .”, p. 28 and note 65.


43 They also found considerable difficulty in distinguishing between legal and moral commandments, a difficulty with which they recapitulated the experience of archaic
closer to their own communities than most British judges and administrators, they knew that in many instances local practice varied from high culture written law. Mayne believes that Hindu pandits made some attempt to take these differences into account by torturing the classic texts, a practice which earlier enabled them to absorb and transform non-Hindu practice as well as to sustain the moral connection between the micro- and macrocosm within Hinduism. The British judges, however, were more royalist than the king in their devotion to sanskritic learning. The pandits' attempts to cover customary practice with incompatible high culture law were found out. “Sometimes the variance between the futwhas [opinion of pandits] and the texts was so great,” Mayne writes, “that it was ascribed to ignorance, or to corruption. The fact really was that the law had outgrown the authorities.” “Native judges,” he continues, “would have recognized the fact. English judges were unable to do so, or else remarked (to use a phrase I have often heard quoted from the bench) ‘that they were bound to maintain the integrity of the law.’” The consequence, Mayne observes, “was a state of arrested progress in which no voices were heard unless they came from the tomb. It was as if a German were to administer English law from the resources of a library furnished with Fleta, Glanville, and Bracton, and terminating with Lord Coke.”

The courts of the various Indian presidencies varied in their levels of orthodoxy, from the Bengal court which sought to apply Hindu law to Assamese tribal peoples to the courts of western India which profited from the fact that Monstuart Elphinstone, an early Governor of Bombay, had occasioned Steele’s and Borrodaile’s compilations of customary law. Still, the main effect of British legal interpretation and administration was to consolidate and lend added authority to high culture law.

Other factors also contributed to this result. Lower level judges and early incumbants of the modern legal profession were uniformly drawn from the upper castes, particularly the Brahmans. Their ‘sanskritic’ orientation and perspectives colored legal practice. Brahmanical law was also strengthened by the need for a legal order with greater generality and reach. The more cosmopolitan and uniform high culture law was better able to meet the requirements of the times than was the more narrow and diverse customary law of village society. If, from the perspective of western law, high culture Hindu law appeared particularistic, from the perspective of customary law it appeared as it had over the centuries, more uniform. The fact that it was a written rather than an oral law also helped strengthen it against custom,
particularly under the new circumstances which the raj created. Its relative ascertainability, certainty and consistency recommended it to those, Indian and British alike, concerned about order and regularity. A comparison between the legal systems of India and Africa, where a parallel diversity of customary law did not shelter beneath an indigenous high culture law, might suggest the extent to which such high culture law does or does not contribute to the development of a modern legal order.\textsuperscript{47}

In the 1870's, however, the validity and usefulness of sanskritic law began to be disputed.\textsuperscript{48} Henry Maine, writing from the perspective of historical jurisprudence and experience as a Law Member of the Governor General's Council, observed that “the codified law — Manu and its glossators — embraced originally a much smaller body of usage than had been imagined . . .” Continuing, he argued that “the customary rules, reduced to writing, have been very greatly altered by Brahmanical exposition, constantly in spirit, sometimes in tenor.”\textsuperscript{49} Burgeoning sanskritic research in the second half of the nineteenth century revealed that many classic texts diverged from “official” ones such as the Mitakshara. The Rebellion of 1857, a most dramatic cautionary tale, had already sharply reminded Englishmen of Indian practice and sentiment in all its complexity and diversity. Ethnological research, which began to accumulate in the second half of the century, escalated sharply after census operations began in 1881 and provided more systematic knowledge of local custom for use in the courts.\textsuperscript{50} Finally, the rise of the historical school of jurisprudence had a subtle but discernible influence on the lawyers and judges of the subcontinent.

Mr. J. H. Nelson, a legal polemicist with experience of the Madras High


\textsuperscript{48} These were earlier disputed. F. W. Ellis wrote long ago that “the law of the smritis, under various modifications has never been the law of the Tamil and cognate nations.” See Sir Thomas Strange, \textit{Hindu Law}, 2 vols. (London, 1830), vol. 1, p. 163. A. C. Burnell supported the same proposition, and apparently influenced J. H. Nelson's accounts.


Court, wrote several provocative books attacking its adherence to the Bengal school’s sanskritic orthodoxy.\textsuperscript{51} Nelson charged the High Court with having assumed “the self-imposed duty of civilizing the ‘lower castes’ of Madras, that is to say, the great bulk of its population, by gradually destroying their local usages and customs.” \textsuperscript{52} Unless he comes into the English courts, “... the conduct of an ordinary Chetti, Maravan or Reddi of the Madras Province ... is no more affected by precepts contained in the Mitaxara than it is by precepts in the Psalms of David.” \textsuperscript{53} Nelson proposed that the Madras court ascertain and use customary law. His attack and remedy neglected to take account either of the degree to which the so-called Dravidian (i.e. non-Brahman) peoples of Madras had adopted Brahman law and practice or the degree to which Madras judges applied customary law. Judges often refused to apply high culture law when they were requested to do so by litigants from lower castes with whose customary law they were familiar.\textsuperscript{54} But if Nelson overstated his case, he was substantially correct in his diagnosis of attitudes and practice.

“To adopt Mr. Nelson’s suggestions,” a puisne judge of the High Court wrote the Governor in an 110-page “reply”, “whether as regards the higher or lower castes, would commit us to chaos in the matter of the Hindu law ...” It would require the British courts to abdicate “the vantage ground (they) have occupied for nearly a century ...”, a ground which will enable them “... gradually to remove the differentiations of customary law, and bring about a certain amount of manageable uniformity.” Nelson’s prescriptions, he warned, would “... commit us to investigation and enforcement of an overwhelming variety of discordant customs among the lower castes, many of them of a highly immoral and objectionable character, which if not brought into prominence and sanctioned by judicial recognition, will gradually give place to less objectionable and more civilized customs of the superior castes.” \textsuperscript{55}

Nelson, like William Crosskey,\textsuperscript{56} was calling on the courts to reverse and correct several generations’ worth of law because it was based on wrong premises. Julius Jolly, in the Tagore lectures in effect answered Nelson when he observed that “what may have been possible in the early times of the


\textsuperscript{52} \textit{Indian Usage}, p. 7.

\textsuperscript{53} View, p. 147.

\textsuperscript{54} Mayne, \textit{Treatise}, in the preface to the first edition of this work describes such attempts in Malabar.


British administration may prove impossible now, after both the legislation and custom itself have been remodelled by a century of judicial decisions. Nelson's essentialist perspective which held that if the law was to be valid it had to be based on "original" custom ran contrary to sanskritization as it affected the law. Social mobility by caste groups usually included efforts to adhere more closely to high culture law and custom, and British courts, more often through insensitivity or ignorance than by design, fostered their attempts to do so.

Despite the challenge which Nelson's polemic represented, despite the fact that the courts paid more attention to customary law as it became known and available to them, despite even its recognition in legislation such as the Punjab Laws Act of 1872, the long-run secular trend was in favor of high culture law. A comparison of the ninth and eleventh editions of John Mayne's classic work marks the triumphal march of what he called Brahmanization. The English lawyer who edited the ninth edition of 1922 preserves Mayne's cautious view that there is a demand for Brahman law, that such law, without its sacred coloration, captures considerable usage but that its wholesale substitution for customary law is not justifiable. Mayne himself criticized those judges and pandits who "seem to imagine that those rules which govern civil rights among Hindus, which we roughly speak of as Hindu law, are solely of Brahmanic origin." They admit that conflicting customs exist, and must be respected. "But," he emphasized, "these are looked on as local violations of a law which is of general obligation, and which ought to be universally observed; as something to be checked and put down, if possible, and to be apologized for, if the existence of the usage is proved beyond dispute."

Mayne finds it "startling" that the Bengal court, always leery of "heresy" with respect to the validity of high culture law, should assume "that the natives of Assam, the rudest of our provinces, are governed by the Hindu law as modified by Jimata Vahanu."

Srinivas Iyengar and N. Chandrasekhar Aiyar, however, the South Indian Brahmins who edited the tenth and eleventh editions of Mayne's work, assumed that Brahman law was the norm and custom the exception. Good lawyers, they took account of custom by citing the extant ethnological studies but plainly regarded the high culture law as that which ought "to be universally observed", a view which they justified in the manner of the pandits by reference to the classic texts. Citing Manu and the Arthasastra as his authority, Aiyar found that "Sudras also were regarded as Aryans for the purpose of the civil law..." an observation that in effect extended high culture law to all caste Hindus. Nowhere do they use Mayne's adjective, "Brahmanic", an adjective designed to characterize not only the content but also the bias of

57 Jolly, Outlines, p. 32.
59 Treatise, 11th ed., p. 5.
the classic texts. Iyengar and Aiyar, by referring instead to Hindu law, a term which suggests that the classic texts apply to all Hindus, become themselves agents of Brahmanization. "It may now be taken as settled," Aiyar observes, "that the general Hindu law... applies to every Hindu... special customs have to be pleaded by way of exceptions. Any other view would be to invert the process by which law is ascertained." Supported by decisions since Mayne's time, he is able to argue that Hindu law applies to many social groups, such as Adi Dravidas, Chamars, various Dravidian communities and Jats, whose legal circumstances were at least in doubt when Mayne first wrote. Even the instance which Mayne found most extraordinary, the Bengal court's application of Hindu law to Assamese tribal people, was confidently brought within the fold. Without citing any anthropological evidence, Aiyar asserts that "...the aborigines of Assam have become Hinduised and are governed by the Bengal school of Hindu law."

*The Legal Standing of the Individual*

Traditional Indian law, the sacred texts of the high culture as well as the spoken law of the peasant society's memory, embodied values which were for the most part antithetical to those found in western law. For traditional law, the "natural" associations of family, caste and locality were the units of the moral and social universe while for British law, the individual was valued over the "artificial" groups in which he might find himself. Under traditional law, rights and privileges, obligations and duties, property and even punishments for crimes varied with an individual's corporate identity. The characteristic form of assets under Indian law was collective and fixed: land inalienably vested in families or lineages and transferrable only by inheritance within the blood line. Under British law, it became individual and mobile: alienable by individuals as well as families, through commercial transactions or by will. Indian law was particularistic, treating castes, communities and the sexes differently, while the law of the British *raj* was universalistic, in principle treating all men as equal before it. Finally, Indian law, below the veneer of uniformity which Brahmanic high culture law gave it, was parochial, differing greatly among regions while British law aimed at uniformity among places as well as persons. These contrasts transcend the cultural and social differences between India and Britain, between East and West, by expressing with considerable clarity the historical differences which Sir Henry Maine, drawing on his knowledge of European feudal society and Hindu social organization, found in the contrasting law of traditional and modern society. 

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The change in emphasis in the law from the corporate group to the individual, from the law of persons to the law of place, from particularism to universalism occurred as much by inadvertence as by design. It is associated with the spread of British power and legal administration, with early efforts to identify and use Indian law in English courts in ways compatible with English conceptions of legal propriety, with subsequent attempts to create a more uniform system of law based on codes, with cautious and selective legislation which incorporated into Indian personal law English conceptions of morality and liberty and with administrative and legal changes in the revenue system which freed real property from its corporate connections.

New values derived from the law also entered Indian public life and society through the Indianization of the legal profession as it grew into the leading sector of a numerous and influential modern middle class. Indian lawyers came to represent and plead for clients and Indian judges came to sit on High Court benches. The influence of the law in its more modern Anglo-Indian manifestation spread well beyond its functional boundaries by profoundly affecting the nationalist movement whose leaders more often than not were lawyers.

At the same time it must be remembered that the British courts constituted only one part of a dual system and what came to be Anglo-Indian law only one of the wide range of influences which shaped beliefs and conduct. For villagers the “administration” of justice remained in the hands of local unofficial tribunals, the panchyats of caste and locality. But because our purpose here is to analyse change we are more interested in what was becoming than what was and more concerned to understand the influences that shaped the future than those that shaped the past.

The unravelling of the individual from his corporately defined legal definition began and for some time proceeded inadvertently. English courts, established to keep the peace among the East India Company’s servants in Presidency towns, gradually expanded their geographic jurisdiction to include Indian residents of towns and then of districts. In the late eighteenth century, as the power of the Moghul Empire continued to decline, Governor Generals Hastings and Cornwallis replaced Indian courts administered by the Muslim agents of the Emperor with English Courts. When Cornwallis substituted as well English for Indian judges at all levels he did so on the ground that “... all regulations for the reform of the [criminal] department would be useless and nugatory whilst the execution of them depends upon any native

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that appears to the superficial eye as differences between Indian and “western” law is a difference of stages. For a recent assertion that the development of law in India is more a matter of historical stages than “East-West” effect see H. A. Freeman, “An Introduction to Hindu Jurisprudence”, American Journal of Comparative Law, Vol. VIII, No. 1 (1949). See also footnote 49.

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Jurisdiction was expanded functionally too. Crime in the eyes of the prevailing Muslim law was, generally, a private offense. Punishment had become a public responsibility but complaint, even in serious cases such as murder, remained the prerogative of the affected family, a private and corporate body. If the family of a murdered man for whatever reason did not take the initiative, a court could not take cognizance. In 1792 the British made certain actions, including murder, crimes in the eyes of the state.

The English began with the clear intention of applying for most purposes Indian law to Indians. As we suggested above, Governor-General Hastings in 1772 had ordered that English judges “in all suits regarding marriage, inheritance, and caste, and other religious usages and institutions [succession was added in 1781] the laws of the Koran with respect to Mohammedans, and those of the Shaster [sacred law texts] with respect to the Hindus shall be invariably adhered to.” Pandits and sastris (traditional specialists in the sacred texts, almost invariably Brahmans) were assigned as advisors or referees to all courts. English judges and Brahman pandits were to share responsibility for judgments by signing the final document.

In “non-listed” subjects such as the law of evidence, commercial suits, contract cases or civil wrongs, while the shaster did not have to be used nor were pandits required to co-sign decisions, pandits were consulted and Hindu law “occupied a large place” in the work of mutassil (district), appellate and supreme courts. Despite these early intentions to use Hindu law “invariably” for the listed subjects and extensively for other subjects and despite a conscious effort to take “... care to add as little as possible by analogy or by inference from the known authoritative rules”, English judges and their courts early and continuously in fact transformed Indian into Anglo-Indian law.

As early as 1781 English judges were directed to apply “justice, equity and good conscience” wherever a vacuum of law existed or was deemed to exist, a directive which was admirably suited to open the way for English

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64 Cited in H. H. Dodwell, ed., *Cambridge History of India*, 6 Vols., 1st Indian Reprint (Delhi, no date). However, Indian legal officers were attached to all courts from the district through the Supreme Court at Calcutta by the Regulation of 1793.

65 Steps were also taken at this time to make the administration of criminal justice more rational and more humane. In 1790, intent rather than the weapon used was made the criterion of offense. Amputation as punishment was abolished in 1791, the disability of non-believers to testify was abolished in 1792. See U. C. Sarkar, *Epochs in Hindu Legal History* (Vishveshvaranand Institute Publication, No. 8) (Hoshiarpur, 1958), p. 348, fn. 6 and 7.

66 See footnote 32.


68 Derrett, “...Hindu Law...”, pp. 25-6.

69 Derrett, “Sanskrit Legal Treatises...”, p. 41.

70 Sections 60 and 93 of the Regulation of 5 July 1781. The regulation was drafted by Sir Elija Impey. For the history of regulations and law in British times, see Rankin, *Background*; Sir Courtney Ilbert, *The Government of India.*
legal thinking. “Though justice, equity and good conscience are the law which Indian judges are bound to administer,” James Fitzjames Stephen observed, “they do in point of fact resort to English law books for their guidance in questions of this sort and it is impossible that they should do otherwise...”

Anglicization of Indian law took more subtle and covert forms as well. Almost from the beginning British judges tried to free themselves from dependence on their Brahman pandits by gaining direct access to dharmasastra texts. Because decisions given on the advice of pandits were to be decisions of an English court, they expected that the rule of stare decisis would apply. But pandits, accustomed to choose and interpret the law according to the needs of the situation and the likely consequences of a decision, did not often offer advice which placed primary emphasis on precedent. As noted previously, this led British judges to suspect their advice and question their motives. The extremely influential W. H. Mcnaghten observed in 1825 that if pandits could be restricted in their citations “to a few works of notorious authority, it might have a salutary effect in curbing their fancy, if not their cupidity.”

As early as 1786, Sir William Jones had had “the pundit of our court read and correct a copy of Halhed’s book” [A Code of Gentoo Laws, the first and one of the most influential of the “few works of notorious authority”] in the original Sanskrit, and “I then obliged him to attest it as good law, so that he never now can give corrupt opinions, without certain detection.” Most pandits of course viewed the dharmasastra more broadly, less literally and more dynamically.

The inadvertent anglicization of Indian law proceeded in part from ignorance and misunderstanding of the nature and extent of dharmasastra, partly through unconscious application of English legal modes of thought. English legal authorities in India failed to explore vigorously the sources of Indian law. In using the traditional law that was at their command, they affected its meaning and the course of its development by applying segments without full regard for their larger contexts, stating Hindu rules in English legal terms and sometimes following them inflexibly, and, quite apart from the conscious application of justice, equity and good conscience, reading the logic and substance of English law into questions of procedure, rights and the interpretation and use of evidence. Yet even one of the most severe critics of the English administration of Hindu law finds that without such importations the

71 Cited in Sarkar, Epochs, p. 378. Derrett observes rather enigmatically that “it is not to be supposed that it [the regulation] was not intended to establish a fundamental source of law”. “...Hindu Law...”, p. 25. See also his “Justice, Equity and Good Conscience”, in Anderson, Changing Law.

72 Principles and Precedents of Mookummudaiz Law (Calcutta, 1825), cited by Derrett, “Sanskrit Legal Treatises...” at p. 76.

Hindu law "could not have been applied effectively or without unjust results".74

Digests and texts of dharmasastra by English authors gradually replaced the learning of Brahmans as the source of Indian law. As they did so, the courts came to rely more and more on these works and less on the larger range of authorities court pandits consulted. In 1864, English judges gained that independence for which the work of men such as Jones and McNaghten had prepared the ground when, dispensing entirely with Indian legal advisors, they assumed full judicial knowledge of Hindu law.

The British came to conceive of their task in India in "Roman" terms. James Mill, chief administrative officer of the East India Company, characterized the Charter Act of 1833 (which included provisions for a law commission and a law member of the Governor General's Council) by remarking that "the state of things at which it aims in prospect is when a general system of justice and policy and a code of laws common (as far as may be) to the whole people of India . . . shall be established throughout the country." 75 But if the design was Roman, its immediate origin was Benthamite (although it is not clear that Bentham would have concurred). The Benthamite enthusiasm for codification, which Britain resisted at home with some success, was poured out on the Indian subcontinent. "Here at least," F. C. Montague observed, "Bentham's teachings bore fruit." "Had Bentham done nothing more than point out the way in which the law of England could best be applied to the needs of India," Montague adds, seemingly oblivious to the failures and limitations of English law in India, "he would have rendered a distinguished service to his country and mankind." 76

The common law, as Rankin put it, was transferred to the subcontinent not by reception but by codification. For a good portion of the nineteenth century a good many Englishmen interested in the law devoted themselves to the framing of codes. India was considered sufficiently devoid of law that it did not seem anomalous to transfer wholesale large elements of British law. "There is nothing Indian or Oriental about [codification] . . ." C. D. Field remarked in Some Observations on Codification in India. What was required was "all in the table of contents of Smith's and Kent's books".77

74 Derrett, "...Hindu Law...", p. 44.
75 Dispatch No. 44 of December, 1834, by the Board of Directors of the East India Company has been attributed to him.
77 Cited in Rankin, Background, p. 139.
First and Second Law Commissions had recommended in 1834 and 1853 that civil law be based on English law, the Third implemented the idea, exempting only personal law. The Penal Code of 1860 and a series of civil acts between 1865 and 1872 elaborated the design. By the late 1870's the surge lost its force but by then codes based on English practice had become a central part of Indian law. It was generally agreed, however, during this great period of codification, that the corporately based personal law, which sustained the social structure, primary groups and morality of traditional Indian society, could be disturbed only at considerable risk, a view strengthened by the Mutiny and Rebellion of 1857.

But this realm of law too was deeply affected, in the first instance by the very directive that ostensibly sought to exempt it from English legal ideas. When Warren Hastings directed that in listed subjects "the laws of the Shaster with respect to the Hindus shall be invariably adhered to" he probably saw himself placing Company policy behind the traditional Hindu view that a ruler should apply its own law to each social group and caste. But, as we have pointed out above, that was not the consequence. Rather, he placed Brahman law in a dominant position, converting the high culture law, which approximated a personal law of the twice-born castes, into territorial law for all Hindu castes regardless of whether or not they recognized the authority of the Shastras. Like others who intended to preserve the legal status quo in the area of personal law, he failed to do so in part because he did not grasp the appropriate means.

Changes in personal law were also deliberately made. The decision of 1829 in principle abolishing suttee [widows immolating themselves on the funeral pyres of their husbands] is the most dramatic example although it affected few people. "When they have been convinced of the error of this first and most criminal of their customs," Governor General Bentinck wrote, "may it not be hoped that others which stand in the way of their improvement will also pass away." Other acts followed, none decisive in themselves, but

78 Sarkar, Epochs, pp. 351–2.
79 Although both Company and Crown approached the alteration of personal law with great caution, the changes that were made in it had very important consequences. Changes in the criminal law, while of considerable significance, had less impact on society and morality. New laws touching business, although they did help foster the growth of trade and industry, did not conflict sharply with existing practice. The Indian contract law was thought by Englishmen to rest upon common sense, by contrast, for example, with the law of inheritance, which appeared to depend on conventional rules. English legal authorities, like Colebrooke, McNaghten and Strange were all struck by the similarities between English and Indian contract law, and attributed them to this factor. Rankin, who endorses this view, discusses the problem at some length. Background, pp. 88–92.
80 The decision was not easily made. A series of attempts at regulating and rationalizing the practice preceded abolition. Some of these attempts can be followed in Kenneth Ballhatchet, Social Policy and Social Change in Western India, 1817–1830 (London, 1957).
taken cumulatively constituting a significant breach in the wall which was supposed to prevent British intervention from affecting corporately oriented Indian personal law. Of these acts, some of the most important were the so called Freedom of Religion Act of 1850, the Widow Remarriage Act of 1856, and various Gains of Learning bills (finally enacted in 1930), and the changes in the provision for wills. Usually of little practical effect, they were rightly attacked by the orthodox as theoretical challenges to the traditional social and moral order.

The Freedom of Religion Act — its unofficial title states as polemic a perspective as does a Right to Work Act — not only struck at the economic sanctions available to Hindu orthodoxy, but also at the collective joint family’s power over its members. By the mid-nineteenth century, a significant number of Hindus had converted to Christianity. By doing so they ceased not only to be Hindus but also lost the corporate definition on which their property rights depended. They were no longer, for example, Brahmans of a certain sub-caste and lineage which held property and regulated succession in a certain way. They had become, in effect, outcastes without legal standing with respect to property rights. The Act of 1850 relieved British judges of the obligation, laid down by Hastings, to enforce the Hindu law which penalized conversion in this way. Any law, the Act provided, which “may be held in any way to impair or affect any right of inheritance, by reason of [any person] renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law...” Individuals who chose a new identity could no longer be materially penalized through the law for doing so.

Ordinarily, property was held by the joint family, not individually. Classical law recognized its partition but it was rarely done. When property was divided, it did not necessarily imply the destruction of the joint family for

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81 Minute of November 8, 1829. It is conveniently available in D. C. Boulger, Lord William Bentinck (Rulers of India series) (London, 1892), p. 111.

82 Cited in Ilbert, The Government, p. 358. Also see Khunnilal v. Govind Krishna (1911) 33All, 356; Chedambaram v. Ma Nyein Me (1948), G. Rang. — Act III of 1872 strengthened this trend in that it allowed marriages to be celebrated between individuals of different faiths, provided, however, they in fact foreswore their previous faiths, declaring they were neither Muslim nor Hindu nor Christian. Act XXX of 1923 made it possible for Hindus to contract marriages without ceasing to be Hindus. But intercaste marriages were not validated until the Hindu Marriages Validity Act (XXI) of 1949. By contrast, Nepal today explicitly bans conversion from Hinduism. The constitution provides that “every citizen, subject to the current traditions, shall practice and profess his own religion as handed down from ancient times”, and the state bans conversion. New York Times, Feb. 22, 1965. — J. D. M. Derrett has pointed out that under the Hindu Code acts passed since independence there are penalties for conversion: i.e. a converting Hindu is liable to be divorced by his wife, lose the right to give his child in adoption or be its guardian, may forfeit claims to maintenance, and deprive his child of the right of inheritance from unconverted relations. “Statutory Amendments of the Personal Law of the Hindus since Indian Independence”, American Journal of Comparative Law (1958), 380, 83–85.
the partitioned unit continued to be on a smaller scale a joint, not a nuclear, family. In the British era, however, those who attended the new English-inspired institutions of higher learning often emerged as professional men earning substantial incomes. Their educational ventures were almost always financed by the joint family whose head, whether father, uncle or brother, also took responsibility for the student's wife and children. After he took up his professional career, the family as a matter of course regarded his income, like that from the family lands, as part of its resources. Such was the case, for example, with Gandhi. In 1903, however, 12 years after becoming a barrister and beginning practice, he in effect broke relations with his eldest brother, who had financed his education after his father's death, by suspending the remissions he had been sending from South Africa. That "all future savings, if any, would be utilized for the benefit of the community" did not assuage his brother's sense of being wronged. Gandhi like others before and after him eventually resisted the presumption that because the family had educated him his earnings were at least in part permanently committed to it. Most did not resist at least in part because the courts, following Hindu law, supported the family's claim against the individual. What the effects on economic growth and social change of such arrangements were is neither obvious or settled. Legislatures too were conservative in the area of personal law and it was not until 1930 that a Gains of Learning bill, often before provincial legislatures, was first enacted in Madras. If legal change trailed behind the most advanced opinion, it supported men who might wish in the future to extricate themselves from traditional collective obligations.

In other areas of the law, increasing mobility and alienability of property, with its consequence for social change, was more evident. The introduction of wills through legal interpretation and legislative acts was particularly important in freeing the individual from the traditional corporate group. Property, particularly landed property, was inherited by blood and kin lines according to prescriptive arrangements. Wills substituted choice by means of a legal instrument for birth and particular prescriptive arrangements. Wills began to be effective in Bengal in 1792. In Bombay they were not recognized until 1860, in Madras not until 1862. The Hindu Wills Act of 1870 estab-

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84 Whether these arrangements hindered economic growth remains a mute question. There is some evidence that the new professionals favored investment in land, a traditional form of investment which probably had little effect on economic growth. The evidence, however, is still inadequate. Certainly no unvarnished argument that the joint family restrains economic development by smothering individual initiative will do. The joint family units of the business community by concentrating capital may often have made risk-taking and entrepreneurial diversification more rather than less feasible.
85 Hindu Gains of Learning Act (XXX), 1930.
lished a general set of rights and requirements. If the actual effect of wills on property and society was limited, it was in part because the courts applied restrictions which protected joint family holdings and in part because habit and custom were not hospitable to their use.87 Alienability and mobility of property made further advances. Madras in 1855 and Bengal in 1872 permitted creditors to bring to sale debtors' interest in their families' property and owners themselves to do the same soon after.88 Both types of legislation helped bring into being the "liberal" society with its opportunities and pains.

From Cornwallis' time forward, British revenue laws decisively affected the collective nature of landed property. Under the Regulation of 1793, which laid down the Permanent Settlement for Bengal and provided for revenue procedures, the authorities were instructed to sell defaulting farms and estates when they failed to meet the annual revenue demand. These arrangements reversed customary practice by making land saleable collateral. Previously liens on crops had often made agriculturists heavily dependent on money-lenders but their land had remained inalienable. The new regulations were often compounded by unreasonable assessments imposed by utilitarian enthusiasts89 under the influence of the rent-fund theory and the replacement of lax and often humane enforcement by unbending rigor. Turnover in land mounted rapidly and in 1854 an official inquiry was undertaken to ascertain the causes and remedies. The structure and stability of the old society was weakened and in some places destroyed90 as merchants with capital and lower level public servants with inside knowledge of revenue arrears and low assessments took advantage of forced sales.91 "The village communities are decaying . . ." latter day utilitarian James Fitzjames Stephen observed with considerable satisfaction. "In spite of regrets prompted by various reasons, they decay because they represent a crude form of socialism, para-

88 Madras in 1862, Bombay in 1873.
90 Villages in northern and western India, for example, collectively held by kinship groups, were particularly hard hit. Some officials, like Byrd and MacKenzie, were aware of this problem and sought to cushion the consequences of the sales law by giving the kin a right to preempt defaulting property.
lyzing the individual energy and inconsistent with the fundamental principles of our rule.” 92

The Bhagavat Gita emphasizes the mutual dependence of the family as a social unit and the immemorial and holy laws which govern it and through it Hindu society. Without them, lawlessness threatens society.93 But it was the emergence of a new moral and social order rather than lawlessness that challenged traditional Hindu society. Changes in personal and revenue law, by freeing the individual and property from the hereditary prescriptions of traditional society, opened the way for them to join and shape a modern society and economy. The possibility of an individual as against a corporate legal definition which changes in personal law created made it easier to choose and create an individual social and moral identity. And the mobility of property which wills and revenue law fostered contributed to the strengthening of a market economy which is a necessary but by no means sufficient condition for economizing behavior and economic growth. But if the joint family restricted individual initiative and self-definition and provided a powerful means for the inculcation of religious and caste values, it also supplied the financial means to take advantage of educational and occupational opportunities, “social security” for the aged and ill,94 and psychological security for all in the moral and functional integration of the generations. And the immobility of property provided economic security. Peasants might be oppressed and exploited but they were less likely to be made landless. If the British raj provided orderly, honest and efficient government, its revenue laws and their enforcement combined with a growing population, rising land prices and the decay of rural industry, hastened social disorganization.

Despite the impact of British rule and its law, most Indians have remained attached to their values and social arrangements. Legal interpretation and legislation after Independence as before reflects this fact. Caste and religious particularism, group identity and corporate duties continue to shape judicial decisions, even while new legal values are taking hold. And the legislative history of the “Hindu Code”, the massive legal reordering of personal law which followed Independence, indicates the strength of old values and legal arrangements as well as the victory of Anglo-Indian law.95 Like India’s

92 Leslie Stephen summarizing his brother’s views in the Life, p. 285.
93 “Upon the destruction of the family perish the immemorial holy laws of the family; when the laws have perished, the whole family lawlessness overwhelms also…” Franklin Edgerton, ed., and translator, The Bhagavat Gita (Harvard Oriental Series), 2 Vols. (Cambridge, 1952), Vol. I, stanzas 40–42.
94 Herman Somers has pointed out to us that the social security function may well have been exaggerated, as the statistics show that few aged survived to be cared for in the older society.
95 See, for example, J. D. M. Derrett, Hindu Law, Past and Present (Calcutta, 1957) and his “Statutory Amendments”; Marc Galanter, “The Problem of Group Membership: Some Reflections on the Judicial View of Indian Society”, The Journal of the Indian
culture and character, its law expresses an uneasy combination of assimilationist and indigenous values.

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