

AN ARGUMENT FOR THE REFORMATION OF TRADITIONAL HINDU LAWIsaac J. Colunga¹**I. INTRODUCTION**

British authorities first attempted to codify Hindu law in the late 18th century. Their mission was simple – they would establish a standardized set of laws that would be applied consistently and uniformly in all communities of India.² It was an enormous undertaking, but it was one that the British viewed as necessary to control the complex and varied Indian legal system under which the country had run, without the British, for hundreds of years. The Governor of Bengal, Warren Hastings, was the first to head the project. In 1772, with a large influx of money from the East India Company, Hastings commissioned a group of *pandits* to translate the *shastras* from Sanskrit to Persian, and then to English.³ He printed the results under the title: “A Code of Gentoo Laws, or, Ordinations of the Pundits.” which covered an assortment of legal fields, including inheritance, civil procedure, rent and hire, debts and partnerships. As it turned out, however, critics renounced Hastings’ new set of laws almost immediately. His code was legal mess, though the British would not stop there.

Over the next two centuries, in their ongoing attempt to codify Hindu law, British lawmakers grappled over the proper balance between a unified system of law and the

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² Madhu Kishwar, “Codified Hindu Law: Myth and Reality,” *Economic and Political Weekly* 29 (1994): 2145.

³ *Id.* Kishwar asserts the *pandits* translated the *shastras* based on what the British expected of them. He notes that the British conspicuously ignored the schools of law from Southern India and thus the first book of codes “had a visible Eastern bias”; Ludo Rocher, “The Dharmaśāstras,” in *The Blackwell Companion to Hinduism*, ed. Gavin Flood (Malden, MA: Blackwell Publishing, 2005), 112.

preservation of India's cultural identity.⁴ What developed was a struggle between two zealous groups. On the one hand was a faction of reformers, who argued that uniformity in the application of laws was the only, undeniable choice for Indians. On the other was a group of traditionalists, who insisted that community-based law, rooted in tradition, promoted cultural identity and therefore could not be abandoned.⁵ Each faction adopted a defiant approach to the argument, though both groups agreed on one stipulation – the current system had to be entirely revamped.

This essay examines just a few of the arguments that the reformers and the traditionalists put forth with respect to the codification of Hindu law, siding, in the end, with the reformers. In doing so, the essay provides a brief overview of the origins of Hindu law, outlining the British-influenced court system, the goals of codification and the sources from which the concept sprang forth. Through this examination, we'll see that a major point of contention for Hindu traditionalists is that any strict codification of Hindu laws would inevitably subvert their religious beliefs, alter their long-standing customs and impose the law from an unaccepted, central authority – the British.⁶ This essay, however, argues that such a result, quite simply, is not that bad, considering that a unified, national legal system would serve as a preliminary step in unifying the Hindus, while making the Hindu law more homogeneous and less contradictory.⁷

II. HINDU LAW IN PRE-BRITISH INDIA

⁴ J.D. Derrett, *Hindu Law Past and Present* [hereinafter, "Past and Present"] (A. Mukherjee & Co., 1957), 3 (explaining that on the hand there is the great diversity of methods and practical approaches, and on the other the essential unity and identity of the institutions and of the objects at which they aim).

⁵ Kishwar, *supra* note 2, at 2147; Past and Present, 29-30 (describing the two groups as "reformers" and "orthodox," the latter of which sought a return to the *dharmashastra*).

⁶ "Past and Present," *supra* note 4, at 38-39 (outlining the reformers' common objections to codification).

⁷ *Id.*, at 40-42 (listing several arguments in favor of codification so that they countered the arguments he sets forth in favor of tradition and custom).

In its earliest form, Hindu law was rooted, for the most part, in religious duties. Freeman tells us that the “law embraced all of life and was synonymous with virtue.”⁸ In fact, there was little distinction between the governing legal rules and religious commands. It was devotionism to an impressive degree. Individuals governed themselves in accordance with social mores that they deemed moral and acceptable. And, in doing so, they not only would lead fulfilling lives, they would in turn follow the law.

The primary sources of law were scriptures, or *vedas*, which contained hymns based on social custom and divine inspiration.⁹ Hindus believed that the *vedic* hymns were the highest authority on all matters with respect to *dharma*, which is defined loosely as “an all-encompassing ideology which embraces both ritual and moral behavior.”¹⁰ But the *vedic* hymns contained very little of the proscriptive and injunctive statements that one would normally associate with the Western idea of law and order.¹¹ So, as it turned out, without any written rules to pursue, Hindu leaders feared that their followers would break away and join other, more organized religions. It was therefore only a matter of time before the *vedas* would slowly evolve to include a controlled way of life, in written form.

The first variations of the *vedic* hymns were known as *śāstras*, which, at their core, were treatises on a number of topics ranging from politics and music to astrology and medicine.¹² The *śāstras* encompassed treatises in relation to *dharma*, but were broad enough to be interpreted in

⁸ Harrop A. Freeman, “An Introduction to Hindu Jurisprudence,” *The American Journal of Comparative Law* 8 (1959): 31 (noting that “[t]he story of the Hindu Code of Manu and Moses’ Ten Commandments is strikingly similar” and that “Manu’s life is a combination of Noah, Jonah, and Moses.”).

⁹ *Id.*

¹⁰ Gavin Flood, *An Introduction to Hinduism* (Cambridge University Press, 1996), 53. Flood further explains that the term *dharma* itself does not translate, as “it has no direct semantic equivalents in any western languages which convey the resonance of associations expressed by the term.” He states: “the transcendent *dharma* is expressed or manifested at a human level in ritual action in order to produce that which is good.”

¹¹ Ashutosh Dayal Mathur, *Medieval Hindu Law: Historical Evolution and Enlightened Rebellion* (Oxford University Press, 2007), xvi (Introduction).

¹² Rocher, *supra* note 3, at 102.

accordance with one's social class and stage in life. In other words, *dharma* was a fluid, highly-individualized concept that differed from person to person,¹³ which partly explains the difficulty in drafting one universal text that governed the Hindus' conduct. Two of these texts, the *dharmaśāstras* and the *dharmasūtras*, came near to mirroring the Western idea of written law. For our purposes, however, we need not delve into a detailed discussion of the differences between these two texts, except to say generally that the *dharmasūtras* were written almost entirely in prose and the *dharmaśāstras* were written almost entirely in verse, while both texts were associated with *smṛti* (Flood defines *smṛti* as remembered texts composed within the *Vedic* schools) and attributed to the ancient sages.¹⁴

The *dharmaśāstras* dealt with both procedural and substantive law, offering rules for recording and evaluating evidence, while at the same time they described the laws that governed economic transactions and those that regulated the relationship between masters and servants, to name a few.¹⁵ For Hindus, the *śāstras* were a brilliant first step towards a unified law, but still something was missing. Despite the *dharmaśāstras*, Hindus lacked a defined church or religious leader (such as the pope) to serve as the final arbiter of right and wrong.¹⁶ Hindu law, as set forth in the *dharmaśāstras*, allowed different groups from throughout the country's various regions to develop their own *dharmas* and to interpret their own laws.¹⁷

¹³ Rocher, *supra* note 3, at 104 ("It cannot be stressed enough that, except for the rules that apply to one an all, in Hinduism *dharma* is different for different individuals and under different circumstances. What is *dharma* for one individual may constitute a breach of *dharma* (*adharmas*) for others; what is *adharmas* under certain circumstances may be *dharma* in other situations.").

¹⁴ *Id.*, at 104-07 (noting that the *dharmaśāstras*, like the *dharmasūtras*, are part of the revealed and eternally valid *smṛti*); Flood, *supra* note 10, at 54-56 ("The *Dharma Śāstras* differ from the earlier *Śūtras* in that they are composed in verse in contrast to the prose or mixture of prose and verse of the *Śūtras*.").

¹⁵ Mathur, *supra* note 11, at xxii-xxiii (Introduction).

¹⁶ Kishwar, *supra* note 2, at 2145 ("There was no single or uniform body of canon law or Hindu pope to legitimize a uniform code for all the diverse communities of India, no Shankracharya whose writ ran all over the country.")

¹⁷ Mathur, *supra* note 11, at 1.

Early on, these groups adhered to a monarchical form of government, in which Hindus considered the king the source of all authority.¹⁸ The king was the chief adjudicator of both trial and appellate matters (civil and criminal), which he heard directly. The king was obliged to follow the *dharmasāstras*, although they conferred to him the power to recognize customary rules, abrogate old laws and promulgate new ones.¹⁹ And, to assist the king in making his decisions it was expected that *brāhmanas* would come forth, knowing that the king was not particularly studied in the *vedic* hymns, nor in the *sāstras*.

It is important to remember, however, that there was not simply one, all-embracing king. Mathur tells us that the same geographical area could have different rulers, with different degrees of authority, “whose powers were determined by their peculiar mutual relations.”²⁰ As luck would have it, the prevailing judicial system hailed from several kingdoms and from the mouths of just as many kings. Thus, the *dharmasāstras*, though juridical in nature, remained flexible and adaptable to an assortment of circumstances, situations and regions. Depending on who was applying the *dharmasāstras* and on where they were being applied, local custom influenced their application greatly.²¹ In fact, local custom often reconciled any conflicting interpretations that arose from one region to another.²² In some instances, regional jurists simply refused to recognize certain rules if those rules did not suit them or their followers.

For example, according to Derrett, at one time in South India it was common for males of the commercial classes to seek a means to raise funds using their jointly-owned family property. In this way, if one were so inclined, he could sell or mortgage his interest in ancestral property,

¹⁸ *Id.* at 20.

¹⁹ *Id.* at 21.

²⁰ *Id.* at 22.

²¹ “Past and Present,” *supra* note 4, at 11 (Derrett states that local customs influenced the interpretation of the authorities, which allowed a particular custom to reconcile conflicting texts).

²² *Id.*

even when his interest in that property was yet to vest. Making matters worse, the joint-owners of the property, who were often close family members, had no means to object, thus their ancestral property could potentially lay helpless in the hands of their free-wielding sons-in-law.²³ So much is true. But such a practice was admonished in other parts of India, where jurists interpreted the *dharmaśāstras* narrowly. The difference between these regions was the concept of equity. Southern Hindus applied equitable concepts freely when interpreting the *dharmaśāstras* to provide legal remedies where public demand and practical needs outweighed the unambiguous principles set forth in the texts.²⁴ This was the case in a number of circumstances.²⁵

We see, then, that in its early stages one of the most striking characteristics of India's pre-British legal system was the existence of several, overlapping community jurisdictions that enjoyed a great degree of autonomy and discretion in administering the laws.²⁶ And because of *dharma's* fluid character, jurists applied the law according to the community's needs, customs and local principles. In doing so, jurists often declared certain laws obsolete, used *smṛti* selectively, added new sources of law that other jurists routinely ignored, excluded rules without reason and criticized the views of their predecessors.²⁷ This incongruent treatment of the *dharmaśāstras* inevitably created a complex system of principles and regulations that varied from person to person and from place to place.

²³ Alan Gledhill, "The Influence of Common Law and Equity on Hindu Law Since 1800," *Hindu Law and Legal Theory*, ed. Ved P. Nanda and Surya Prakash Sinha, (New York: 1996): 576-603.

²⁴ "Past and Present," *supra* note 4, at 18 (describing this dichotomy with respect to "coparcener," stating: "Equity found its way in generally in order to provide remedies where the *śāstra* might have denied them, and to supplement the *śāstric* law in answer to public demand.").

²⁵ Mathur, *supra* note 11, at 16-17 (noting that the texts relied upon by authors did not have any fixed texts, and several variant readings were available; thus, those interpreting the texts often chose "the readings which suited their own preferences."). In support, Mathur provides an example with respect to the ascension of property upon the death of a woman without children. *Id.*

²⁶ Marc Galanter, "The Displacement of Traditional Law in Modern India," *Journal of Social Issues* 24 (1968): 66 (explaining that "[t]he existence of the *Dharmaśāstra*, 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.").

²⁷ Mathur, *supra* note 11, at 14-19.

III. EARLY COURT SYSTEMS AND BRITISH INFLUENCE

As the British began to acquire Indian territories, they became distantly acquainted with the prevailing legal system, describing it as a vastly diverse assortment of tribunals.²⁸ The British realized its complexity almost immediately, and therefore sought to administer justice in a manner that was acceptable to each community.²⁹ The idea was to let the natives govern themselves, especially in the villages and in the outlying areas. But let's not get ahead of ourselves. At first, the British's interest in India was mainly commercial, and the goal of the British, although ambitious, was not to upset the herd.³⁰ In 1672, on the Island of Bombay, the British established a "Court of Judicature" to which they would refer cases that involved Hindus.³¹ The cases were typically commercial in nature, so the local jurists generally referred the cases to a body of merchants to resolve disputes. As a result, the suits were rather informal proceedings in which a gang of arbitrators relied heavily on local custom to determine who cheated who, and why.³²

In 1726 the British royal charter established the courts in the Presidency towns (Madras, Bombay, Bengal), while the East India Company turned its attention, somewhat, to the outlying areas. There the Company established what were known as the *muffassal* courts. To decide cases in the *muffassal* courts where a Hindu was concerned, jurists drew from Hindu law and, failing that, from custom together with "justice, equity and good conscience."³³ The British

²⁸ J.D. Derrett, "The Administration of Hindu Law by the British," *Comparative Studies in Society and History* 4 (1961): 12-14 [hereinafter "Administration"].

²⁹ *Id.* at 12-13.

³⁰ Wendy Doniger, *The Hindus* (Penguin Press: 2009), 580 (noting how the British romanticized India and how they were open-minded, even in matters of religion).

³¹ Gledhill, *supra* note 23, at 577.

³² *Id.*

³³ *Id.* at 576 (noting that after the East India Company established the *muffassal* courts, "the rule governing a case in which a Hindu is concerned is to be found in a statute, or, failing that, in matters of succession, religious usage, and institution, the Hindu law, except when excluded by custom, and, failing that, in "justice, equity and good conscience.").

appointed their own judges to oversee the *muffassal* courts, though these newly-appointed judges were mere neophytes in pondering the contours of Hindu law. Knowing this, the new judges simply outsourced the law's interpretation, relying heavily on the work of Indian *pandits* (Hindu law officers).³⁴ When Hindu law applied in a given situation, the British judge turned over the case to the assigned *pandit*, who would then issue an opinion according to the *śāstras*, which he swore to follow. But the system would not last long.

Less than fifty years after the first *muffassal* opinions came down, in 1772, Hastings put forth a decree that would make the *dharmasāstras* official legal texts.³⁵ Hastings, in effect, imposed a tinge of firmness on Hindu law that previously it had not recognized. The laws that local jurists often chose to ignore all of the sudden became binding on all Hindus, regardless of their caste and location. But, given the criticism that Hastings' code endured, William Jones became determined to free the British from their dependence on *pandit*-provided interpretations.³⁶ In this way, he attempted to write a series of code books that replicated the *Corpus Juris* that European judges relied upon for years. A few years later, seeing Jones' limited success, Colebrook tried his hand at a similar set of codes, while Sanskrit scholars set out to write legal treatises that met the British demand.³⁷ It was a mad rush for a usable reference, but none of them fit the bill, at least not immediately.

By 1861, a legal system comprised of the High Court,³⁸ the Privy Council and other intermediate courts began to take shape.³⁹ It would not take long before these new courts

³⁴ Gledhill, *supra* note 23, at 576 (explaining that the *pandit* received orders from the court, while swearing to issue an opinion according to the *dharmasāstras*).

³⁵ Rocher, *supra* note 3, at 112.

³⁶ Kishwar, *supra* note 2, at 2146 (quoting William Jones, "I can no longer bear to be at the mercy of our *pandits*, who deal out Hindu law as they please, and make it at reasonable rates, when they cannot find it ready made.").

³⁷ *Id.*

³⁸ Gledhill, *supra* note 23, at 578 (describing the High Court as an amalgamation of the East India Company's *muffassal* courts and the *Sudder Diwani Adalat*, which was manned by the Company's servants, who, after the combination, manned the subordinate courts).

introduced the British concept of *stare decisis* (judicial precedent). The decisions of the Privy Council bound all lower courts in India, while the decisions of the High Court bound all intermediate courts within that Court's jurisdiction.⁴⁰ In 1877 a British judge in Madras opined that the Hindu law that the Anglo-Indian courts administered was a "phantom of the brain, imagined by Sanskritists without law, and lawyers without Sanskrit."⁴¹ His criticisms likely were aimed at the decisions that stemmed from the appeals from the *muffassal* courts, where most of the Hindu legal questions arose. English judges simply couldn't fight the urge to introduce English rules to Hindu cases. Beyond that, judges continued to doubt the translations of the *śāstric* texts and became quite cagey of all court *pandits*.⁴² Nevertheless, as for the previous attempts to codify the *dharmasāstras*, it was clear that these attempts would have to suffice. For the British, it was time for some permanency.

IV. CODIFICATION AND ITS RESISTANCE

The codes introduced by Colebrook and his predecessors went on to become the most cited works for British judges. What is more, with an appeals system in place – one that recognized the precedential value of substantive cases – it wasn't long before the new codes began to make alterations to Hindu custom, even when British law sought to protect it.⁴³ And, as the codes replaced what was left of traditional Hindu law, the arguments that cursed the alteration of Hindu custom sprang up immediately. Soon advocates against this type of change disseminated a fervent call to arms.

³⁹ "Administration," *supra* note 28, at 14 (discussing the appellate court system).

⁴⁰ Gledhill, *supra* note 23, at 578.

⁴¹ *Id.* at 576 (citing Nelson, *View of the Hindu Law as Administered by the High Court of Madras*, 2).

⁴² Rocher, *supra* note 3, at 113 (citing a letter from Sir William Jones, describing it as a "natural and pragmatic reaction to his distrust in court pandits and second-hand translations"); Kishwar, *supra*, 2145 ("The British began to increasingly mistrust the pandits feeling that the latter were misleading the court or that they favoured the interests of their own caste.").

⁴³ Kishwar, *supra* note 2, at 2146.

The traditionalists fired off a swift counter-attack to codification. Their first target was the reformers' cry for uniformity. Kishwar explained that traditionalists instilled in Hindus the question of how far the British should take it upon themselves to interfere with the Hindus' personal and religious lives.⁴⁴ They asked: "Was uniformity so important, in that it would allow a foreign, centralized authority to become an instrument of social reform?" From the traditionalists' standpoint, uniformity, as the British understood it to be, imposed on Hindus a means to adopt a European style of law that decimated the customs that drove the Hindus for hundreds of years.⁴⁵ According to the traditionalists, these customs, rooted in religion,⁴⁶ should not have been compromised. But in a persistent attempt to curb the growth of Hindu custom and religion, the reformers, in actuality, put an end to the essence and soul of Hindu law.⁴⁷ Then, adding insult to injury, the reformers called their codes, "Hindu."

The reformers, of course, saw things quite differently. As to the subversion of Hinduism as a religion, the reformers claimed that if the codes reflected religious laws, then individuals would adhere only to "a sectarian and dogmatic standpoint."⁴⁸ But how could one be so stolid? For the reformers, it was absolutely crucial to separate the concept of theology from modern lawmaking.⁴⁹ While the new jurisprudence owed much to the *śāstras*, reformers felt as though they had moved beyond its assistance. The codes, in the reformers' eyes, were meant to organize and to publicize legal development; they were not meant to subvert religious beliefs.

⁴⁴ *Id.*, 2147.

⁴⁵ *Id.* (noting that "this attitude was inherited by English-educated rulers of independent India along with the machinery of colonial government that had fully internalized it.").

⁴⁶ "Past and Present," *supra* note 4, at 44 (stating that certain codes that the traditionalists claim to be contrary to religious doctrine have "no value unless we agree upon a particular definition of "religion").

⁴⁷ Kishwar, *supra* note 2, at 2147.

⁴⁸ "Past and Present," *supra* note 4, at 45.

⁴⁹ *Id.* ("We should be taking part in a theological controversy, and this is a part which no Parliament in modern times will be content to play.").

But let's take it one step further. If we consider the changes and evolution of Hindu law that have come forth in the past five to six hundred years, as we discussed above, we'd see that at all stages of development, even before the British period, there was never a time that Hindu laws, including those founded on religion, were wholly inflexible. And, if we put aside the root of those changes in modern times – a foreign and centralized power – then why should we not characterize the Hindu codes as another link in the evolutionary chain? The new Hindu code, regardless of its origin, seems to be part of an ongoing pattern of proscribing rules and laws that Hindus could follow and, eventually, develop.

Moreover, it should not be forgotten that the practice of deciding cases pursuant to the broad strokes of custom leaves open the possibility that *pandits* or other interpreting judges may favor one caste over another.⁵⁰ Where the law deconstructs the movement in favor of differential treatment, this would certainly shift the law in favor of the public, as a whole, without regard to one's caste or place in society. The customary uncertainties that still persist all over the country arguably work against Hindu unification. Codification, then, is not a means to an end, but one that may work to further public unity, as well as the end of civil injustice under the current laws.

V. CONCLUSION

For the British, the case of India was quite unique. By the time they arrived, a highly-intricate system of law was in force, served by legal experts trained in traditional ways. On top of that, there were countless customs that one could distinguish only according to caste, region and, in some cases, family. The laws' extent and character was entirely undocumented, thus little precedent existed to which jurists could apply the existing laws. So, recognizing these deficiencies, the British sought to take hold of India's legal system by commissioning Hindu scholars to transcribe a uniform set of laws, based on the *dharmaśāstras*, that appointed judges

⁵⁰ "Past and Present," *supra* note 4, at 40-41.

would apply uniformly in all parts of India. Over time, these texts were transformed into an immutable set of codes. Critics of these codes, however, quickly claimed that they undermined Hindu custom and, especially, religious traditions. But the benefits of codification perhaps outweighed this assessment.

Through a uniform set of laws, Hindus were no longer governed by disparate cases, whose rulings came down according to one's caste, community and family. In this way, we can infer that codification was merely a preliminary step in promoting India's national policy. If applied properly in the future, the laws should no longer treat individuals differently, by taking into account the region in which a party to a suit was born. Codification, in essence, is a unified movement, marked by fundamental changes to the laws under which many classes of Hindus have long suffered. Though, admittedly, the true benefits of codification remain to be seen.