the norms which constituted the foundations of the legal system were an extension of the principle of hierarchy. The *dharmashastras* clearly lay down differential standards of legal rights and administration of justice based on the recognition of qualitative-ascriptive status of various castes and classes to which the standards of legal sanctions were graduated. "Thus, a Brahmin slandering a Kshattriya should, accorc..ng to Manu, pay a fine of fifty panas, but for slandering a Vaisya or a Shudra the fines are only twenty-five and twelve panas, respectively. For members of the lower orders who slander their betters the penalties are much more severe. Similar gradations of penalty according to the class of the offender are laid down for many crimes, and the equality of all before the law was never admitted in ancient India, and was quite contrary to most Indian thought."[43] However, to this we must add that, whereas by their social status the higher classes enjoyed superior legal rights, in relation to conformity with higher ethical standards, traditional Hindu law set more rigorous standards for them from which the lower sections of the community were either exempted or for the violation of which they were punishable with comparative leniency. Bhasham writes:

> In fairness to the Hindu legal system, we must note that it did not always work in favour of the Brahmin. Manu lays down that as the penalty for theft the Shudra should pay a fine equal to eight times the value of the stolen goods, while the Vaisya, Kshatriya and Brahmin should pay sixteen, thirty-two, and sixty-four times the value, respectively. The upper classes were expected to follow higher standards of conduct than the lower, and their theft were correspondingly more heinous.[44]

In both instances, however, we come across the principle of hierarchy. In Hinduism, the innate moral and qualitative attributes of men have been conceived of hierarchically, and these differ in men according to their birth in high or low castes. The men in the higher castes are, therefore, expected to be also having a higher level of charismatic moral endowments in comparison to those at the lower level. Hierarchy of charismatic qualities (*guna*) in human nature, to which reference has been made before (Chapter 2) logically fits in with this form of particularistic and non-equalitarian system of law, which imparts justice not on the basis of equity and individual responsibility but on the ground of holistic group or caste affiliation or status of a person. Theoretically, such a system of law could be treated to be logically consistent with the Hindu phenomenology of human nature and the conception of social structure. But in practice there have always been variations in the functioning of this system.

As in the case of the other aspects of Hindu tradition, in respect of legal system too, there has been a lag between the textual records and contextual functioning. The legal system *and its practices* were constantly being adapted to regional and sub-cultural requirements as were dictated by the

needs of ethnic assimilation[45] and historical circumstances. Apart from the *dharmasastras* (law books), local customs and royal decrees modified the contextual significance of the socially operative legal norms and its social structure. Despite these regional and contextual variations the particularistic and hierarchical nature of the Hindu legal system persisted. It continued to be group-oriented and non-equalitarian or ascriptive instead of being individual-oriented and universalistic. The impact of the Muslim culture and administration did not bring about any basic change in the qualitative nature of this legal system. Muslim law was itself in many ways particularistic. "Evidence of non-Muslims was inadmissible against Muslims, a rule which made it impossible to hold the scale of justice evenly in cases between Hindus and Muslims.... The sons or next of kin.... were free to pardon the murderers of parents or kinsmen."[46]

At the time of the contact of the British with the Indian society, the legal system which existed in various parts of the country was still particularistic and non-equalitarian. Towards the end of the 18th century most of the central India and the Deccan was under the domination of the Marathas and in these areas Hindu form of legal administration operated. Whatever accounts are available reveal that justice was inequitable, often arbitrary and without conforming to any systematic logic of law.[47] Certain groups such as the Bhats in Gujarat and Brahmins in the north used to maintain their privileges under the threat of committing suicide (*traga* in west India and *dharna* in the north), of which people were highly apprehensive since they believed the sins of such a death would fall upon them.[48] Operation of law and administration of justice was highly mixed up with local customs, people's superstitions and the non-equalitarian values of the traditional Hindu and Islamic legal codes. The operation of the law was also partial owing to the lack of law and order[49] and an organized form of political structure in the country.

With the establishment of the British power in India there came a new turning point in the legal system of the country. Various forms of legal innovations were introduced by the British which were in contradistinction with the traditional Hindu law, and were based on the principles of universalism, rationalism and individualism. Legislation thus became an instrument of modernization. Its growth was, however, slower and in one respect it might be true to say that gradually a synthesis was taking place between the traditional and modern legal forms and practices reflecting the over-all process of synthesis between tradition and modernity in India.

The foundations of the new jural system were laid down by Warren Hastings. He was for a decentralized system of law courts to conduct civil and criminal justice in the districts. These were all Company's courts; Supreme Courts, first in Calcutta and then in Madras and Bombay were also established under a royal charter based on the provisions of the Regulating Act of 1773 enacted by the British Parliament to control the activities of the East India Company. The Supreme Courts or King's

Courts, were separate from the Company's courts and exercised no jurisdiction over the latter. So, for a time there existed a dual form of administration of justice which was confusing and often led to hardship for the people. This was removed by 1861 when the enactment of the Indian Penal Code and the Codes of Civil and Criminal Procedure rendered it possible to have a systematic control on lower courts in each province by a provincial High Court vested with powers to hear appeals from these lower courts. Above these lower courts and the High Courts was the Judicial Committee of His Majesty's Privy Council as the court of ultimate appeal, vested with highest powers.

In the growth of this jural administration and its legal normative structure a novel feature was the separation between the judicial and executive functions and powers of courts. The credit for this goes to Cornwallis who first introduced it in Bengal and later the same model was followed by other provinces. The sociological significance of this system was that even the governmental executive decisions were now contestable in civil courts, thus providing a foundation for the rule of law and right of liberty and justice.50 But still the legal norms, specially in respect of domestic and personal realms, were heterogeneous consisting of such diverse legal traditions as the English, Hindu, Islamic, Parsi, Customary and Tribal. Even within some of these traditions there were regional variations.

Nevertheless, establishment of a uniform system of legal rights and its administration which was achieved with the stabilization of the British rule in the third quarter of the nineteenth century brought about many forms of cultural changes. Firstly, its emphasis was on humanistic values. Many social customs which violated the norms of human dignity and personal security and freedom were legally abolished. *Suttee* (widow burning) was declared illegal in 1829. Claims to slaves was abolished by law in 1843. Earlier, in 1832 the trade in slaves from one district to another was made a penal offence. In 1850, Caste Disabilities Removal Act was passed which guaranteed freedom of conscience and right to keep one's property and inheritance rights even after conversion to a different faith. An Act legalizing the remarriage of the Hindu widows was passed in 1856. These changes were introduced during the pre-Mutiny period, which was marked by an extraordinary enthusiasm of the British administrators to introduce radical changes in the indigenous Hindu social customs and cultural practices which were inhuman and unhealthy; it was also followed by their zeal to introduce new liberal institutions based on Western cultural patterns.

The Mutiny of 1857 dampened this enthusiasm of the British administration for social reforms. But directly or indirectly the process continued and most of the basic changes in the legal system of India, which had a modernizing effect on its culture were introduced during the post-Mutiny period. Lindsay writes:

The first Law Commission, under the presidency of Lord Macaulay,

was set up in 1834; its most notable achievement was the production of the draft of the Indian Penal Code, which, however, did not become law until 1860. Macaulay's Commission also drew up a number of reports which embodied proposals for legislation and which fell under the consideration of a succession of Law Commissions which sat in England at various times between 1853 and 1870 and whose efforts led to the enactment of the Codes of Procedure, civil and criminal, in 1859 and 1861, respectively. This latter year also marked the unification of the judicial system in India by the amalgamation of the Supreme and Sadar Courts into the High Courts. The later fruits of the labour of these Commissions were the Succession Act (1865), the Limitation Act (1871), the Evidence Act and the Contract Act (1872), and still later, under the direction of the Government of India, there came the Specific Relief Act (1877), the Negotiable Instruments Act (1881), the Trust Act (1882), the Transfer of Property Act (1882), and the Easement Act (1882). By this time, it may be said, the process of codification came to an end, though further legislation of a comprehensive character was undertaken to define the law of land tenure for the various provinces.[51]

This shows the radical character and sweep of the new legal norms which were introduced for the administration of justice in India. Much of its basic formulation was completed by the end of the nineteenth century, but since then new additions have been going on. Legislations introducing social reforms in many sensitive areas of Hindu customs continued. In order to accommodate the marriage customs of the Brahmos, who claimed no formal membership with any religion, a Native Marriage Act III was legislated in 1872, which in an indirect form was like a civil marriage law, since it permitted marriage between two persons who were or claimed to be outside the membership of various religious groups in India. This was the first secular legislation of its kind. In 1891, another controversial legislation in the field of marriage, the Age of Consent Act, was passed. This was further modified in 1929 when the age of consent for marriage of girls was raised to thirteen years from ten.

In fact, the legislation raising the age of consent for marriage of girls was a very human need. But the conservative sections in India, including even eminent leaders like Tilak were opposed to it and treated it as an intrusion on the Hindu culture. A month after the Age of Consent Bill became an Act, Tilak wrote (April 12, 1891) in the *Mahratta*, "We are very sensitive and we feel nothing so much as an attack on our national character. That the Age of Consent Act will write in the statute book the character of the Indian nation in the blackest letters is our grievance.....so long as this certificate of bad character remains on the statute book we can enjoy no rest."[51] Tilak's exhortations deeply stirred nationalistic feeling and motivation for self-reform and reinforced the conservative nationalist faction in India. Despite this, how badly such social reforms were required is clear from the

fact that in the Census of 1881 in Bengal 14 per cent of all Hindu girls in the age of ten were either married or widowed. Same figure for Bombay was 10 per cent and for Madras 4.5 per cent.[52] The problem of widowhood was equally worse. In 1931, 21 per cent of women in Bengal between the ages of 15 and 40 were widows.[53] Evidently, legislation to enforce humanistic reforms in marriage customs was highly justified.

Towards the end of the nineteenth century legislation became more diversified and attuned to the expanding economic, industrial and political requirements of the time. India had now entered into the age of mass communication through post office, printing and press. In 1878, a Press Act came into being to be followed by the News Papers Act in 1908. Many legislations were enacted for the welfare of factory workers as the number of factories increased. The Factory Act was first passed in 1881 and then successively revised in 1891, 1925, and 1931 and later. Bengal Tenancy Act was legislated in 1885, setting a pattern for reform of land tenures. In 1904, a Co-operatives Act was passed. Without going into the details of other enactments, in the fields of industry, communication, penal codes, and civil rights and customs, it may be noted that by the first quarter of the twentieth century a uniform all-India pattern was established in the form of judicial administration based on a homogeneous normative structure of law. Sociologically, the content of new legislation was as important as its pan-Indian character which created an institutional base for a new national identity and processes of cultural modernization.

However, more radical social legislations in the field of Hindu personal law and custom had to wait till the dawn of freedom, which introduced a new era of radical social legislations. The beginning was made with the enactment of the Constitution itself which guaranteed to all citizens without discrimination of religion, caste, sex, place of birth, equality and freedom before law. It also abolished the practice of untouchability in any form, striking at the very root of the Hindu system of caste. This was followed by legislations like the Special Marriage Act (1954). Hindu Marriage Act (1955), Dowry Prohibition Act (1961), Children's Act and many other welfare legislations for the underprivileged classes and tribes in India[54] which if set into actual operation would change the very fabric of Hindu society.

These legal innovations provide us examples of gradual spread of modernizing cultural norms in Indian society. It is true that until Independence, many aspects of the Hindu customary and personal law were left intact by the British. Despite this, they had introduced numerous enough legislations to change the very form of jural administration and relationships pertaining to the economic, commercial and social institutions. Firstly, the jural postulates emphasized "equality in the eyes of the law, judicial ignorance of the complainants, the ideal that economic relations are based on contract not status, the goal of settling the case at hand and only in that case, and the necessity of a clear-cut decision rather than compromise,"[55]

which in ethos and procedure were fundamentally different from the traditional pattern.

From a cultural point of view the impact caused a major breakdown in the principles of hierarchy and holism, the two pivotal value systems of the traditional culture. Hierarchy was abolished in the new legal system which was anchored in the norms of equality and equity in matters of its administration. Justice founded upon new legal norms did not have inequitable standards based on distinction between one caste and another.[57] Not only in theory, but also in actual practice the introduction of new legal norms led to breakdown in many hierarchical values and relations in the social system. O' Malley writes:

Two results of the judicial system may be briefly noticed, viz., the establishment of the principle of equality and the creation of a consciousness of positive rights. The last was a plant of slow growth owing to the abject submissiveness of the lower classes, which prevented them from taking advantage of the system of equal laws and vindicating their rights by legal action. A change was gradually effected. In 1841, for example, it was noticed that the Chamars, despised untouchables of northern India, were not afraid to bring suits against their landlords, and it was added, "nothing vexes or annoys the zamindars in our whole system so much as this."[57]

In assessing the extent to which legal innovations have succeeded in realizing egalitarianism in social justice, a distinction may be maintained between the potential and actual change. Law in India has introduced many factors leading to the possibility of changes in the customs and structure of the Indian society. But have these potentialities for change kept pace with actual rate of change? Its evaluation in the absence of empirical data may not be perfect, but the indications are that actual changes are much more slow considering the form of legal radicalism in India. In a comparative study of this phenomenon at village level Bernard S. Cohn points out that although the lower classes in villages have become increasingly conscious of their legal rights and often even try to enforce it through law courts, they are rarely successful. The superior knowledge and economic resources of the upper caste villagers always tends to foil the effort of the lower classes for legal equality and redressing of their grievances.[58] Yet, most villages now have a class of people who are supposed to be experts in the matters concerning law and law-courts and serve as village-level legal advisers and as go-betweens for urban lawyers and villagers.[59]

Nevertheless, compared to the personal laws (those related to family, marriage, divorce, adoption, joint family guardianship, minority, legitimacy, inheritance, succession and religious endowments) the impact made by the legislations about land rights, commerce, trade, industries and labour, etc., which involve the material interests of the people directly has been

relatively greater. In case of personal law, recourse to it appears to be greater in cities than in villages and more among the educated than the illiterate. The actual changes, which legal innovations have brought about in hierarchical social relationships, might be less than expected, but from a cultural point of view great significance is also laid on efforts to change such relations which fail or which are mere potentialities. As the number of educated and urban citizens increases, the potential rights guaranteed by law would be increasingly converted into realities. The trend in this direction is already there.

Holism is another characteristic of Hindu tradition which is materially affected by legal reforms. Traditional culture did not treat individual to be the unit of social and cultural participation: for all modes of interaction the household, clan, sub-caste and caste were recognized social units. Now, the legal and administrative innovations recognize only the individual as the unit in all matters of negotiation.[60] This marks a major break from the tradition. The impact of change is magnified since individualism in legal normative structure is also coupled with values of rationalism and universalism rendering it specially modernizing in significance. O' Malley says that: "The spirit of individualism, to which other factors have also contributed, has already done much to modify the organization of a society of which the group rather than the individual is the unit and in which a man's status is determined by the rights which belong to him as a member of a group."[61]

Cultural modernization through legal innovations, therefore, proceeds in India in many forms. It operates by posing a challenge to the time honoured traditional value systems of hierarchy and holism. It produces changes also of a systematic and pan-Indian character by being a part of a uniform judicial administration, which constitutes a new cultural Great tradition in India. It serves the objectives of modernization by also educating people in the culture of individualism and rationalism and consciousness of their rights and obligations. Finally, it contributes to the growth and multiplication of modern legal professions and new professional norms, leads to the establishment of rule of law which, as Weber had postulated, reinforces the growth of a viable and rational economic system, so essential for modernization.[62]

Education and Modernization

Contemporary education, which is an agent of modernization in various forms is also of the Western origin. Traditionally, content of education was esoteric and metaphysical; its communication was limited to the upper classes, or the 'twice-born' castes and the structure of its professional organization was hereditary and closed. The roles both of the teachers and the taughts were qualitative-ascriptive. Modern education has a fundamentally different orientation and organization. Its content is liberal and exoteric, and it is steeped in modern scientific world-view. Freedom, equality,

humanism and denial of faith in dogmas are the themes which a modern education should contain. It has a professional structure which is not ascribed to any specific group or class but can be achieved by merit by any one in society. Some branches of modern education such as science, engineering and medicine directly focus on a world-view which embodies the core values of modernization, and imparts skill to realize the goal of a modern society. Traditional Indian education departed fundamentally from these normative and organizational prerequisites.

The foundation of modern education in India was established by the British. Its historical landmarks are: Macaulay's policy of 1835 to promote European learning through English, Sir Charles Wood's dispatch of 1854 which for the first time recognized the need for mass education with the private and missionary help and gave up the policy of selective education known as the 'filtration theory',[63] and finally the first Indian Education Commission of 1882 which recommended the initiative of private Indian agencies in the expansion of education.

Gradually, a broad structure of educational organization emerged in India which may be roughly classified into three groups: first, primary-vernacular education (with the exception of the English missionary schools); secondly, high school and secondary school education and, thirdly, college and university education. From the very beginning a contradiction between the primary and the college-university level of education emerged in India on account of the medium and content of education. At the primary level the medium of instruction (with the exception of missionary and public schools) was the regional language and at the college level it was English. Teaching of science and European literature was done at the colleges and universities to which select few had access; but the mass education at the primary level remained isolated from this main current. This lag in the structure of education which started from the time of Macaulay has still not been fully bridged. Modernization through education thus right from the beginning in India has been confined to a sub-culture of college and university educated youth and elite and never did become a mass pheno-menon.

In the expansion of education, too, in early days there was more emphasis on the higher education than primary education. In the nineteenth century the rush was for higher education, specially among the urban middle classes and the growth in higher education was also considerable.[64] Primary educa-tion was neglected till education became a provincial subject. For instance "the number of scholars in all kinds of colleges in 1921 was 59,595. It rose to 144,904 in 1939, nearly 2.4 times as much. The number of pupils in schools of all kinds during the same period increased from 8.32 to 14.55 million, only 1.7 times as much. The difference in the pace of college and school education was accentuated in the decade following 1939. In 1949-50, for example, the number of all kinds of college students rose to 380,837, is, 2.7 times as much in ten years. The corresponding figure for pupils

in all kinds of schools rose from 14.55 to 23.66 million, an increase of only 1.6 times as much. Higher education was thus becoming increasingly top heavy, especially after British influence."[65] The school population now stands at about 50,000,000 and the literacy rate is nearing 25 per cent.[65] This aspect of the expansion in education has contributed to many important sociological problems in cultural change in India.

The significance of education in modernization could be analysed in three areas: first, the cultural content of this education, secondly, its organizational structure and thirdly, the rate of its growth. The content of new education was doubtlessly modernizing and liberal in nature. This is true whether reference is made to the humanities or social science or natural and applied sciences. The literary content of the courses in the humanities and social sciences was drawn from the literature of the European Renaissance, Reformation and Enlightenment. Its themes were humanistic, secular and liberal. For example, "John Stuart Mill's essay 'On Liberty' soon after its publication became a text in Indian colleges. Indians came to know about Magna Carta, and the struggle for liberty and equality in Europe and America. The implications of modern science became manifest in their studies."[66] An important element in this education was emphasis on contemporaneity and humanistic evaluation of social, political and historical issues. Its sociological result was a disenchantment from traditional education, whose categories being embedded in the scriptural and mythological lores had an obsessive degree of orientation towards the past. The categorial structure of the new education was oriented to the present and the future. Disciplines like history, geography, political science and economics, etc., in the curricula had a subtle orientation to focus the attention of students on social and physical realities and on the world-view of contemporaneity and anthropocentrism. This itself marked a major break from the traditional outlook and system of values.

In cultural modernization through education often more positive value is associated with learning of physical and biological sciences, medicine and engineering rather than the humanities and social sciences. The reason for this association is not only that science education has more modernizing effect than arts, but because this education creates manpower which is indispensable for economic and industrial growth. Nevertheless, if the creation of a substantial profession in science and engineering contributes to modernization of society, education in the humanities and social sciences contributes to the modernization of man. One must not be considered less significant than the other. This is evident from the analysis of the pedagogic content of both groups of disciplines. How and to what extent the humanistic content of the Western literary forms supplemented the liberal values of the intellectuals and the educated in India has been sketched by Edward Shils as follows:

It was almost as if this older generation had taken, as their guiding star,

Macaulay's lightly uttered assertion of superiority of a shelf of books
of Western literature and science to whole libraries of Oriental works.
The situation has been little different in the generation now between
the middle thirties and middle fifties. The names have changed to some
extent, but the distribution of attention remains the same. Tennyson
and Browning fall away, Blake and Donne take their places. Keats,
Shelley, Byron are recalled with distant honor. T.S. Eliot, Ezra Pound
replace them. Dickens and Thackerey are supplemented by Aldous
Huxley, Ernest Hemingway, William Faulkner, Sartre, Camus, Mann,
and Moravia. Thomas Huxley, John Morley and Burke yield place to
Bertrand Russell and Harold Laski; Mazzini and Ruskin are supplemented
by Marx and Lenin, Bergson by Freud. Among the less intellectual
intellectuals, Somerset Maugham and Stefan Zweing are much appre-
ciated. *Encounter* and *The New Statesman* bring a continuous flow of names,
which many know about and some read. The idols of the Victorian gene-
ration, which in India lived longer than they did in the West, continue to
hold high places mainly because they continue to be 'set books' in
secondary schools, and colleges.67

Apart from the emphasis on the works of Western thinkers and litterateurs
a current of cultural introspection and new look on traditional literature
was simultaneously going on in India. Its symbols were drawn from
the pragmatism of the Vedas, the logical metaphysics of the Upanishads
and the *karma yoga* or the philosophy of positive action as contained in the
Gita. Leaders like Vivekananda, Tilak, Gokhale, Gandhi, and Aurobindo
established the foundation of this tradition. A militant nationalist culture
flourished in Bengal, Punjab, Maharashtra and some other parts of India.
This cultural process served to counterbalance the effect of Western edu-
cation and its literary and cognitive content.

The new education was also different in its organizational structure.
It was imparted by teachers who were appointed on the basis of educational
achievement irrespective of their caste or birth, a principle which was in
basic contrast with the concept of *Guru* (teacher) in the Hindu tradition
who had to be a Brahmin by caste. Not only the content of education but
also the structure of the teaching profession was thus secularized. Training
schemes for teachers in the primary, middle and high and higher-secondary
schools were launched. In Bengal, first Normal School for teachers was
established in 1844 and the district primary and middle school education
was placed under the charge of Inspector of Schools. The Education Code
of 1904 for the first time made the appointment of a certain minimum
number of trained teachers a necessary condition for the recognition of
schools.68 During 1919-20 the total number of vernacular teachers in India
was only 201,000, of which 70,000 were trained. The teachers in Anglo-
vernacular schools during the same period were 100,000 of whom 35,000
were trained and 11,000 possessed a degree.69