

## Ananyo Basu

### Torts in India: Dharmic Resignation, Colonial Subjugation, or “Underdevelopment”?

**T**ort is the area of law where in response to a private or civil wrong or injury the courts provide the remedy of allowing a lawsuit for (usually monetary) damages. Thus, the goal is to restore the victim to his or her former condition. It has been suggested that the law of torts is rather underdeveloped in India, the world’s largest democracy. Most of Indian tort law was developed after the British colonization. Yet Hindu law in its various incarnations and evolutions represents the oldest continuous legal system in the world. For several millennia Hinduism was the only religious and legal system in India; in the last millennia it has coexisted with Muslim and Christian legal systems, but it has remained culturally hegemonic and applies to most Indians in some degree today. When we add to the long duration of Hindu law the fact of India’s great diversity of culture, language, and even political systems over the ages, the situation appears still more troubling. Moreover, the continued underdevelopment of Indian tort law is surprising given the impressive commitment to both compassion and comprehensiveness embodied in the Indian constitution ratified in 1950 (three years after independence from Britain).

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Tort law is said to be a development of the old maxim *Ubi jus ibi remedium* (Every right needs a remedy). Are Indians simply possessed of fewer rights in this important sphere? What are we to make of this underdevelopment regarding a fundamental question in almost all systems of law—how to make the victim whole, how to provide reparation? Does the explanation lie in some aspect of Indian society or culture?

On a first consideration of tort law in India today, the American observer is likely to be struck by its familiarity. Closer inspection, however, reveals some differences in structure and still more in operation. The Indian legal system is a standard common law democratic system. Law is conducted in English with much the same categories and vocabulary as in England and the United States. There is a written (albeit rather voluminous) constitution and there is judge-made common law. The Indian constitution provides all the fundamental rights found in the U.S. Constitution but encourages greater social and economic justice—understandably, since India is more liberal and poorer. In particular, the language of Article 39 (in the section of articles on “directive principles” or what we would call aspirational rather than enforceable laws) is a tribute to the progressive leaders who fought for India’s independence. Thus, in 39(b) we see that the state is exhorted to direct its policy so “that the ownership and control of the material resources of the community are so distributed as best to subserve the common good” and in 39(c) so “that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.” Regrettably there is a gap between these guiding principles and the socioeconomic and legal realities of India. Nonetheless, concern for social justice motivates Indian judges in a way that many Western observers would find surprising if not troubling.

The underdevelopment of torts in India may seem at first glance to be in conflict with the very essence of a common law system. In an important sense there can never be lacunae in any area of law in a common law jurisdiction because, to varying degrees, the common law of England and its former dominions and colonies is available for adoption. India’s constitution adopted all existing English law with the proviso of adaptation where necessary.<sup>1</sup> If new rules or statutes from England are more consonant with the requirements of justice, the Indian courts are allowed to discard older common law rules in their favor. Moreover, a common law judge is entitled (within limits) to generate new law as dictated by equity. Lord Scarman in

a British opinion made this very point: “The common law . . . covers everything which is not covered by statute. It knows no gaps: there can be no *casus omissus*. The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of a new law to meet the justice of the case. But whatever the court decides to do, it starts from a base-line of existing principle.”<sup>2</sup> Mass and toxic torts are now commonplace in many common law jurisdictions. For instance, Union Carbide was forced to withdraw its pesticide Temik from the market after tort litigation in the United States. Tort law, whether in the United States, Canada, or India, is based on judge-made common law derived from old English causes of action. These developments in tort in other common law nations are doctrinally available to Indian judges.

The problem is, however, that the standard common law model of torts assumes an idealized world where (presumably middle-class and educated) citizens are full participants in democracy and conscious consumers of their legal rights. In the cultural context of India, where half the population is illiterate and access to the courts is forbidding in terms of complexity, time, and expense, the idea of a victim receiving redress from a wrongdoer in open court may be the stuff of dreams. Certainly few Indians would believe that a landless laborer in Bihar could get legal remedy in local court against a powerful *zamindar* (feudal landlord).

Consequently, the severe deficiencies of tort law that we do see in India have far more to do with implementation than with doctrine.<sup>3</sup> Institutionally there are only 10.5 judges per million of population (compared with 107 per million in the United States). There are Byzantine laws of civil procedure that allow interminable delays. The upper courts can meddle endlessly with lower courts (a holdover from the British Raj, where largely English upper courts did not fully trust the native lower courts), leading to further delays.

The Indian government itself has offered evidence in court of a fifty-year survey (1914–65) that found only 613 tort cases nationwide (only 132 were for negligence).<sup>4</sup> Worse yet, the duration of tort cases has been on average nearly thirteen years and total recovery less than thirteen hundred dollars.<sup>5</sup>

This situation is caused by a combination of slow judicial procedure, understaffing, and barriers to entry such as requiring payment of ad valorem fees of up to 5 percent just to initiate proceedings. The low and late

payoffs mean that there is really not much incentive for plaintiffs to sue in tort at all. And the lack of any system of contingency fees makes it difficult to find legal representation.

The inadequacies of tort law in India were brought into excruciating focus by the disastrous gas leak at Union Carbide's factory in Bhopal in 1984. This remains the worst industrial disaster the world has ever seen. Around midnight Sunday, December 2, a massive leak of toxic methyl isocyanate (MIC) gas poured out lethal white vapor from a storage tank for over two hours. The city was smothered in miles of poisonous fog and thousands died, poisoned in their sleep or in terror as they tried to flee (especially the poor who had little access to transportation). Hundreds of thousands of survivors still remain affected. Compared with the magnitude of the suffering, compensation has been little more than symbolic. Even the pittance awarded by the Indian court has been held up by a combination of inefficiency, bureaucratic delays, political maneuvering, and lack of infrastructure. Certainly Union Carbide and the U.S. courts must accept a large share of the guilt in the abysmally poor compensation that the victims of this tragedy received. But blame must also be laid on the inadequate legal and institutional framework provided by the Indian government. In practice even the modest award remained largely unexecuted. The multitudes of victims continued to languish without interim compensation while the government of India waited to see how the appeals turned out (preferring Union Carbide to make any interim payments). The massive infrastructure required for efficient relief was simply never put in place. The formal structures set up by the government were also a bureaucratic nightmare: each claim was supposed to go through forty stages, including review by various clerks and medical evaluators. And all of this was in addition to the fundamental problem: the courts were essentially having to make up the law as they went. In contrast to the slow incremental evolution of law that is typical in a common law context, they were faced with the hurried development of a complex legal framework.

Bleak as this picture seems, there are some features of Indian law that provide reasonable grounds for optimism. The judiciary themselves are often progressive activists and have made many innovations.<sup>6</sup> For one, they have loosened rules of standing for public interest cases so that almost anyone can bring suit (including a judge, of his own initiative, merely on reading a newspaper article!). They have treated individual cases as representative of a whole class of defendants (this action assumes a great importance in India,

where class actions are rare). They have ordered detailed long-term injunctions, including requiring that tort-feasors (those found liable in tort), and courts work toward the rehabilitation of victims and families for years.

There are some precedents that Indian courts can and do draw on, including some of a considerable vintage. For instance, it has been clear in India for almost three hundred years that a foreign corporation like Union Carbide may indeed be sued in tort.<sup>7</sup> Torts of nuisance (including injury to property) are also of some provenance and may be extended further afield to cover new situations like the one encountered in Bhopal. Even in Victorian India injunctions were granted to prevent increases in smoke, noise, and other pollutants.<sup>8</sup>

Such seemingly favorable characteristics of Indian law led Judge John Keenan of the Southern District of New York to send the Bhopal disaster litigation back to the Indian courts.<sup>9</sup> Keenan invoked the legal doctrine of *forum non conveniens*, which allows a judge to decline jurisdiction where both convenience and justice are better served in some other court. He felt Indian law was adequate, because it is very similar in structure to U.S. law and because the Indian Supreme Court has a distinguished record of defending fundamental rights. Moreover, where tort law was not developed in India, the Indian courts could build on the same common law foundations that U.S. courts had. While delays were common, the courts could certainly take exceptional steps in such a situation to expedite the process.

In the case of the Bhopal disaster, the Indian Supreme Court certainly strove valiantly to justify Judge Keenan's trust but it faced tremendous obstacles. The Indian government was reluctant at best to provide speedy or efficient relief; there were no clear tort precedents to bind the foreign corporation whose subsidiary was at fault; and cases in tort usually took years to prosecute and resulted in paltry sums in damages. The Supreme Court showed its judicial creativity, generating a new kind of tort liability in the *Mehta* (in India the case was originally discussed as *Shriram Oleum Gas Leak* but actually published as *Mehta*) case just in time for application to Union Carbide.<sup>10</sup> The Supreme Court also seized this opportunity to develop rules of general application with respect to mass tort cases. They defined a far more extreme form of liability called absolute enterprise liability, "not yet recognized by English Courts or possibly elsewhere."<sup>11</sup> Absolute enterprise liability assumes an absolute obligation to provide that all ultrahazardous activities be conducted with required standards of safety.

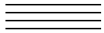
Thus the court acknowledged that in a complex and intricately organized international business, it is impossible to pinpoint responsibility to a discrete unit or individual within the enterprise. The multinational alone has the power to prevent a disaster and must therefore be held accountable for damage done at one of its subsidiaries. Indeed, with respect to enterprises involved in ultrahazardous activities not even the defenses of an act of God or sabotage would be allowed. The court therefore overruled the more traditional model of common law strict liability set up in the old case of *Ryland v. Fletcher*.<sup>12</sup> The *Mehta* court was very conscious of creating new and necessary law, and Chief Justice Bhagwati, a true hero of Indian jurisprudence, wrote in his opinion: "We cannot allow our judicial thinking to be constricted by reference to the law as it prevails in England or for that matter in any foreign country. We are certainly prepared to receive light from whatever source it comes . . . for social development, orderly growth of society and cultural refinement, the liberal approach to tortious liability . . . is more conducive."<sup>13</sup>

Still, in the end the Bhopal disaster's legal resolution was disappointing at best. Questions will always be asked about Judge Keenan's decision to send the case to India—after all, Union Carbide's management and assets were in the United States, and U.S. courts were far more likely to award a suitable level of compensation. One can only suspect a degree of protectiveness toward U.S. corporate interests. Moreover, the Indian courts' ability to enforce judgment against a powerful U.S. corporation is limited at best. Indeed the allegedly court-imposed modest settlement was really a ratification of what the parties would settle for. While the Indian Supreme Court ably rose to the challenge of developing new and effective law, this novelty and lack of precedent afforded Union Carbide the opportunity to assume the moral high ground and denounce the activism and nationalism of the court.

Inasmuch as India's courts have recognized the great inequalities in social power between corporations or landlords and their impoverished workers, they have also recognized that the standard model of torts is simply inadequate to address deeper problems of social injustice. Therefore they may be content to be creative and activist in shaping injunctions and remedies rather than to focus on developing a clear corpus of tort law. Thus even where the actual infrastructure physical and legal is woefully underdeveloped, the activist Indian judiciary can sometimes secure a just result.

As an aside, it seems odd to suppose in the first instance that every country should need or desire an identical articulation of law. Votaries of the "law

and development” school in U.S. legal thought at one time acted on the belief that U.S. law is indubitably more advanced and should be spread to other nations. This view has been largely discredited everywhere. In the latter half of the past century some Third World nationalists began to resist certain kinds of Western capital intrusion, demanding economically and culturally “appropriate technology.” Perhaps the same analysis applies here—Indians need culturally appropriate jurisprudence and legislation. And (despite all the constraints and problems) that may be precisely what some Indian courts and legislatures have been trying to provide.



The lack of specific legal development and codification in torts as well as the more flexible and activist judiciary may partly reflect Indian cultural preferences. To this end a brief discussion of some relevant features of Hindu law and also some aspects of Indian traditional justice systems is appropriate here.

The origins of Hindu law are both ancient and obscure—certainly there has been continuous commentary for at least fifteen hundred years but older works are used and references are made to even older documents. The very definition of Hinduism has presented enormous problems and in 1966 the Supreme Court was forced to enumerate certain common features of belief that might determine whether one was a true Hindu.<sup>14</sup> The enormous number of texts, both ancient and medieval, and the practice of not indicating specific authorship or dates have added to the confusion regarding Hindu law. For instance, distinctions between the original and the accretion, are based usually on speculation and often on bias. One famous Indianist describes the state of Hindu law in the twentieth century:

The private law of the Hindus is one of the most complicated in the world. No system of law is, or has ever been, in such an almost inextricable confusion. It is doubtful whether any living person knows the depths of the chaos into which centuries of neglect and indifferent administration, of historical aberration and fortuitous error have thrown it. It was once theoretically capable of being a magnificent system of law, superbly equipped with every feature, substantive and adjective that could be required by a people desirous of the very best administration of justice and the most subtle jurisprudence.<sup>15</sup>

The central concepts of Hindu law are also challengingly incommensurable with core concepts of Western law. Even the key concept of dharma defies a quick summary. Robert Lingat traces the meaning of dharma in his seminal text *The Classical Law of India*. First, as applied to the universe, dharma signifies the eternal laws that maintain the world.<sup>16</sup> This idea of a world governed by an objective order Lingat sees as a shared Indo-Iranian concept. I might add that it is quite pervasive in ancient Asian cultures. For instance, the Chinese idea of *Tian-ming* (mandate of heaven) also presupposes a grand cosmic moral order with which a ruler must align himself in order to have the right to rule.<sup>17</sup> The next sense of dharma Lingat identifies is actions in conformity with the moral order that help humans realize their destiny in this life and benefits in the next.<sup>18</sup> However, the most common sense of dharma, as he points out, is the sum of duties incumbent on a person based on his or her status or *varna* (caste and gender most crucially) and *ashram* (stage of life).<sup>19</sup>

It is not hard to see the incompatibility of a view of the law as rooted in a cosmic moral order with a notion of judge-made common law. In practice, however, flexibility and contextualism have been salient features of Hindu legal practice and the incompatibility with common law may not be as great as one might expect. In India, custom and equity are routinely allowed to trump adherence to the law as defined in the ancient texts.

The dharmasutras (ancient treatises of law and morality) enumerate the Vedas, tradition, and good custom as the sources of Hindu law. The codes of some leading lawgivers add a fourth source, inner contentment, which is akin to the idea of conscience. Although this appeal to conscience may suggest some flexibility and subjectivity entering the system, it appears that this source may be limited to individuals of great virtue (sages living the true Hindu life), making it closer to an Aristotelian virtue ethics—based on the choices of moral exemplars.

Of the other three sources, the most authoritative are the Vedas, revealed texts dating perhaps to 1100 B.C.E. Unfortunately, these largely literary, liturgical, and philosophical texts do not provide very many specific precepts for the Hindu moral agent. The second source, tradition or *smṛiti*, provides more guidance. These are the transmissions of traditional learning as recollected by great sages and do not claim to be divine revelations. However, *smṛiti* too has a primary focus on ritual and liturgy. The third source is called *sadachara* or good custom. This is not custom in the sense of some hoary tra-

dition, rather it is a notion of practices that have historically been observed by the virtuous and well-educated. In ancient times a committee (*samiti*) of ten would evaluate the provenance of such customs. By the time of the great law-giver Manu (dated to some period between 200 B.C.E. to A.D. 200) the *samitis* were largely extinct. Indeed Manu would allow one well-qualified Brahmin to provide this judgment.

When we consider the fact that any understanding of a long and unbroken tradition of revealed and remembered wisdom requires enormous exegetic efforts, it becomes clear that in practice subjective evaluations have played a major role in the Hindu legal system. A vast hermeneutic project is required to derive, from diverse sacred writings, a coherent and consistent dogma. When we add to this the rather autonomous authorities of *samitis* and later of sole local interpreters of custom, it becomes clear that Hindu law defies simple categorization as either a code or a common law. The eternal and immutable authority of the Vedas faces in the former direction, while the flexible forms of application comport with the latter.

Lingat describes the situation in the following terms:

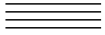
The Hindu concept of law marries ill with our methods of administering justice. . . . There was never in India, prior to the British period, a power able to pass legislation. . . . However, law did not reside entirely in custom. Certainly the dharma-shastras were not Codes in the European sense of the word. But their precepts did not thereby lack a certain authority in the eyes of all Hindus. . . . The written law of the Shastras and the customary laws of the different groups of humanity thus existed side by side, equally respected though often in notable disagreement with each other. . . . The result was an extremely variable and diverse law, the application of which required the judge to use a power of assessment quite incompatible with our conception of the judicial function. What was needed was a judge who could decide with sovereign independence and total liberty so far as the choice of law was concerned, in short an arbitrator rather than a judge.<sup>20</sup>

In the end Lingat argues, persuasively, that custom was the preeminent source of Hindu law, whereas the great scripture/codes were more an ideal that led to homogenization of diverse regional and local practices.<sup>21</sup> Most other Indianist legal scholars have also recognized this expansionist view of the judge's role in ancient India and its demise with the coming of the

British. Thus Marc Galanter follows Duncan Derrett's analysis: "In their quest for clarity, certainty, and finality, in terms foreign to Hindu tradition, the British attempted to treat Hindu law as if it could be made to assume a fixed form. They insisted on a certainty and consistency alien to Hindu jurisprudence, which depended on expansive judicial discretion."<sup>22</sup>

Indeed Hindu legal practice was characterized by diversity, flexibility, interpretive ingenuity, and pragmatism. Galanter says, "Hindu law . . . openly embraced normative diversity; legal learning was attuned to a multiplicity of legitimate group norms."<sup>23</sup> Two rules of traditional shastric interpretation illustrate the Hindu realist/pragmatist approach. One of them is the famous principle enunciated by Jimutavahana: "A fact cannot be altered by a hundred texts."<sup>24</sup> Another is essentially the common law rule of *Quod fieri non debet factum valet* (What ought not to be done is valid when done). Thus Hindu exegetes allow for the post facto validity of a legal act if there is only a violation of a formal rule (rather than something that goes to the core of the action).<sup>25</sup> In other words, depending on the consequences of the breach and the magnitude of the violation, a court may choose to recognize as valid an originally improper act. Overall there is a common thread of sensitivity to local culture, context, and circumstance.

Hindu legal and social cultures in India evince a peculiar mixture of respect for millennia-old uninterrupted traditions alongside a very local, situated, and pragmatist (perhaps even at times cynical) manner of operation. Certainly many observant Hindus have been quite good at finding loopholes that allow the breach of a principle without its actual overthrow. One interesting example can be seen in the practice of upper-caste and upper-class Hindus during the colonial era of sending their sons to Oxford or Cambridge for an education. This practice was a clear contravention of the traditional proscription of crossing the "black water." Moreover, to actually go live among the untouchable English was certain to cause loss of caste—Brahmins were even forbidden to learn the speech of *mlechchha* (foreign untouchable barbarians).<sup>26</sup> In response, some Hindus set up an elaborate system of *prayaschitta* or repentance involving huge expenditures and elaborate rituals to "cleanse" the young Oxbridge graduates on their return to their native land. This level of flexibility may seem cynical, but one may also read it as an efficient compromise: preserving class and educational aspirations without making a public statement of disobedience to the ancient dharma.



The claim of underdevelopment of torts in Hindu law is undeniably plausible. On perusing Mayne's classic of Hindu law one is struck by the fact that in some fourteen hundred pages there is not a single section on torts, while probably over 90 percent of the text is devoted to questions of family law and inheritance.<sup>27</sup> Certainly torts in India were quite limited before the British Raj: "Under the Hindu Law and Muslim Law, tort had a much narrower conception than the tort of English Law. The punishment of crimes in these systems occupied a more prominent place than compensation for wrongs. The law of torts in India is the English law as found suitable to Indian conditions and as modified by the Acts of the Indian Legislature."<sup>28</sup> And in fact in modern India tort is one of the areas of law where the substitution of Western concepts has been nearly total. Thus, Duncan Derrett says, "The procedural law, contract (or nearly all of it), torts and criminal law . . . were all replaced by foreign rules, which were thought to be more just and more practicable to enforce."<sup>29</sup>

In the ancient *smṛiti* texts (especially the scholarly treatises called *dharma-sūtras*) there is an overwhelming focus on the two concepts of *varna* and *ashram*. Lingat suggests that where *varna* or caste provides a spatial/hierarchical ordering of life, the *ashrams* or stages of life provide an ordering of the temporal.<sup>30</sup> What becomes clear from a study of these two pervasive concepts is that Hindu law has an overwhelmingly deontological (duty-based ethics) focus. Thus the crucial question in every case is what duties are expected and what is forbidden based on one's membership in a caste or life stage.

What this entails, among other things, is that there is a far deeper emphasis on wrongdoing and punishment/repentance than there is on providing reparations or compensations to victims. Lingat discusses some of these penances:

Those which match the gravest crimes amount to a death-sentence, for they force the culprit to commit suicide. Thus he who murders a Brahmin must, in order to gain absolution, seek death in battle or cast himself into fire. One who drinks fermented liquor, from which he must abstain, dies purified if he swallows such liquors heated to boiling point. He who has defiled the bed of his Guru must lie on a red-hot bed of iron, or embrace an iron figure of a woman which has been made red-hot, or even cut off his genitals and holding them in his joined palms, walk

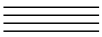
towards the South without stopping until he drops dead. (Dharmasutra citations omitted)<sup>31</sup>

Although clearly the ancient Hindus took sin and punishment seriously, there is no mention of any monetary or other kind of compensation for the wronged. There were some crimes for which a penalty had to be paid, but the fines went into the treasury of the king, who had no specific duty to help provide compensation of any kind to the victims. Even when causes of action were listed that would constitute a tort in Western systems, the focus remained on criminal taxonomies and punishments and not on compensation of victims. Still, Manu in his *dharmashastra* identifies a list of eighteen actions that came to the royal courts. These include, among others: nonpayment of debts, sale by nonowner, relations with partners, recovery of things given, boundary disputes, assault, oral insults, theft, adultery, and rape.<sup>32</sup> Many of these would lie in tort in most modern common law jurisdictions and as such indicate an engagement in early India with certain kinds of torts. In a few cases where tort issues overlap with more fundamental areas of concern there is more discussion in the traditional literature. For instance, with regard to trespass and adverse possession there is an entire tradition of commentary on *Yajnavalkya's* original precept.<sup>33</sup> *Yajnavalkya* (a leading lawgiver who lived around A.D. 300 to A.D. 500) in this discussion of trespass to property allowed for a trespasser's adverse possession of real property after twenty years of trespass and use, and similar possession of moveable property after ten years.

The Hindu perspective on torts can be understood in another way by considering the doctrine of karma. Good actions or good karma (in accord with *dharma*) lead to better rebirths and ultimately to liberation, while bad acts condemn one to miserable deserts (rebirth in a lower form most prominently). Under this doctrine, what are most crucial in life are actions that we perform of our own volition. Conversely, bad things that happen to us are accepted as fruits of indiscretions in a past life. Since any horrors that befall us are only our due, there is no question of compensation (this is perhaps the true source of the much-touted "Hindu fatalism"). After all, if everything that happens is both deserved and predetermined, then it is foolish to cry out against one's destiny. Nor should one act out of concern for consequences, because the only correct motive for action is duty (this is the core message of the *Bhagavad Gita*, the most important Hindu scripture). In

short, Hinduism is one of the most staunchly nonconsequentialist ethical systems in the world. (Kant's ethics is the closest Western approximation.)

It is not surprising that Hindu law is not especially taken with the idea of torts. To focus on recompensing a victim (who is really reaping his or her sins of the last life) is most emphatically to miss the whole point of Hindu ethics. Certainly one should do charity and succor the suffering, but once again the focus is on one's own duty, not on any purported entitlement of the downtrodden. So while it is the duty of the good *Kshatriya* (member of the royal and military caste) to defend the weak and helpless, the weak and helpless have no specific claim to betterment. Here, in contrast to the old tort maxim *Ubi jus ibi remedium*, there is no remedy or recompense precisely because no right is assumed.



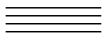
The traditional Hindu justice system may also shed some light on the contemporary Indian judiciary's sensitivity to particular circumstances and the dictates of social justice. A great deal of local autonomy and regional divergence always characterized the practice of Hindu law in ancient times. The Muslims in the medieval era, even in establishing a powerful centralized state under the Moghuls, did nothing to diminish local legal authority.<sup>34</sup> It was not until the British that an active effort was made by a central government to expropriate the lawmaking function as their preserve.

In both ancient and modern times, and in many regions of India, the most common local unit of administration was the *panchayat*, an institution that recent governments have sought to revive or reinvigorate. The term literally means "five coming together" and the practice dates back millennia.<sup>35</sup> The group of five was chosen by the villagers from among themselves and they traditionally dispensed a kind of rough and ready justice in cases of disputes among villagers. These panchayats did not strictly apply either the rules of the dharmashastras or the common law of British India. Instead, they relied almost exclusively on a mixture of tradition and notions of equity. Marc Galanter says of the panchayats, "These tribunals would decide disputes in accordance with the custom or usage of the locality, caste, trade or family. Custom was not necessarily ancient or unchangeable; it could be minted for the occasion. The power of groups to change customs and to create new obligatory usages was generally recognized."<sup>36</sup> In ancient times the king's court was largely appellate except with regard to violent crimes. The early

courts were the Puga, which was a group of fellow villagers; there was also a Sreni court for members of a specific guild, and a Kula court for members of a clan or lineage.<sup>37</sup> All of these ancient courts tended to apply local custom in the light of equity.

In many ways, then, the modern judiciary in India, more activist, context-specific, and creative than its Western counterparts, is recognizably a continuation of the old Hindu traditions. Coming out of such a tradition, it may seem less disturbing not to have black-letter law on some topic such as torts. If custom and equity are our guides, then new events and developments (for which there is no custom) should be expected to call forth new law. Similarly, the activism of the Indian judiciary reflects this expansive view of the judge in Hindu law.

The nonconsequentialist bent of Hindu law may also have implications down the road. The Hindu tradition's indifference to the compensation of victims is at war with the socialist ideals of modern Indian leaders who seek to protect the weak and vulnerable. A way to reconcile these tensions would be first to criminalize most of the tort offenses, thus satisfying the Hindu law's penchant for retribution, and second to set up a compensation fund for tort victims funded by the government or by philanthropic organizations. That is to say, perhaps the model of torts as practiced in the United States really is culturally inappropriate in the Indian context. But this is mere speculation, and I offer it only as part of an explanation for the low enthusiasm for tort remedies in India. I am inclined to concede some possible effects of Hindu tradition and law on modern Indian law and jurisprudence. I maintain, however, that much remains to be explained on other bases than these.



Perhaps any deficiencies in Indian law with respect to torts may be better understood by a consideration of the economic and political history of the region rather than by an appeal to an always invented notion of a particular, autochthonous, and unique tradition. In this context the twin crucial concerns are India's status as a Third World nation and its experience of extended colonial subjugation by the British.

Much of modern Indian law is derived from a colonial system that aimed to exploit India's natural and human resources. The British, whatever their commitment to democracy at home, cared mainly for control and profit in

the colonies. Protection of private property and maintenance of law and order were the ultimate goals of this legal system that was organized by the British in India. Unfortunately, modern Indian governments have also often chosen to sacrifice the rights of individual citizens at the altar of such allegedly overriding national interests as developing the infrastructure, protecting fledgling industries, or attracting foreign capital investment.

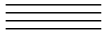
Environmental law provides a good illustration. In modern India, environmental and safety goals were subordinated to economic development and no comprehensive environmental legislation was enacted till 1986. Courts sought to rely on Article 51 (A) (g) of the constitution which makes it a fundamental duty of all citizens to “protect and improve the natural environment, including forests, lakes, rivers and wild-life.” However, fundamental duties tend to be honored only in the breach; while these duties are taught in school, they rarely enter public discourse.<sup>38</sup> The law’s privileging of profit over human rights is aggravated by the underpaid and undertrained public service’s inability to effectively monitor and regulate those laws that do protect the public. The most egregious instance in recent times has been the group of projects aimed at damming and developing the Narmada River. Despite principled and persistent grass-roots activism resisting these projects, thousands of homes have been flooded and villagers displaced in the name of questionable developmental goals and national interests. This gloomy picture of environmental law has been ameliorated only by some recent judicially sponsored public interest litigation (since independence in 1947) that has brought some gains in human rights.

The legal system was also designed by the British colonists to exclude natives from the courts, and the system continues to privilege the new elites. Access is very difficult without some education, wealth, and influence. It is very common in India for people with valid claims not to bring them. As we move down the social ladder this becomes even more common since the financial and legal barriers coupled with multi-year delays make it impossible for the poor to bring suit. Additionally, the upper courts’ ability and propensity to meddle with lower courts add further delays. This, too, is a product of the colonial era when the upper courts were the preserve of the English.

The activism of the Indian judiciary today also reflects the more socialist orientation of India.<sup>39</sup> Judges have often been pressured to be agents of social change in India: neutrality is not overly valued in a context of overwhelming immiseration and class inequalities. Until very recently there was

little middle-class to speak of in India—and the classes were deeply antagonistic.

To repeat, much of the problem with Indian torts is at the level of actual execution in the courts. The grossly understaffed and torturously slow judicial system is not a consequence of cultural or political predilections but of sheer poverty and lack of resources. Certainly most Indians would like to see more courts and judges, but most Indians are also comfortable with according a higher priority and urgency to such questions as agricultural self-sufficiency, national defense, and industrial development. One could describe this as a cultural difference, but it is not culture in the sense of being a product of some ancient strain of Hindu jurisprudence. Or to put it another way, the economist may have more to tell us about these choices than the anthropologist.



Many have felt that the situation of torts in India is wretched. The condition has been described thus: “At least until now the law of tort in India is little more than a myth about how people would be cared for in a better world.”<sup>40</sup> As I show, however, the law of torts in India is not as acutely underdeveloped as this would suggest. And though it is tempting also to seek in Hindu law and culture some pathology that would cause such underdevelopment, again, one culture’s idea of underdevelopment may be another one’s comfort in flexibility, diversity, and innovation. Certainly we see in the tradition of Hindu law a willingness to allow the judge to play arbiter and to let him or her interpret local custom to serve justice rather than to force him or her to identify and follow general principles of law. To many Indians this may appear to be a good thing. Moreover, an appeal to unique characteristics of Hindu culture, while intriguing, is only a partial answer at best. Other reasons such as the effects of a long colonial subjugation must be considered at least as significant. The barriers to access, the hierarchy, and indeed the sometimes conflicting legal authorities all bear testimony to a foreign and often malign administration. Finally, it seems that the problems of tort law in India lie not so much in the laws themselves as in their use and application. As such they may have much to do with economic and political realities of a more general “underdevelopment” in a Third World nation. After all the number of judges and courts available is really a product of economic necessities and political choices.

In the end torts in India will develop as the socioeconomic realities warrant, but better measures are needed than what is standard in wealthy Western nations. While the development of Indian law has been and will be at times different from that seen in other common law nations, there are more reasons for this difference than Hindu culture alone.

### Notes

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- 1 *The Constitution of India* (Delhi: Delhi Law House, 2000), art. 372, 224.
- 2 *Mcloughlin v. O'Brien*, 2 All ER 298, 310 (H.L. 1982).
- 3 Jamie Cassels, *The Uncertain Promise of Law: Lessons from Bhopal* (Toronto: University of Toronto Press, 1996), 150–53.
- 4 *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*, 634 F. Supp. 842, (S.D.N.Y. 1986).
- 5 Cassels, *Uncertain Promise of Law*, 152 (quoting a study by Marc Galanter).
- 6 *Ibid.*, 153–55.
- 7 *Henriques v. Dutch West India Company*, 2 Ld. Raym 1532 (1728).
- 8 *The Land Mortgage Bank of India v. Ahmedbhoj Habibbhoj and Kesoram Ramanand*, ILR 8 Bom. 35 (1883). There an injunction was granted prohibiting any increase in smoke, cotton-fluff, and noise by a cotton mill adjoining a building with many rental apartments.
- 9 Opinion and Order, *In Re: Union Carbide Corporation Gas Plant Disaster at Bhopal, India in December 1984*.
- 10 *M. C. Mehta v. Union of India*, A.I.R. 1987 S.C. 965.
- 11 Ratanlal Ranchhoddas and Dhirajlal Keshavlal, *The Law of Torts: Centenary Edition* (New Delhi: Wadhwa, 1998).
- 12 *Ryland v. Fletcher*, LR 3 HL 330 (1868).
- 13 *M. C. Mehta v. Union of India*, A.I.R. 1987 S.C. 1086.
- 14 *Sastri Yagnapurushdasji v. Muldas Bhundardas Vaishya*, A.I.R. 1966 S.C. 1119.
- 15 J. Duncan M. Derrett, *Hindu Law Past and Present* (Calcutta: A. Mukherjee, 1957), 3–4.
- 16 Robert Lingat, *The Classical Law of India* (Delhi: Oxford, 1998), 3.
- 17 Conrad Schirokauer, *A Brief History of Chinese Civilization* (San Diego: Harcourt, Brace, Jovanovich, 1991), 20, 42.
- 18 Lingat, *Classical Law*, 4.
- 19 *Ibid.*, 4.
- 20 *Ibid.*, 141–42.
- 21 *Ibid.*, 195–206.
- 22 Marc Galanter, *Law and Society in Modern India* (Delhi: Oxford, 1989), 24.
- 23 *Ibid.*, 98.
- 24 John Mayne, *Hindu Law and Usage: Fourteenth Edition* (New Delhi: Bharat Law House, 1998), 30.

- 25 Ibid., 30.
- 26 *Vashishtha-dharmasutra*, bk. 6.41.
- 27 Mayne, *Hindu Law and Usage*.
- 28 Ranchhoddas and Keshavlal, *Law of Torts*, 1.
- 29 Derrett, *Hindu Law*, 10.
- 30 Lingat, *Classical Law*, 29.
- 31 Ibid., 55.
- 32 Manu, *Dharma-shastra*, bk. 7 (4-7).
- 33 *Yajnavalkya-smriti*, bk. 2.24.
- 34 Galanter, *Law and Society*, 17.
- 35 Ibid., 54.
- 36 Ibid., 55.
- 37 Mayne, *Hindu Law and Usage*, 11.
- 38 In this regard it is interesting to note that the only comment on this section in a leading annotated edition of the constitution refers to the court's suggestion (in *M. C. Mehta v. Union of India*, A.I.R. 1988 S.C. 1115, 1127) that schools teach an hour a week of environmental/ecological subjects. *Constitution of India*, 48-49.
- 39 Indira Gandhi in 1977 even inserted the word *socialist* into the very first line of the Constitution.
- 40 Cassels, *Uncertain Promise of Law*, 153.