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An Introduction to Hindu Jurisprudence

This article intends to be introductory to other more specific studies and, to that end, briefly surveys Hindu jurisprudential theory. It seeks an orientation, recalls the development of Hindu legal institutions, and examines “schools” of jurisprudence in ancient India. It turns to an analysis of ancient Hindu thought on common jurisprudential issues (the state, law and the rule of law, punishment and procedure) and finally attempts to reveal something of modern Hindu jurisprudence’s growth, richness, and diversity and its similarity to our own.

(1) An Orientation. The practice has become prevalent in American academic writing to set off East and West as opposites. It is said that the West places its reliance on reason and the scientific method; the East, on supersensory experience and intuition. This tends to emphasize, to borrow F. S. C. Northrop’s phrase, “ideological differences.”

Even if a writer concludes that natural law is at the foundation of both Eastern and Western legal orders he still treats them as different—one “known by immediate apprehension,” and the other “known posturally.” This leads to the conclusion that attempts to combine Oriental and Occidental economic, political, aesthetic, and religious values end in failure.^

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2 F. S. C. Northrop, The Meeting of the East and West (1946) and Ideological Differences and World Order (New Haven, 1949). Thus, Professor Northrop once attempted to explain the attitudes of America and India on Korea on the basis that American law, derived from the Christian concept of an all good God against an all evil devil or right opposed to wrong, required a determination of “wrong” or “aggression” and “punishment.” On the other hand, India, which recognized no God vs. Devil theology, emphasized compromise and settlement without determination of right and wrong. (“Asian Mentality and United States Foreign Policy,” 276 Annals 118, 1951). In my work in India with lawyers, law schools, and courts, I found law as litigious as in America. The ratio of litigation to settlement was greater than in my own practice; the proportionate cost of litigation was higher; the minuteness of legal detail at issue was greater; the insistence on vindication of legal “rights” was comparable. In fact, I felt completely at home with the bench and bar of India and South Asia generally.


4 See, for example, Commencement Address of F. S. C. Northrop, “Understanding the Contemporary World,” Univ. of Hawaii, July 1949; id., “Obstacles to a World Legal Order and Their Removal,” 19 Brooklyn L. Rev. (1952) 1; id., The Taming of the Nations (1952). Of course, this posits the issue whether Socialist and Marxist legal
The more I study, the more I find no sharp dichotomy between Eastern and Western basic legal theory. Eastern thought is no more supersensory or less reasoning than Western thought. In law, as in religion and matters philosophical, the reply of Dr. Nitobe to Kipling's famous "The East is the East and the West is the West," is more accurate:

"The East is in the West and the West is in the East;
There are no points of compass in the human soul."

Elsewhere it has been suggested that world jurisprudence might properly ground itself on basic elements common to all great religions and cultures. This still allows for differences in specific laws just as there are differences within the Anglo-American system, for example, as to the rule against perpetuities.

(2) Early Development of Legal Institutions. In this paper, Indian legal thought is briefly considered to show that much the same jurisprudential development, schools of jurisprudence, and theories of law occur as in our traditional Western pattern.

Sir Henry Maine in Ancient Law made comparison after comparison between the development of Hindu legal institutions and the development of legal systems of Europe. In fact, he was able to point out from his study certain characteristics of primitive legal systems and certain fundamental stages in their early growth: the prevalence of co-ownership and the intermixture of personal and proprietary rights; the confusion of public and private duties; the importance of the family; the

theory is a part of the "East" or "West", and where China and India fit into the classification. These writers have tended to rule the communist world out of their systems and to seek a world law for half a world. Northrop, "Naturalistic and Cultural Foundations for a More Effective International Law," Yale L. J. 1430.


7 I would be the first to admit the value of the taking of differences. The whole technique of the lawyer is based on recognizing differences—millions of them. What I hope we avoid in comparative law is the mistake comparative religion made, and has not yet rectified, of emphasizing differences to prove that one's own system was \textit{summa cum}. Thus Western religion emphasized its belief in a Supreme Being compared to a pervading presence revealed in many avatars, a man centered compared to a cosmic universe, condemnation of idolatry compared to image worship, original sin and salvation compared to Karma, immortality compared to reincarnation, a religion of material well being compared to asceticism. I venture to suggest that actually all religions have had (and have) in them each of the elements mentioned and that comparative religion is now discovering its ownness. See note 5 \textit{supra} and E. A. Burtt, Man Seeks the Divine (New York, 1957).
continuous tutelage of women; the growth of the law through fiction. His historical jurisprudence is grounded in Hinduism.

In the early development stages of all legal systems there is no clear distinction between legal rules and religious commands. The story of the Hindu Code of Manu and Moses' Ten Commandments is strikingly similar. Manu's life is a combination of Noah, Jonah, and Moses. The avowed assumption of the old textbooks of Hindu law is that the law is eternal. The primary source of the law is the scriptures—the Vedas. In keeping with the religious view of law, the second source of law is the teaching of the religious leaders and, after that, conscience. There was no clear distinction between legal duties and moral duties. Law embraced all of life and was synonymous with virtue. The Hindu word for law—"dharma"—shows this derivation.

The same relationship can be illustrated by the development of legal literature. The oldest sources of Hindu law are the Vedic hymns based on social custom and divine inspiration. The Aranyakas and Upanishads contain some law, but mainly philosophy and ritual. The Sravta and Grihya Sutras come next and do spell out Aryan custom and rules relating to the social organization. The final stage in the evolution toward ancient Hindu law is the Dharmasūtras, which come near to being lawyer's law. They prescribe detailed rules governing all four stages of life, though chiefly that of Garhasthaya or householder. The Dharma Sastras, or Legal Institutes of the Hindus, actually cover civil and criminal law (in Vyavahāra), but also social and religious observances (in Achāra) and expiation for sin (in Prāyaschitta). Smritis, of which eighteen are known, provided numerous commentaries on the Sastras—widely varied by geography, tradition, and culture (somewhat comparable to the glossators on the Roman Code). A practice (e.g., marriage with a maternal uncle's daughter) might be common practice in South India and condemned in the North, and both glossators would find support in the Sastras. In fact, writers from the earliest times up to and including the present debate on the Hindu Code Bill have always sought support of the Sastric norms to justify and approve, or to oppose and challenge practices or proposals of the society in which

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8 Sir Henry Maine, Ancient Law (Everyman ed.) 156; "The ancient German law, like Hindu jurisprudence, makes the male children co-proprietors with their father, and the endowment of the family cannot be parted with except by the consent of all its members," p. 116; widow frequently becomes ward of sons, p. 90; adoption used to expand family into community, p. 16 and ch. 5.
9 Manu 10.63.
10 Manu 2.1.
11 Manu 12.108; Manova-dharma-sastra, VII, v. 6; N. S. Sen-Gupta, Sources of Law and Society in Ancient India (Calcutta, 1914); Morley's Digest of Indian Cases, vol. I, cxcvii.
12 A. S. Nataraja Ayyer, "Dharma Protects Him Who Maintains It," 4 Vyavahara Nirnaya (1955) 65; "What holds together," "the basis of all order," "the right way," are translations of Dharma.
they live. One of the real strengths of Hindu law has been its reliance on ancient law (religion) while changing it to meet social demands.\(^{13}\) I shall leave further illustrations of ancient Hindu law and its transition to sections (4) and (5) of this article.

(3) "Schools of Jurisprudence" in Ancient India. If you recall that in Anglo-American jurisprudence the earliest legal writings did not differentiate schools and that our scholastic jurisprudence took shape only in the nineteenth century and became recognizable as "schools" in the prolific writing of Dean Pound in the twentieth, and that the chief exponents of some of our schools appeared only within the last forty years (realist, pure theory), you will understand my conclusion that there were no "schools" of jurisprudence in ancient India. Many writers on Indian legal theory have pointed out that the ancient writers would have been surprised to be told that they belonged to a particular "school,"\(^{14}\)—just as, I suppose, Cicero did not know he was a "natural law" man. Yet these same writers have illustrated the degree to which one can find, in the earliest Hindu writings, matter which presents the natural law, historical, philosophic, analytical (and every other) school of legal thought.\(^{15}\) But, we ought not to labor a point which should be fairly obvious. Perhaps a quotation from one of India's great modern legal scholars will suffice.\(^{16}\)

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\(^{13}\) This note can do little more than refer to a few of the source materials for the above paragraph: Sen-Gupta, Evolution of Ancient Indian Law (London and Calcutta, 1953); McNaughton, Hindu and Mohammedan Law (9th ed., 1885); Seymour Vesey-Fitzgerald, "Law, Hindu" in 9 Encyc. of Soc. Sci.; V. P. Kané, The Dharma Sastras, (Bombay, 1935).

\(^{14}\) Dr. Burnell (a Sanskrit scholar and lawyer) in his translation of the Varadraja observed, "Another principle deduced by English lawyers is the doctrine of the Schools of Law. This is unnecessary and foreign to the original texts and digests." J. C. Ghose, The Principles of Hindu Law (Calcutta, 1917) 15 agrees. This is also clear from N. C. Sen-Gupta's first Tagore Lecture, 1950, Evolution of Ancient Hindu Law, Introductory (Calcutta, 1953).

\(^{15}\) N. C. Sen-Gupta in "Sources of Law and Society in Ancient India" (Calcutta, 1914) and Evolution of Ancient Indian Law (Calcutta, 1953) points out much the same factors. Taking random sentences from the introductory chapter of the latter book we find him referring to "the social background of the law" (p. 2 ff.); "positive law grows and ultimately develops into an elaborate code" (p. 3); "Law existed then not as rules administered by kings but as rules developed in fact by custom and usage . . ." (p. 3); "Transgression of these rules (anrita) is not a mere violation of human laws . . ." (p. 3); "the development of law . . . was conditioned by historical events and by the pressure of environments and circumstances, amongst which were the changing needs of society" (p. 18), etc. See notes 8–11 supra on historical jurisprudence.

\(^{16}\) Sri C. P. Ramaswami Aiyar recognizes all these jurisprudential concepts in ancient Hindu law:

"The importance of 'natural law' and of conscience is recognized by way of guidance in matters of doubt where the Vedas, usage and custom and divine commands do not furnish any help. . . . Dharma is obeyed as such because of the coercive might of the State and the Dharma Sastras of India (the legal text books) like those of Manu, Vaynavaalkya, Narada, Brihaspathi and others acquire the validity of statutes on the recognition of their authenticity and authority by the State."
(4) Ancient Hindu Thought on Typical Jurisprudential Issues. This section takes several issues with which jurisprudence has always concerned itself to show the degree to which, in approaching these, Hindu thought has evidenced the same theories as has the West, namely (a) the nature of the State and the ruler, (b) punishment and procedure, and (c) the nature of law and the “rule of law.”

(a) Hindu Theories of King and State. One of the earliest issues to which Hindu jurisprudence addressed itself was the position of the King and State. Originally the king had no divine attributes. From Manu onward he was supposed to rule by divine right. The king was first considered as a judge, taking over the administration of justice from the Kulas and gilds. Vedic theory did not view the king as either the source or repository of the law. He was under and subject to the law and, failing to maintain it, was destroyed by the law. Frequently referred to as checks on the king were religion, custom, pragmatism, natural justice. The right to overthrow a bad king came to be recognized. This view broadened into a true Hobbesian “contract” theory. One of the earliest statements of the political theory that the state of nature was one of might and war and that the state and

“In Europe, law has been regarded sometimes as the embodiment of eternal justice and as part of the natural heritage of man and embodying natural reason. Another school of thought is that law is that which is brought into existence by the fiat of a law-maker. In other words, that law is obeyed not merely because it is just or good but because it has been laid down by the State. In this way arises the distinction between positive law and ethics. The ethical conception of law was the first to be expounded by Indian law-givers and philosophers. ... Later on, theories were supplemented by the concept of positive law and there is a long catena of Indian law-givers, including Narada, Sukra and Jaimini who hold that the performance of duty for its own sake having fallen into disuse in the course of human history positive law (vyavahara) was introduced and the King became the superintendent of the law, the wielder of the power to punish (denadharma). Kautiya lays down that dharma or law is Regnâm Agnya—the command of the Ruler.”


17 Rigveda IV, 42; Puranic Story of King Vena; Manu 7. 3–13; Majumdar, Chandhuri and Datta, Advanced History of India (London, 1950) 120 ff. Brihatparasara and Ramayana i, 67 quoted in Ghoshal, note 5, supra, at 121, 185.


19 Manu 8. 15; Sukra, i, 121, quoted in Ghoshal, p. 217; Sen-Gupta, pp. 39–41; Rangaswami Aiyanger, Rajdharma, p. 43.

20 The most quoted religious aphorism is “Dharma is the king of kings” (Brihadaranyakâ Upanishad). Beni Prasad, The State in Ancient India (Allahabad, 1928) 506 demonstrates how both religion and custom controlled the king from the time of the Vedic Hymns. Many of the early apologists for kingship, e.g., Kautalya, emphasized the right of subjects to revolt, their disaffection to the enemy and like pragmatic considerations why the king should act properly, Prasad, 507; Manu 12.108; A. S. Nataraja Ayyar, Dharma Protects Him Who Maintains It, 4 Vyavahara Nirnaya (1955) 65, 83; Sen-Gupta, Sources of Law and Society in Ancient India (Calcutta, 1914) 64–78.

21 Prachetasa Manu, Ghoshal, p. 138; Mahabharata and Santipurvan, Anusasana 61.32–3, Ghoshal, p. 142; Ghoshal, ch. 4 generally.
ruler were created to destroy anarchy is known as the doctrine of the fishes (Matsya Nyaya) or the two destructive demons (Sundopā) that in nature the larger devour the smaller. The people “assembled together and made compacts (samaṇyā) mutually undertaking to expel from their midst persons guilty of abuse, assault, and connection with other men’s wives, as well as those who should break the compact. Afterward they collectively (sa-hitāh) approached the God Brahma . . . (and) the God appointed Manu to rule over them.”

Thus, an examination of the early theorists will show further reliance on contract and utilitarian theory. Thus, the taxes which the king is permitted to collect are said to be his wages for a return agreement to protect the subject.

Although the Mahabharata considers absolute monarchy as the sole Vedic theory of government, writers have demonstrated that the monarchy was limited and that every other form of government existed in ancient India. The king did not rule alone but with a highly organized Sabha, as Sen-Gupta thoroughly documents. Beni Prasad concludes that Indian polity “was saturated through and through with the principles of what for convenience may be called federalism and feudalism.” K. P. Jayaswal in his classic Hindu Polity discusses the republican forms of government in ancient India. The dedication of the book is interesting: “To the memory of the republican Vrishnis, Kathas, Vaisalas, and Sakyas, who announced philosophies of freedom from devas, death, cruelty, and caste.” Some of the forms of government which he finds discussed in ancient Hindu literature are: the Bhaujya or cabinet form, membership in which was elected not hereditary, Pettanika, similar to the Bhaujya form but with hereditary leadership, presidential form (Svarajya) in Northern and Western India, the Taṭṭṭtiṛya Brahmāṇa describing the president as “the leader of equals”, the Viruddha-rajjani in which the state is ruled by parties, the Arajaka

22 Satapta Brahmana, xii.6.24; Ghoshal, p. 127; Santi Parva, chs. 67–68; Ramayana ii.67; K. M. Panikar, Indian Doctrines of Politics (Calcutta, 1940) 4 ff. This is prominent in the Mahabharata.
23 Bandhayara, i.10.18.1, Govindaswamin comment (Ghoshal, p. 40); Manu 8.144 (Ghoshal, p. 40); Santi, 71.10 (Ghoshal, p. 137); Aparaka commenting on Yaj. i.366 (Ghoshal, p. 194).
24 Sen-Gupta, supra, 41–47.
26 Jayaswal, Hindu Polity, note 62.
27 Id., 79.
28 Id., 85.
29 Id., 80.
30 Id., 88.
or extreme democracy, where the law was ruler and there should be no man-ruler;\textsuperscript{31} the Buddhist assemblies, practicing a form of parliamentary government.\textsuperscript{32} A government in which the whole population took the consecration of rulership apparently did exist in Nepal—the Vairajya or "kingless constitution."\textsuperscript{33} Perhaps there is no better way to point up the continuity of this past with the present than to mention the Village Panchayats, often referred to as "village republics." These were the most ancient indigenous village organizations in India. They placed on chosen wise men of each village extensive civil, criminal, and administrative jurisdiction in small matters. They functioned largely in an arbitral manner and seemed to have handled 75–80\% of all disputes and government. They combined executive, legislative, judicial, and "administrative" functions, operated without fixed rules of law, and applied a form of local equity or custom. They have continued even under the British, are reconstituted by Article 40 of the Constitution, and are presently efficient in most villages as shown by recent studies.\textsuperscript{34} This diversity and yet continuity of past and present seems similar to that in our own tradition, and leads me to deny that the jurisprudence of any country or region has grown so unitary that it is essentially at variance with theories employed in other regions. Our own Graeco-Judeo-Christian jurisprudence contained enough variety to produce Stoic-Republicanism, Hegelian-Nazism, Marxian-Communism, Hobbesian-Monarchism, and at one time even Jeffersonian-Democracy.

(b) \textit{Punishment and Procedure}. There are those who distinguish primitive from civilized law by the degree to which the system embodies well-organized patterns of punishment and procedure. Without accepting this test of civilization, it is to be pointed out that on both scores the earliest Hindu society had a highly organized system. As early as Manu, there is extensive jurisprudential discussion of the king's relation to punishment, judgment on him who uses punishment unjustly, an organized police force, a detailed catalogue of punishments under four titles (admonition, reproof, fine, corporeal) and rules for the use of each.\textsuperscript{35}

In our own jurisprudence, we have done much to demonstrate that

\textsuperscript{31} Id., 86.
\textsuperscript{32} Marquis of Zetland quoted by Professor Rawlinson in The Legacy of India (London, 1937) xi.
\textsuperscript{33} Jayaswal, supra, 81.
\textsuperscript{34} India (Government Reference Annual) (Delhi, 1955) 84 ff; D. Thorner, Panchayats, Indian Yearbook, 1953; Statistics for Uttar Pradesh up to March 1954 show 13,000 cases handled by Panchayat adalats (courts), revision asked for in 3\% of the cases and granted in 1\%.
\textsuperscript{35} Manu, 8.129, 8.130, 7.14–15, 7.20–22. E.g., "If the king were not without indolence to punish the guilty, the stronger would roast the weaker like fish on a spit."

"The whole race of men is kept in order by punishment; for a guiltless man is hard to find; through fear of punishment this universe is able to enjoy its blessings."
a "right" is a protected interest, that procedure is at the very heart of substance, and that the more highly developed the procedure the more complete is the jurisprudential system. In India, so complete are the records, we can almost place the exact time at which a thorough procedural system comes into being. Apastamba, Gautama, Vasistha, and Visnu contain few procedural rules (though they develop some rules of evidence); they are still speaking of ordeals and compurgation, (there is slight reference to witnesses).\(^{36}\) Manu developed an extensive code of evidence but otherwise little procedure.\(^{37}\) With Jajnavalkya and Narada, the law of procedure becomes complete. Thus in Yajnavalkya we find procedure classified under Plaint, Answer, Proof and Decision.\(^{38}\) The detail of rules can be seen from the following:

1. No recrimination or counterclaim is allowed until the complaint is discharged;
2. No departure from pleading is permissible.
3. Counterclaim or recrimination is permitted in certain criminal charges.
4. Each party is required to find a surety for satisfaction of judgment.
5. Where a contesting defendant loses, he pays an amount equal to the claim to the king; while, where the complaint is found to be false the complainant pays double the amount to the king.
6. Distinction between cases which have to be tried immediately and those where decision is to be adjourned.
7. Order of examination of witnesses, plaintiff's witnesses first examined.\(^{39}\)

Fraud nullifies litigation; the parties are held to their pleadings; sureties may be required; lack of capacity of children and others is known; subpoena, injunction, dismissal on motion, fatally splitting or joining causes of action are all provided for; rules fix parties, classes of complaints, available defenses.\(^{40}\) The list could be greatly expanded. Perhaps we can make the modern Anglo-American lawyer feel completely at home by the four classes of answers: (a) Admit (Satya), (b) Deny (Mithya), (c) Confession and avoidance (Pratyavasakandana) and (d) Res judicata or previous decision (Pranguyaya).\(^{41}\)

\(^{36}\) Gautama, Dh. S. XI, 23-25; XII, 1-6; Apastamba, Dh. S. II 5-7, 11, 29; Manu 8, 1-10; Rigveda VII, 14-15, 105; Vasistha (May. ed. Mandlik, 9). Note the 5 classes of ordeal (Divya): fire (agui), emersion (Apah), balance (Tula), poison (Visa), and drinking (Kosa).

See Gautama Dh. S. XIII, 43 (2 Sacred Books of East, p. 246).

\(^{37}\) Sen-Gupta, Evolution of Ancient Indian Law, 50.

\(^{38}\) Vajnavalkya, II, 6-11; Sen-Gupta, 50.

\(^{39}\) Narada (Jolly Intro., II, 24); Yajnavalkya II, 9-10, 19, 31-32, Mitaksara, Yaju II, 5-6; Kané, Katayanasmriti, 15-16, 142.

Sen-Gupta, 50-58 and authorities cited.

\(^{41}\) Narada II, 5-6, I, 62.
Evidence is particularly well and early developed. As early as Gautama, the rules are detailed.\textsuperscript{42} From Visnu on, we find classification into real evidence, witnesses, and presumptions. The rules refer to best and secondary evidence, qualification of witnesses, order of proof, cross-examination, burden of proof, \textit{res ipsa loquitur}, hearsay, perjury, demeanor.\textsuperscript{43} The point need not be labored further.

\textit{(c) Meaning of "Law"; the "Rule of Law."} In Indian literature, one can find all the conflicting meanings of law which the West has formulated: \textit{lex} and \textit{jus}; justice, legislation, right, duty; natural, divine, enacted.\textsuperscript{44} Although we shall turn our attention in a later section to the continuity of modern Hindu jurisprudence with the past, perhaps we can here illustrate these views of law by the opinions of the five India Supreme Court Justices in the famous case of \textit{Gopalan v. Madras}, 1950 S.C.R. 88. Three judges, speaking through Justice C. J. Kania, expressed their view that "law" as used in the phrase "procedure established by law" in Art. 21 of the Constitution meant \textit{"lex"}—laws passed by the legislatures, not \textit{"jus"}—law in the general sense of the principles of natural justice or natural law:

"To read the word 'law' as meaning rules of natural justice will lead one into difficulties because the rules of natural justice as regards procedure are nowhere defined."

Justice Sastri said that while the word "law" did not mean \textit{jus naturale} it was not limited to law as passed by the legislature but included "settled usages" and "normal modes of proceeding." Justice Fazal Ali held that "law" did mean principles of natural justice.

What has already been said illustrates the extent to which the rule of law obtained in ancient India.\textsuperscript{45} This point on "rule of law" may be

\textsuperscript{42} Gautama XIII (Sacred Books of East, II p. 246).
\textsuperscript{43} See authorities collected in Sen-Gupta, pp. 66--77. Also Manu 8. 24--26, 46--47, 50--57; Vajjavalkya 6--7, 13--15, 17, 23 (Gharpure's ed. Mitakshara); Narada I 63--64.
\textsuperscript{44} Manu 8. 15; Rangaswami Aiyanger, Rajdharma, 43; P. V. Kané, Hindu Customs and Modern Law (Bombay, 1950); N. C. Sen-Gupta, Evolution of Ancient Indian Law, 39 ff; A. S. Nataraja Ayer, Dharma Protects Him Who Maintains It, 4 Vyavahara Nirnaya (1955) 65; "The Hindu Conception of Law," 17 Bombay L. J. (1939) 41.
\textsuperscript{45} I may summarize this ancient and continuing Hindu experience and why some see in India the future hope for the rule of law by reference to the paper of my former student, Professor Chandra P. Gupta, University of New Dehli, "The History and Present Status of the Rule of Law in India" presented at the Fourth International Conference of Comparative Law, Chicago, 1957:

"Through the centuries, the one supreme guiding principle of the Hindu system was that the conduct of the authority, as of the subject, must conform to law or 'Dharma.' 'Dharma,' a word difficult to translate into English, includes the concepts of justice, law, right and duty, and acting according to Dharma means the duty of acting in a way, in the sphere of one's activity, that would best lead the individual to his self-realization—Moksha or Nirvana." . . .

"In shaping the development of the rule of law in our system, the traditions of the English system, acquired during the British rule, the influence of the American Constitutional system, with its 'due process,' our own ancient traditions and the
concluded by reference to two positions of the Indian courts and parliament in the critical years, 1950–53. First, although the Supreme Court refused to accept natural justice as a definition of "law," it has set aside a decision of a labor tribunal, which failed to allow the parties to produce evidence, as contrary to the rule of law; it issued certiorari to determine whether a tribunal acted contrary to and in other cases followed the established principles of natural justice. Second, the courts in 1950–51 held certain provisions of the land reform acts, adopted under constitutional authority, invalid as not providing proper compensation. Although there was wide criticism in India of the decisions, which held up the much needed land reform program, and many lawyers and political figures believed the decisions thwarted the purposes of the constitution, the country showed its respect for the rule of law and the independence of the judiciary by amending the constitution to remove any ambiguity which the Court had found in the original constitution.

(5) Modern Hindu Jurisprudence; The Great Synthesis. We have already objected to the tendency to refer to Asian jurisprudence as though we were discussing the year 500 B.C., which assumes that if Confucius says "X" or the Dharma Sastras contain "Y" or Buddhism teaches "Z," then these must characterize the legal philosophies of modern countries. We have even attempted to show that, properly understood, ancient Hindu jurisprudence is not "ideologically different" from our own. But, it is insisted that, important as antecedents may be, nothing could be wider of the truth than that we should ground economic and social conditions in the country, have all played an important role. . . .

"In an ideal sense, rule of law implies a social order in which the individual can best attain his self-realization. . . . So long as there is poverty and ignorance, hunger and disease, and so long as there is crime and coercion, force and violence and the denial of basic freedoms, the rule of law is not fully established. Rule of Law is an ideal to be constantly struggled for. In its pure form, it can only exist in a society based on truth and non-violence." See also Judge Ram Keshar Ranade, Pres. Address, Judicial Conference, Godhra, 45 A.I.R. Jour. 37:

"It may sound platitudinous but it is absolutely true that the success of democracy in our country pivots substantially, if not wholly, on the success of the rule of law." Nehru, "The Tragic Paradox of Our Age," N.Y. Times Mag., Sept. 7, 1958, p. 13.

our discussion solely in ancient history. We are concerned with modern law, and modern law is the product of growth and synthesis. Nowhere is this more true than in India.

So much has been written of the English influence on Indian law that it is necessary to do little more than recall its major outline. In the footnotes there is somewhat more extensive consideration of certain fields of law on which American articles are not likely to appear for some time. With British rule in India, English public law, criminal law, law of torts, and procedure were imported wholesale.\textsuperscript{52} English influence extended even into Hindu law of family, property, and inheritance, though the Acts declared that Hindu or Mohammedan law was to be applied in these areas.\textsuperscript{53} The law of wills is chiefly a British

\textsuperscript{52} See generally, S. V. Gupta, Hindu Law in British India (Bombay, 1947).

development. The concepts of common law and equity became the common property of Indian law. The association of Colebrooke and Jayannath Tarkapanchanan in translating the last of the great Sanskrit digests in 1797 marked the beginning of a new period. The courts treated Sanskrit legal texts as statutes, whereas previously they were considered merely evidence of unwritten eternal law. The doctrine of *stare decisis* took on all its English rigor.


Some of the provisions were enacted; see Hindu Marriage Act of 1955, Hindu Succession Act of 1956; See Divan, Paras, "The Hindu Marriage Act, 1955," 6 Int. & Comp. L. Q. R. (1957) 263; Derrett, Legal Status of Women, *supra.*

Anyone who has taught or studied in an Indian law school knows that the modern jurisprudence is distinctly English oriented. The texts are Salmond and Austin. Even the 26-page Manual of Jurisprudence by P. S. Atchuthner Pillai, which nearly every Indian student uses to cram for examinations, discusses not only analytical, historical, ethical or critical, or teleological, comparative, sociological, functional realist, and natural jurisprudence but also "economic," "psychological," "ethno-

It may be objected that the discussion, while showing a familiarity and acquaintance with English and American jurisprudence, lacks depth of insight. However, if one reads the Indian law journals, he will find depth as well as breadth in Indian jurisprudential thinking. The law reviews are replete with articles on such specific concepts as "Juristic Personality of the Hindu 'Idol.'"55

The broad juristic philosophy of an emergent socialist state could be seen in many current law reviews.56 This progressive outlook is shown by numerous excellent articles on criminology, psychology and social ideals. "Crime and Punishment" by B. K. Bhattacarjee is one example.57 He is able to discuss the Soviet penal experience with a detachment not often found in American writings. In "Social Ideals

56 4 Indian L. Rev. (1950) 300. Consider the review by Justice P. B. Mukharji of Simpson and Stone's, Law and Society:

"Materials in the pronouncements of the new school of American thought so ably expressed in the superb judgments of such great Judges of America like Holmes, Brandeis, Cardozo, Murphy and Frankfurter do not appear to have provoked the authors to a clearer idea of the shape of things to come in juristic thought."

"The law is the calling of thinkers and jurisprudence, not a mere survey either of cases or of individual decisions determining particular rights. One learns from law an amiable latitude with regard to psychology, beliefs and tastes and acquires that catholic outlook whereby men may be pardoned for the defects of their quality if they have quality in their defects. To be able to see so far as one may and to discern the great forces that are behind every detail makes all the difference between philosophy and disputation and between legal compilation and jurisprudence. . . ."

"Excessive preoccupation with the purpose of law (Bentham's 'utilitarianism,' Pound's 'social engineering,' and Jhering's 'means to an end' are referred to), unrelated to the source from where it originates has caused much unnecessary mystification about 'executive legislation,' 'New despotism' and 'Administrative Law.' . . ."

"It appears that the future jurisprudence will have for its major concern the functional view of the law which alone can reconcile the demands for change with the demands for security."

57 5 Indian L. Rev. (1951) 149.
and the Law," Radhaknal Mukerjee gives a penetrating analysis of law and modern psychology and in other articles it is advocated that the bar receive training in psychology. A glance at any current Hindu law journal will reveal that the articles tend to be more jurisprudential than our own.

Elsewhere, it has been pointed out how India has borrowed from the world in framing its constitution. It has drawn on the common law of England and the civil liberties cases of the United States. Some say that it has taken the concept of preventive detention from Russia. I might digress a moment to show how complete has been the synthesis on preventive detention. The oldest existing statute of which I know is the Bengal Regulation of 1818, though some date its Indian antecedents to 1795. Numerous Provincial Maintenance of Public Order Acts existed in the 19th and 20th centuries, and the British Defence of the Realm and Defence of India Acts (under which Ghandi was imprisoned) were continued and finally embodied in the 1950 Preventive Detention Act (to meet partition’s problems). Local, Russian, British law have all contributed.

Though India is evolving many original rules of her own, it need not be assumed that her appetite for imported legal principles is exhausted. She will doubtless pick and choose among the systems with which her citizens become acquainted. India has always shown a tolerance and hospitality for other cultures, even those forced upon her. Hardly a writer facing Indian jurisprudence but remarks on this.

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58 2 Indian L. Rev. (1948) 229.
59 Bimul Kumar Bhattacharya, "Insanity and the Criminal Law," 6 Indian L. Rev. (1952) 41.

"The greatest contribution to posterity made by the Hindu tradition was the broad-mindedness, sympathy, and the toleration of different viewpoints exhibited almost alone in India amongst the civilized communities of the earlier days.

The modern Hindu lawyer, regarding his ancient law with patriotic pride, looks upon English law also with possessory affection. He would not separate even if he could the two systems of which he is the living synthesis, and in adapting his inherited conceptions to the needs of today he is merely doing openly and with modern tools what in another age and another fashion was done by the sages and commentator before him, above all by Vijnanesvara."

In the concluding chapter of Hindu Polity, Jayaswal writes:

"The constitutional progress made by the Hindus has probably not been equalled much less surpassed by any polity of antiquity. The great privilege of the Hindu at the same time is that he is not yet a fossil; he is still living with a determination which a great historian has characterized as a tenacity which bends but does not break. The Golden Age of his polity lies not in the Past but in the Future." K. P. Jayaswal, Hindu Polity, 2d ed., Bangalore, 1943, pp. 366-7.
A Suggested Approach. Perhaps the essence of my approach can now be stated. It is to recognize that we are concerned with modern law, even when we review ancient law for comparison; that modern law in all countries is a synthesis of old and new, Western and Eastern; that for adequate study we divide law into subjects, some of which are deeply rooted in old traditions and culture and some of which are related to, but largely replace, those traditions; that we should clearly distinguish the area studied and the approach needed; that we recognize that in areas like “family law” which are closest to custom, the variations between two states in America or two sections in India may be as great as the dissimilarities between East and West; that in many areas no one can tell from what law a given quotation comes. I venture to say that there is no Eastern or Western philosophy and no Eastern or Western law.