INTRODUCTION

Wherever the laws of India admit the operation of a personal law, the rights and obligations of a Hindu are determined by Hindu law, ie, his traditional law, sometimes called the law of his religion, subject to the exception that any part of that law may be modified or abrogated by statute. Hindu law, as it is now generally agreed, has the most ancient pedigree of any known system of jurisprudence. The study of any developed legal system requires a critical and analytical examination of its fundamental elements and conceptions, as also the practical and concrete details, which go to make the contents or body of that law. It also requires consideration of the line of development it has pursued. The abstraction and exposition of the principles or distinctions necessarily involved in Hindu law and the consideration of the line of development which it has pursued, are the appropriate matters of jurisprudence and legal history. The concrete legal system, which deals with the contents or body of Hindu law, is a matter of positive law and the questions that arise for consideration at the outset are: What is Hindu law? What are the sources from which knowledge of Hindu law must be derived?

Law as understood by the Hindus is a branch of *dharma*. Its ancient framework is the law of the *Smritis*. The *Smritis* are institutes, which enounce rules of *dharma*. The traditional definition of *Dharma* is: 'what is followed by those learned in the *Vedas* and what is approved by the conscience of the virtuous who are exempt from hatred and inordinate affection'.[1] *Dharma* is an expression of wide import and means the aggregate of duties and obligations—religious, moral, social and legal.[2] In Sanskrit, there is no term *strictissimi juris* for positive or municipal law, dissociated from the ethical and religious sense. In a system of law

1 *Manusmriti*, II, 1. *Medhatithi*, one of the earliest commentators on *Manusmriti* explains the term '*dharma*' as duty—*Dharmashabdah Kartavyata Vachanah*. VII, 1. For Medhatithi, see p 21.

2 Cf *Ulpian's Statement of the Commandments of the Law*, containing a broad summary of a lawful man's duties, preserved in the introductory chapter of Justinian's Instituties: '*Juris precepta sunt haec—Honeste vivere, alterum non laedere, suum cuique tribuere*'—Commandments of the law: To live honestly: not to injure anyone: to give every man his due.

necessarily influenced by the theological tenets of the Vedic Aryans, and the philosophical theories which the genius of the race produced, and founded on the social and sociological concepts of a pastoral people, the admixture of religion and ethics with legal precepts was naturally congruent. It was not possible, indeed, always to draw any hard line of logical demarcation between secular and religious matter, because certain questions, for instance, such as marriage and adoption, had the aspects of both. Any attempt, therefore, to isolate completely, any secular matter from its religious adjuncts, would fail to give a comprehensive idea or proper perspective of the true juridical concepts of Hindu law.

Where, not modified or abrogated by legislation, Hindu law may be described to be the ancient law of the Hindu rooted in the *Vedas* and enounced in the *Smritis* as explained and enlarged in recognised commentaries and digests and as supplemented and varied by approved usage. Its basic structure was the law of the *Smritis* and it was from time to time supplemented and varied by usage. That was its early character. Then it made remarkable progress during the post-*Smriti* period (commencing with about the 7th Century AD), when a number of explanatory and critical commentaries and digest (*nibandhas*) were written on it and which had the effect of enlarging and consolidating the law. A body of law so developed, bears upon it many marks of its origins. Unfortunately, many ancient works on law are not available in their integrity and a number of them are probably irretrievably lost. However, historical research by orientalists, both European and Indian, during the last hundred years has brought to light a wealth of variegated material that had contributed to the growth of this ancient system of law.

The ancient law promulgated in the *Smritis* was essentially traditional, and the injunction was that time-honoured institutions and immemorial customs should be preserved intact. The law was not to be found merely in the texts of the *Smritis* but also in the practices and usage which had prevailed under it. The traditional law was itself grounded on immemorial custom,[3] and provided for inclusion of proved custom, ie, practices and usages that from time to time might come to be followed and accepted by the people.[4] The importance attached to the law-creating efficacy of

3 *Manusmriti* states: 'Here the sacred law has been fully stated...and also the traditional practices and usages of the four *varnas*'—1, 107. A popular verse from the *Mahabharata* is: '*Dharma* has its origin in good practices and *Vedas* are established in *Dharma*'—*Achara sambhavo dharmo dharme vedah pratisbthitah*—*Vana Parva*, 150, Ch 27. Vasishtha observes: 'Manu has declared that the (peculiar) practices and usages of countries, castes and families may be followed in the absence of rules of revealed texts'—1,17 (*SBE*, Vol XVI).

4 *Athatah samayacharikan dharman vyakhyasyamah*—We shall now propound the acts productive of merit (obligations) which are sanctioned by tradition and current usage—*Apastamba Dharmasutra*, 1, 1.1.1. Haradatta explains this by stating: *Samayacharikah paurisheyi vyavastha*—current practices and conventions of the people. For Apastamba, see later part of the discussion.

custom in Hindu jurisprudence was so great that the exponents of law were unanimous in accepting custom as a constituent part of law.

It would be pertinent here to note one or two matters of more practical importance. The last century and a half of judicial decisions has, though not in theory but in effect, remodelled many points on both textual and customary law. Many of the important points of Hindu law are not to be found in the law reports.

Moreover, material and substantial changes and modifications in the law have recently been brought about by a number of recent enactments, which aim to ensure a uniform civil code of personal law for Hindus in the whole country. The changes, no doubt radical, proceed in the principle of equality stressed in the Constitution for evolving a just social order after taking due note of existing conditions and ideas. Of those enactments, it will suffice here to draw attention to the Hindu Marriage Act 1955 and the Hindu Succession Act 1956. This outstanding feature of the changes effected in the law of marriage is that monogamy is now the rule, and dissolution of marriage is permissible in certain cases. The alterations made in the law by the latter enactment is that in effect it eliminates all disparity in the rights of men and women in matters of succession and inheritance. These recent enactments, from their very nature, cannot be and are not (except on few matters expressly so stated) retroactive in their operation and even in matters where they apply retrospectively, it will become necessary to know the law as it previously existed. Besides, even now a part of Hindu law and usage, as has hitherto been applicable, remains unabrogated by statute and the importance and necessity of a study of the entire system cannot be minimised of this hereafter.[5]

SOURCES OF HINDU LAW

The sources from which knowledge of Hindu law is to be derived are the indices of *dharma* that have been stated by Hindu jurisprudentes. The *Veda*, the *Smriti*, the approved usage, and what is agreeable to good conscience are according to Manu,[6] the highest authority on this law, the quadruple direct evidence (sources) of *dharma*. Law did not derive its sanction from any temporal power; the sanction was contained in itself. The *Smritikars* and those who preceded them declared and emphasised the divine origin and sanction of the rules of *dharma*.

> Since law is the king of kings, far more powerful and rigid than they, nothing can be mightier than the law by whose aid, as by that of the highest monarch, even the weak may prevail over the strong... .[7]

5 See pp 67–68; introductory notes to the two enactments.

6 *Manusmriti*, II,12. The variant text of Yajnavalkya adds one more source 'desire spring from due deliberation', see p 22.

7 *Shatapatha Brahmana*, XIV, 4.2.26—*Tadetat Kshatrasya kashatram yad dharmah tasmat dharmatparannasti athovaleeyanna-valeeyan samashante dharmena.*

The minutest rules were laid down for the guidance of the King. It was his duty to uphold the law and he was as much subject to law as any other person. He did not claim to be the lawmaker; he only enforced law. One of his chief duties was described to be the administration of justice according to the local usage and written Codes.[8] It was obligatory on him not only to enforce the sacred law of the texts, but to make authoritative the customary laws of the subjects as they were stated to be. These included customs of countries, districts, castes and families. So also of traders, guilds, herdsmen, moneylenders and artisans, for their respective classes.[9]

It was an article of belief with the ancient Hindu, that his law was revelation, immutable and eternal. *Shruti*, which strictly means the *Vedas*, was in theory the root and original source of *dharma*.[10] It was the fountainhead of his law. *Shruti* means, literally, that which was heard. It was supreme to the early Hindu like the *Decalogue* to the later Christian. The *Vedas*,[11] however, do not contain much that alludes to positive or municipal law. The few statements of law that are to be found in the *Vedas* are mostly incidental. *Smriti* means, literally, recollection. The *Shruti* was accepted as the original utterings of the great power. The *Smritis*, though accepted as precepts emanating from that source, were couched in the words of the *rishis* or sages of antiquity, who saw or received the revelations and proclaimed their recollections.[12] The authority of these two primordial sources is described by Manu:

> By Shruti, or what was heard from above, is meant the *Veda*. By *Smriti*, or what was remembered from the beginning, the body of law—from these two proceeds the whole system of duties.[13]

Theoretically, if a text of the *Smriti* conflicted with any *Vedic* text, it had to be disregarded: 'Where there is a conflict between the *Vedas* and

8 Gautama XI, 19, 20 (*SBE* Vol II); *Manusmriti*, VIII, 41,46.

9 Brihaspati II, 26–31 (*SBE* Vol XXXIII); *Manusmriti*, VII, 203; VIII, 41.

10 *Shrutistu vedoanjeneyo dharmashastram tu vai Smritih*; *Manusmriti* II.10.

11 The *Vedas* comprise of: (1) *Rigveda*, the *Veda* of the verses; (2) *Sama-veda*, the *Veda* of chant consisting of prayers composed in metre; (3) *Yajur-veda*, the *Veda* of sacrificial formulae; and (4) *Atharva-veda*, consisting inter alia of incantations, imprecatory formulae and prayers for averting calamities. The *Vedas* are of composite origin and include hymns by many generations of the early Aryans. Originally, they were transmitted orally by the preceptor to the disciple. The Vedic language was related to the classic Sanskrit, just as Attic was to Homeric Greek.

12 According to Blackstone, all human laws rested on the twin foundation of the law of revelation and the law of nature. The theory of Canonical law, which affected all European systems of law, was that the fundamental rules of law had been derived from a divine source. The Muslims believe a part of the Quoranic law to contain the *ipsissima verba* of the divine revelation and the rest to be inspired by God, but expressed in the Prophet's own words.

13 *Manusmriti*, II, 10.

the *Smriti*—the *Veda* should prevail'.[14] However, as there was not much of positive law in the *Vedas*, an equation was established, whereby the *Smritis* were understood as having been based on lost or forgotten *Shrutis*. By inflexible rule of Hindu jurisprudence, the *Smritis* were in practice never understood as in discord with *Vedas*. For all practical purposes, therefore, the *Smritis* were accepted as the effective source of Hindu law.[15]

THREE STAGES OF LEGAL LITERATURE

Considered chronologically, and having regard to the stage of its legal literature, Hindu law falls under three epochs:

(i) the Vedic epoch. This is also referred to as the pre-*Sutra* period;
(ii) the era of the *Dharmashastras*. This is often sub-divided into:
  (a) the *Smriti* period;
  (b) the *Sutra* period;
(iii) the post-*Smriti* period.

(i) Vedic or Pre-*Sutra* Period

The fixation of the chronology of the Vedic period is a matter about which it is indeed difficult to say anything definite. The authentic history of this period of Hindu civilisation has not been preserved. The philosophic doctrines of the ancient Hindus did not encourage any desire to leave historical records for posterity, and the Aryans or Indo-Aryans did not preserve any evidence comparable to the Tablets of the Babylonians or the Papyrii of the Egyptians; nor have we anything comparable to the Annals of Livy. There has been considerable diversity of opinion amongst the western and many Indian scholars on the question of the chronology of the Vedic or pre-*Sutra* period. The former have given later dates, while the latter have accepted much earlier dates. After the archaeological discoveries at Mahenjodaro and Harappa, and the most recent discoveries at Lothal and Rangpur and in the southern Narmada valley, some added support has been lent to the opinion of scholars who had assigned a hoary antiquity to the Rig-Vedic age. It is not difficult now to accept the view expressed by many Indian jurists and scholars that the age of the *Vedic Samhitas* and other works of the pre-*Sutra* period was approximately 4000–1000 BC. It is possible that some Vedic hymns may have been composed at a period earlier than 4000 BC.[16]

14 Vyasa, 1.4; *Manusmriti*, II, 13, 14.
15 The formula affirming this equivalence was critically discussed by the leading *mimansakars*, and particularly by Kumarila. The practical summation of Kumarila in his *Tantra-Vartika* is—*Tena sarvasmritinam prayojanavatee prama-nyasiddhih.*
16 Mahamahopadhyaya Kane, *History of Dharmashastra* Vol II, Pt I, p XI. In the opinion

continued on the next page

The Vedas were the outpourings of the Aryans as they streamed into the rich lands of the Punjab and Doab from their ancient home beyond the Hindu Kush Mountains.[17] Totalitarian claims apart, it is now established history that those early Aryans were a vigorous and unsophisticated people full of the joy of life, and though not given to much intellectual broodings—the era of the *Yoga* system of philosophy of cordial harmony between God and man was yet to come—had behind them ages of civilised existence and thought. The dedication in *Rig Veda* appropriately states: 'To the seers, our ancestors, the first path-finders'. Those early Aryans primarily invoked the law of divine wisdom, by which according to their theological conceptions, all things in heaven and earth are governed. Their appeal was to the divine law and the universal order[18] to judge of their rectitude or obliquity. This was natural law or the law of reason; the unwritten law. Then came to be stressed the conventional and customary law, which a body of rules dealing with the right, the wrong, rights and duties and obligations as established and accepted by the people for themselves but with greater stress on duties and obligations. There is intrinsic evidence in the *Shrutis* that those Aryans of the Vedic age had robust concepts of a lawful man's duties. The emphasis was on the practice of *dharma*, an expression which came to signify 'the privileges, duties and obligations of a man, is standard of conduct as a member of Aryan community, as a member of one of the castes and as a person in a particular state of life'.[19]

Although, the Hindus appeal to the *Shrutis* as the primary source of their law and religion, the *Shrutis* do not contain much that can be regarded as positive or lawyers' law. The references on these to secular law are mingled with matters ethical and religious and direct statements of law are rather few. A number of rules of law to be found there are

of Sri BG Tilak, 'the traditions recorded in the *Rigveda* unmistakably point to a period not later than 4000 BC when the vernal equinox was in Orion'. The same view was expressed by Jacobi.

17 In a conglomeration of what may seem stereotyped bucolic hymnology, there are to be found some natural outpourings of the heart in language which is sheer lyric poetry: *Rtasya jihva pavate madhuah* Rig IX, 75:2. One prayer is: 'Lord, be near us, hearken to us and make our speech truthful', Rig. 1.82: 1, 'O Faith, endow us with belief'.

18 The expression chosen for the universal order and law was '*Rita*'. 'The down follows the path of *Rita*, the right path as if she knew that before. She never oversteps the regions. The sun follows the path of Rita'. Cf 'He gave to the sea his decree, that the water should not pass his commandment': Proverbs 8.29. The expression '*Rita*' also came to mean the fountain of justice and the path of morality to be followed by men. One prayer was: 'O Indra, lead us on the path of *Rita*, on the right path...' *Rig Veda*, X, 133:6.

19 Even when later on rights were naturally the topic of forensic discussion, the accent was on obligation rather than on rights. Curiously enough, there is no equivalent expression in Sanskrit for the word 'rights' as used by modern writers on jurisprudence.

incidental and at time metaphorical. The existing *Dharmashastras* belong to the second period. However, we find references in the *Dharmashastras* to previously existing laws and customs. It is obvious that for many centuries, there existed *Gathas* which are mentioned in the *Manusmriti* and the *Sutras* of Gautama, Vasishtha and others, but of the original form of those *Gathas* we know very little. The *Smritikars* are agreed and common traditions have always accepted that the earliest exponent of law was Manu. The *Smritis* purport to embody one traditional law, namely the pronouncements of Manu.[20] The *Rig Veda* enjoins observance of the ancient rules of Manu: 'Do not take us far away from the path' (rules of *dharma*) prescribed by Manu and come down to us from our forefathers.[21] The material of that period available to this day does not render much assistance in collating an authenticated account of that body of original law, traditionally accepted as Manu's law, which indubitably existed. It was the unsophisticated age during which were composed a catena of *Sutras*, simple and naïve, yet adequate for the purposes of pastoral people and their corporate life. Those early *Sutras*, composed at a time when knowledge was imparted catechetically, are so far matters of legendary history and what we know of them is only from references to some of them in the extant *Dharmashastras*. Jurisprudence in the Vedic age was nascent and creative. There is ancient literature reflecting the continued cultural existence of many centuries during the Vedic period, but we do not have that abundant data requisite for the purposes of the history of that epoch and we know much less of its legal history. The initial difficulty has been the lack of any genuine works of historiography and no historical survey of that first epoch of legal literature has so far been accomplished. There is, however, reliable data of a long period of transition between the first epoch and the era of the *Dharmashastras*. The *Brahmanas*,[22] which form the second part of the Vedas, and deal with rituals, and sacrificial rites, belong to this period during which were formed numerous *Shakhas* or Schools of the *Vedas* and greater emphasis was placed on the supremacy of the *Vedas* and observance of castes and stages of life. All these and the rise in power and dominance of the priestly caste are the features of the period of transition. In the ancient Brahminical society, several groups called *Charanas* had been formed. Each of these *Charanas* had its own *Shakha* (branch) of the *Veda* and had its own ritualistic and legal codes. Every *Charana* had also *Kalpasutras*, which included the *Shrauta*, the *Grihya*

20 See *Smriti*, Introduction to the book.

21 *Manah pathah pitrayan dooram naishta: Rig-Veda*, VIII, 40: 3.

22 The *Brahmanas* are theological treatises in prose attached to the Vedas. The principal *Brahmanas* are *Aitareya*, *Shatapatha*, *Panchavimsa* and *Gopatha*. They mainly deal with rituals and efficacy of sacrifices.

and the *Dharma Sutras*.[23] The *Charanas* of the Vedic period were called the *Sanhita Charanas*. There were similar *Charanas* also in the Brahmana period that followed. After that, came the period of the *Sutra Charanas*. The *Charanavyuha*, the writings of the early *mimansakars*, and the available *Kalpasutras* are full of references to those early works and draw attention to that mass of early literature in the form of *Grihyasutras* in which were stated the duties and obligations of the Aryan as an individual and as a householder. During this period of priestly dominance, a good deal that was written was full of elaborate sacrificial technique and religion assumed a stereotyped form verging on syncretism. However, it was also the age of protest against that rigid formalism and the time when the older *Upanishads*[24] were composed. The bold philosophical speculations embedded in the *Brihadaranyaka* and other early *Upanishads* are a reminder of the long journey from naturalistic polytheism to almost cabalistic ritualism and ultimately to monism. The emphasis now was on self-realisation.[25] In the field of law also there was progress. A number of *Sutras* written during the later part of the Vedic epoch dealt with legal injunctions and customs. These are quoted in Yaska's *Nirukta*, a series of legal maxims in *Sutra* style.[26] There is also date which shows that towards the end of the Vedic epoch, philosophical and at times legal disputations were carried on in learned assemblies or *parishads*. These debates were responsible for the rise and development of schools of philosophers, principles of reasoning (dialectics) and the practice of the art of discussion. A parallel to this may be noticed in the use of the art of debate by Socrates for the purpose of eliciting the truth and in the logical treatises of Aristotle. However, of those legal disputations in the *parishads* of the learned, no record has been preserved just as no record exists of those early *Sutras* from which only a few quotations are to be traced. All that is known today is that there existed in the Vedic Epoch, rules of *dharma*, traditionally regarded as promulgated by Manu and *Sutras* containing aphorisms on law. It would be a misnomer, therefore, to call this as even a bare outline of the legal literature of that first epoch of Hindu law.

23 See *Dharmasutra*, Introduction to the book.

24 The *Upanishads* are philosophical discourses described as 'ancient rhapsodies of truth' and denominated as the *Vedanta* or the concluding treatises of the *Vedas*. Schopenhauer made it clear that his philosophy was shaped by the fundamental ultimate of the *Upanishads*. He stated: 'From every sentence, deep, original and sublime thought arise...It has been the solace of my life, it will be the solace of my death'.

25 One supplication was for the removal of the veil or obstacle that hides the real. The obstacle was described in one of the most quoted of the *Upanishads* ::s ' The golden lid that covers the face of truth'.

26 Yaska, who is very ancient himself, quotes earlier grammarians and etymological exegetes. Manu emphasised the importance of *Nirukta*—XII, 111.

(ii) Era of *Dharmashastras*

In the three periods stated above, are discernible successive strata of legal thought, progressive evolution and expansion and growth of a system of traditional law claiming its foundation in the law of revelation, and having the *Smritis* as its ancient framework. The era of the *Dharmashastras* was the golden age of Hindu law. No doubt, the more critical period was the post-*Smriti* period, when the system became more refined and ampler, but this second era was the productive period of Hindu law. It was synchronous with the age of some of the leading *Upanishads*, which are instinct with a spirit of inquiry and a passion for the search of truth about the hidden meaning of things. 'Truth wins ever; not falsehood' was the favourite axiom,[27] and the famous invocation was: 'Lead me from the unreal to the real: Lead me from darkness to light: Lead me from death to immortality'.[28] The spirit of the time was naturally reflected in the aphorisms of law then promulgated and the influence on secular matters of the philosophical impulses and tendencies is easily discernible. However, care was taken in laying down the minimal standards of conduct appropriate to the society that was being governed, to see that ethical judgment should not be allowed to control the operation of every rule of universal application Even modern jurisprudence, according to which the functions of law and ethics must be different, does not require that laws must be ethically neutral.

The Smriti Period

Nature of Smritis The Hindu jurisprudence regards the *Smritis*, which are often designated as *Dharmashastras*, as constituting the foundation and important source of law. The term 'sources of law' used in many legal treatises on Hindu law and in decisions of the Privy Council is somewhat ambiguous. Possibly it was borrowed from that department of Roman law entitled '*De juris fontibus*'. It has in any case been found convenient and useful because in one acceptation of the term, sources of law are the earliest extant monuments of documents by which existence and purport of the body of law may be known.[29] The *Smritis* of *Dharmashastras* are the earliest extant treatises from which our knowledge of the line of development which Hindu law had pursued during the second epoch of its history is derived. Mostly in metrical redactions and in some cases both in prose and metre, the *Smritis* are collections of precepts handed down by *rishis* or sages of antiquity. Composite in their

27 *Satyameva jayate nanritam.*

28 *Asato mam sadgamaya; tamaso mam jyotirgamaya; mrityor mamritamgamya.*

29 The expression used by many *Smritikars* is '*Dharmamoola*', which is also used by Manu. *Dharmasya lakshanam* is another expression used by Manu, which means direct evidence of *dharma.*

character, the principal *Smritis* blend religious, moral, social and legal duties. They contain some metaphysical speculations, matter sacramental and also ordain rules of legal rights and obligations. Ethico-religious obligations were regarded by these exponents of *dharma* as more important than legal obligations. The *Smritikars* were not always punctilious about stressing a clear distinction between the positive or lawyers' law and moral law, but this is not to suggest that they were unmindful of this distinction. When necessary, they took care to define this distinction, as for instance, in the case of the pious and legal obligation of a son to pay the debt of the father when the debt was not for an immoral or illegal purpose.

The charge levelled by some western scholars against the authors of the *Smritis* for a want of precision and discrimination between moral and legal maxims is unreasonable and unfounded but it is unnecessary now to take any serious notice of the same. The *Smritis* are *Dharmashastras* enouncing rules and precepts of *dharma*, an expression understood in a broad and comprehensive sense. A clear perspective of Hindu law is not possible unless it is properly appreciated that the blending of religion and ethics with law by these juris-theologians was in a large measure the natural results of a philosophy of life, which laid emphasis on the supremacy of inward life over things external. The acceptance by a corporate society of the connotation of duty (*dharma*), which associated religious and ethical concepts with secular matters was bound to be projected into its codes of positive law. There are to be found, however, numerous texts in the *Smritis*, illustrative of the distinction between law and morality applicable to questions where it was felt necessary to emphasise any such point of distinction. The distinction, when not observed, was because the best rule was regarded as that which advanced *dharma*.[30] Religious injunctions and legal precepts were at times apt to be mingled up unless the rules of logic and certain accepted canons of construction were brought in aid of the ascertainment of the distinction which nevertheless obtained.[31] It may also be observed that Yajnavalkya and some other *Smritikars* divided their treatment of subjects into three sections, *achara*, *vyavahara* and *prayashchitta*. The first and the last relate to rules of religious observances and expiation. The early writers laid greater stress on these rules than on rules of *vyavahara*, ie, of civil law. The later *Smritikars* mentioned above have treated rules of *vyavahara* in separate sections (*prakaranas*) and exhaustively considered rules of positive law and Narada and some *Smritikars* have compiled rules only on *vyavahara*.[32] The shrewd practical insight of the Hindu *rishis*, who

30 Cf *Summa ratio est quae pro religione for it.*

31 See *Dharma*, Introduction to the book.

32 *Vyavahara* embraces forensic law and practice as well as rules for private acts and disputes.

were both sages and virtually lawmakers, left very little that was undefined. At a very remote period, law, was treated under 18 heads and 132 subdivisions and laid down rules of law both substantive and adjectival. Founders of their own jurisprudence, these philosophical jurists enunciated and expounded a system of law, which does not suffer in comparison with Roman law, which inspired the continental codes and much of English case-law.

By the Austinian principles of jurisprudence or theories of Bentham, much of the traditional law of ancient India would be termed as 'morality' because that law was not 'a direct or circuitous command of a monarch or sovereign number to persons in a state of subjection to its author'. The *Smritis*, some of which deal exhaustively with various topics of law and are generally referred to as institutes or codes, were not codes in the strict sense in which a code is not understood, ie a single comprehensive legislative document on any particular topic or branch of law. The extant *Smritis* were compiled at different times and in different parts of the country, but they all purported to record on traditional law. The *Smriti* was not autonomic law, which is the result of a true form of legislation or is promulgated by the state in its own person. It was not imposed by any superior authority *in invitos*. There was no dogmatic insistence upon any fundamental notions of command of a sovereign and habit of obedience to a determinate person. What was accepted was the rule-dependent notion of what ought to be done as agreeable to good conscience and in conformity with the cherished article of belief that the fundamental rules of law had been derived from a divine author. A legal system is a system of rules within rules; and to say that a legal system exist entails not that there is general habit of obedience to determinate persons, but that there is a general acceptance of a constituent rule, simple or complex, defining the manner in which the ordinary rules of the system are to be identified. One should think not of the sovereign and independent persons habitually obeyed, but of a rule providing a sovereign or ultimate test in accordance with which the laws to be obeyed are identified. The acceptance of such fundamental constituent rules cannot be equated with habits of obedience of subjects to determinate persons, though it is of course evidenced by obedience to the law.[33] The general effective motive, according to these *Smritikars*, was observance of *dharma* and the sanctions recognised by the people themselves. Enforcement of law (*danda*) in the nature of things proceeded from the sovereign, but one view of the genesis of legal institutes was that the King and the law were created by the people. Medhatithi and Vijnaneshvara

33 See *Professor Hart's Introduction to Austin's Province of Jurisprudence Determined*, pp xi–xiii. Prof Hart also refers to Bryce, Kelsen and Salmond *General Criticism of Austin's Doctrine of Sovereignty*.

as also the *Mahabharata* and the *Arthashastra* of Kautilya maintain the view that law as enjoined in the *Vedas* and the *Smritis* was a popular origin. It was law by acceptance—*jus receptum*—and constituted in part of recollections of precepts claimed as of divine origin and in part of conventional and customary law. The law rested on the quadruple source already mentioned and the sanction behind that law was not the will of any supreme temporal power but that which was inherent in the law itself and the nature of and sanctity attached to its sources.

Smritikars The *rishis* who compiled the *Smritis* did not exercise temporal power nor did they owe their authority to any sovereign power. The authority or imperative character of their legal injunctions was partly derived from the reverence in which they were held and the accepted principle that what they laid down was agreeable to good conscience. What the *Smritikars* said was regarded as the principle direct evidence of *dharma*. The *Smritikars* did not arrogate to themselves the position of law-makers, but only claimed to be exponents of the divine precepts of law and compilers of traditions handed down to them and clung to that position even when introducing changes and reforms. Changes in the law were primarily effected by the process of recognition of particular usages (unless they were repugnant to law) as of binding efficacy. Brihaspati ruled that 'immemorial usage legalises any practice' and that:

> ...a decision must not be made solely by having recourse to the letter of written codes; since, if no decision were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice.[34]

Acting on these principles, the *rishis* abrogated practices which had come to be condemned by the people and ordained and prescribed rules based on practices and customs which had come to be recognised and followed by the people.

The *Smriti* texts evince profound acute thinking of the sages and jurisconsults responsible for them. A remarkable instance of this is furnished by their treatment of 'ownership' and its comprehensive signification. Salmond in defining ownership states that 'ownership' in its wide sense 'extends to all classes of rights, whether proprietary or personal, *in rem* or *in personam*, in *re propria* or *in re aliena*...'. There are a number of texts in the *Smritis* on the subject of ownership, which show that the jurisprudential concepts reflected through them remarkably accord with the view of the most modern writers on jurisprudence. The basis of what we know as Holland's theory of 'ownership' as 'plenary control over an object' and the necessary qualification to the same that the right of

34 Brihaspati, II, 26, 28 (*SBE*, Vol XXXIII).

ownership must be enjoyed without interfering with the rights of others has been logically considered by the *Smritikars* and those who followed them,[35] with due regard to the refinements implicit in this theory. Another remarkable instance was the recognition of 'prescriptions'. Although, Roman law accepted extinctive and acquisitive prescriptions as sanctioned by jurisprudence, modern western lawyers, as pointed out by Sir Henry Maine, viewed them 'first with repugnance, afterwards with reluctant approval'. Law, it was said by these *Smritikars*, should help those who were vigilant in asserting, their rights and not those who slumbered over them. In their treatment of the law of prescription, these lawmakers evinced practical insight and legal acumen of a high order. Yajnavalkya laid down a period of 20 years for recovery by the lawful owner of land and 10 years for the recovery of a chattel enjoyed by stranger,[36] and Brihaspati ruled that in case of continuous and uninterrupted possession of land for the prescriptive period there would even as against the original owner be created possessory title in favour of the person in actual possession.[37] Thus, lapse of time was recognised both as destructive and creative of title. A further instance is equally remarkable. 'A fact', it was said in an apophthegm, 'cannot be altered by a hundred texts'.[38] An act done and finally competed, though it may be in contravention of hundred directory texts (as distinguished from any mandatory text), will stand and the act will be deemed to be legal and binding. This maxim of Hindu law has been recognised and applied by the courts in cases of certain questions relating to the validity of marriage and adoption. The doctrine corresponding to this maxim was *factum valet quod fieri non debuit*. Also notable was the logical acumen of the *Smritikars* and those who followed them to harmonise rules not easily reconcilable. The fallacy of rigid literal construction was not overlooked. Synthesis was, as far as possible, achieved by in effect rejecting that meaning which was apt to introduce uncertainty, confusion or friction.[39] In their desire to adapt the more ancient law to progressive conditions, they sometimes resorted to the favoured contrivance of the jurist by evolving a number of beneficent and elegant fictions. To mention only one, they announced the identity of the husband and wife and on that assumption, rested the

35 There is an instructive dissertation by Vijnaneshvara on the juridical concept of ownership in Ch II of the Mitakshara.

36 Grounds of legal disability were recognised. Thus, for instance, there was exemption from operation of limitation in case of minors, property of the king and deposits involving the element of trust.

37 Brihaspati, IX, 6, 7 (*SBE*, Vol XXXIII).

38 There has been some conflict of opinion among Indian jurists on the question of the correct meaning of the maxim as stated by Jimutavahana: *Vachanasbatenapi vastunonyathakaranashakteh*: Ch XXII, § 434.

39 Roman law.

rule that in case of a person who died sonless, his widow could succeed in preference to all other heirs recognised by law.[40] A maxim that found favour was that reason and justice are more to be regarded than mere texts. Some of the ancient rules of law propounded by these lawmakers surprise us by their strikingly modern character and remarkable insight into jurisprudential concepts, for insight does not depend on modernity.

The *Smritis* or *Dharmashastras* are divisible into two classes. The first of these are the *Sutras*. Complete *Sutra* works contain aphorisms on sacrifices (*shrauta*); aphorisms on ceremonies requiring domestic fire (*grihya*) and aphorisms on law and custom treating of temporal duties of men in their various relations (*samayacharika*). The last one of these three kinds of *Sutras* are referred to as *Dharmasutras*.[41] Some of them were written in prose and some both in prose and verse.[42] The extant *Dharmasutras* though part of the *Smritis* of *Dharmashastras*, being more ancient, are sometimes differentiated from the metrical versions more specifically referred to as the *Smritis*. The principal extant *Dharmasutras* are those of Gautama, Baudhayana, Apastamba, Harita, Vasishtha and Vishnu. The *Smritis* more specifically, the Institutes of Manu, of Yajnavalkya, Narada and the *Smritis* of Parashara, Brihaspati, Katyayana and others belong to the second category of *Dharmashastras* and are later in age than the *Dharmasutras*. The *Dharmasutras* are sometimes divided into *Purva* and *apara Sutras*, the former being the more ancient of them, but no list intended to be exhaustive. The *Sutras* generally bear the names of their authors and in some cases the names of the *Shakha* or school to which the authors belonged. It will suffice to refer only to some of them in the present context. The *Gautama Dharmasutra* belonged to the Samavedins. The *Vasishtha Dharmasutra* belonged to the Vasishtha group of Rigvedins and the Apastamba and the Baudhayana to the Taittiriyas. The rituals of the groups differed in details. The *Dharmasutras*, however, dealt mainly with duties of men in their various relations and in course of time began to be accepted as of authority by members of all the groups.

The Sutra period

Dharmasutras The *Dharmasutra* of Gautama, Baudhayana, Apastamba, Harita and Vasishtha are now considered and accepted to be the most

40 *Yo Bharta sa smritangana—Manusmriti*, IX, 45. *Jeevatyardhashareererthaṁ Kathaṁ anyah samapnuyat...Asutasya prameetasya patnee: tadbhagahareem—Brihaspati* cited in *Smritichandrika*, Mysore Series No 48, p 678. The provisions of the Hindu Women's Rights to Property Act 1937 adapted this *fictio juris*.

41 The expression means 'strings or threads of rules of *dharma*'.

42 The objective of the *Sutras* or aphorisms was to give in a compressed style of composition, principles and rules with the utmost brevity. The aphorismic style helped to avoid overburdening the memory. A trite saying was 'and author rejoiceth in the economising of half a vowel as much as in the birth of a son'.

ancient of the existing recorded aphorisms on law and custom treating the duties of men in their various relations. As has been observed:

> Though the texts of the *Dharmasutras* have not always been preserved with perfect purity, they have evidently retained their original character. They do not pretend to be anything more than the compositions of ordinary mortals, based on the teachings of the *Vedas*, on the decisions of those who are acquainted with the law, and on the customs of virtuous Aryans... It is further still possible to recognise, even on a superficial examination for what purpose the *Dharmasutras* were originally composed. Nobody can doubt for a moment that they are manuals written by the teacher of the Vedic *schools* for the guidance of their pupils, that at first they were held to be authoritative in restricted circles, and that they were later only acknowledged as sources of the sacred law.[43]

The *Dharmasutras* were fascicular rules, which came to be accepted as records of the one traditional law. They were not bodies of law struggling with each other for recognition. Composed in different parts of the country and different times they did not present any anomaly but tended to slide into each other. In common with most of the *Dharmashastras*, they mingled religious and moral precepts with secular law. Some of them are remarkable for the manner and vigour of their expression and the multifariousness of the subjects of living interest covered by them. Some of these teachers give the impression that they were free-willed, creative, ideal-harbouring human beings who did not feel bound by everlasting orthodoxies. In their texts, there are no urgings to docile and sedulous conformity to every authoritarian mandate of the ritualists. If anything, they suggest that confining and endless conformity is bad for the human spirit. The authors of these *Dharmasutras* took the law from earlier *Gathas*, *Sutras* and customs, which had grown up bit by bit and reduced them to some sort of order and symmetry. Some of these Sutrakars have evolved idioms of expression and contributed a significant quota to the language of law.

Apastamba The *Apastambasutra* is probably the best preserved of these *Sutras*. In a distinguished manner, not free from archaic phraseology, Apastamba treats certain aspects of the law of marriage and of inheritance and criminal law. A notable feature of this *Sutra* is the clarity and forcefulness of its language. Untampered with by later redactors, it is one of the most quoted of the *Sutras* and accepted as a high authority. Apastamba hailed from the South and it is believed that in his work were embodied the customs of his part of the country. Haradatta has written

43 Dr Buhler, *Introduction to 'The Laws of Manu'*, Sacred Books of the East Series, Vol 25, P XI. The *Smritis* of Manu and some others were largely based on law, which had partly been systematised by the *sutrakars*. The *Dharmasutras* supplied the ground plan for those works.

a commentary on this work. It is entitled *Ujjvala*. Apastamba emphasises the traditional view that the *Vedas* were the source (*pramana*) and nucleus of all knowledge. He takes care, however, at the end of his work, to impress his pupils with statement; 'Some declare that the remaining duties (which have not been taught here) must be learnt from women and men of all castes'.[44] He also states: 'The knowledge which...women possess is the completion of all study'.[45] Haradatta explains this as in part referable to the science of useful arts and other branches of *Arthashastra*, which latter expression he uses as embracing all general knowledge. The classical Sanskrit writers including Kalidasa endorse this pithy maxim in some phrases. The expressions 'knowledge' and 'completion of all study' were presumably used by Apastamba bearing in mind the rule that wide and comprehensive meaning must be attributed to word, if they are fairly susceptible of it.

Gautama The *Gautamadharmasutra* is probably the oldest of the extant works on law and as already pointed out belonged to the Samavedins. The injunction that it was the duty of the King to preserve intact the time-honoured institutions of each country and make authoritative the customs of the inhabitants of different parts of the country just as they are stated to be, favoured by Manu, Brihaspati, Devala[46] and other writers of the metrical *Smritis*, does not appear to have been quite established at the time of Gautama.[47] It would seem, however, that by the time of Baudhayana, the rule was firmly established.[48] *Gautamadharmasutra* is in prose and treats extensively of matters legal and religious importance. These include questions of inheritance, partitions and *stridhana*. Gautama attaches adequate importance to tradition and practices and usages of cultivators, traders, herdsmen, moneylenders and artisans.[49] Haradatta has written a commentary also on the work of Gautama.

Baudhayana *Baudhayanasutra* is not available in its integrate form. What we have is a dismembered work, which according to the researches of Dr Burnell consists of four *prashnas*, of which the last would seem from intrinsic evidence to be an interpolation. There is evidence, both internal and external, to suggest that *Budhayanasutra* is older than *Apastambasutra*. Dr Buhler has examined various arguments which go to establish the high antiquity of this work.[50] Baudhayana is rather elaborate

44 II, 11, 29, 15.
45 II, 11, 29, 11.
46 *Yasmin deshe pure grame traividye nagarepiya; yo yatra vihito dharmastam dharman na vichalayet.*
47 Gautama, however, does say that the laws of countries, castes and families should be recognised in administering justice—XI, 20.
48 See Baudhayana. I, 1, 2, 1–8.
49 Gautama, XI, 21.
50 *SBE* Vol XIV, p xxxvii.

in his treatment and discursive. He himself says: 'This teacher is not particularly anxious to make his book short'. Baudhayana treats of a variety of subjects including inheritance, sonship, adoption and marriage. He mentions a number of usages and practices of the people and refers to certain customs prevalent only in the South, one of them being marriage with the daughter of a maternal uncle. He also mentions some customs which were peculiar to the people living in the North, two of them being trading in arms and going to sea.[51] He also speaks of the levy of sea-customs *ad valorem*,[52] and of imposition of excise duty on traders by the king.[53]

Harita Harita is another *Sutrakar* whose work deserves special notice. One of the most quoted of the early exponents of law, he is mentioned as an authority by Apastamba and some other compilers of *Dharmasutras*, and possibly his work is one of the oldest *Dharmasutras* so far known to be in existence. His treatment follows the same pattern that is adopted by the early *Sutrakars*. Harita is freely quoted also by the commentators. A verse ascribed to Harita is reminiscent of the stage of progress that Hindu law had made even during the first period of the era of the *Dharmashastras*, when the defendant avers that the matter in controversy was the subject of a former litigation between him and the plaintiff when the latter was defeated, the plea is a plea of former judgment—*pragnyaya*. This is similar to the doctrine of *res judicata* and the *exceptio res judicatae* of Roman law.

Vasishtha Of the *Dharmasutra* of Vasishtha, not much is extant. He deals inter alia with source and jurisdiction of law and rules of inheritance, marriage, adoption and sonship. Vasishtha stresses the importance of usage and describes it as a supplement to law. A number of manuscripts of this *Sutra* have been translated and published and opinion is divided on the question of the authenticity of certain chapters. Vasishtha gives an interesting description of *Aryavarta* (the country of Aryas). He adds that, according to many writers, its northern and southern boundaries were respectively the Himalayas and the Vindhya range,[54] and goes on to state that customs which are approved in any country must be everywhere acknowledged as authoritative.[55]

Vishnu Vishnu is another *Sutrakar* whose collection of aphorisms is entitled to consideration among the ancient works of this class, which have come down to our time. Vishnu is one of the *Smritikars* mentioned

51 I, 1, 11, 1–4.
52 I, 10, 18, 14.
53 I, 10, 18, 15.
54 I, 8, 9, 12, 13.
55 I, 10, 11—Provided they are not contrary to the policy of law.

in the enumeration of Yajnavalkya,[56] but an examination of the extant work clearly shows that its author has copiously borrowed from *Manusmriti* and other standard works and must have adopted as the basis of his work, an ancient collection of aphorisms intituled *Vishnusutra*. The bulk of the extant work consists of rules in prose composed in the laconic style of the early *sutrakars*, but most of the chapters conclude with metrical verse. It deals with rules of criminal and civil law, inheritance, marriage, debt, interest, treasure trove and various other subjects. Nandapandita himself an erudite writer on law, has written a commentary of *Vishnusutra* known as the *Vaijayanti*.[57]

Of other ancient authors of *Dharmasutras* very little is known, although, the aphorisms of some of them, mostly remnants, are to be found mentioned in the works of later compilers of the *Dharmashastras*. Of those, mention must be made of the brothers Shankha and Likhita, the co-authors of a *Dharmasutra* bearing their names. In and oft-quoted verse from *Parasharasmriti*, the *Dharmasutra* of Shankha-Likhita is given considerable prominence. The *Dharmasutra* of Ushanas is mentioned by Yajnavalkya in his enumeration. The author appears to have ascribed his work to Ushanas,[58] who is probably Shukra, the mythological preceptor and the regent of the planet Venus. An oft-quoted text of Ushanas is that the son is under no pious obligation to pay a fine or the balance of a fine or a tax (or toll) due by the father; nor is he bound to pay a debt due by the father which is not proper.[59]

Importance of the *Dharmasutras* The great importance of those works today is not so much in their texts as in the concepts of jurisprudence reflected through their medium and the historical value of their contents and the reference that is traceable in them to previously unrecorded custom, and crystallisation in the form of precepts of usages and practices and the transformation of these into constituent law. Gautama in enumerating the sources of the sacred law speaks of the *Vedas* and the tradition and practices of those who know (the *Vedas*). The chapter on duties of a king also states that his administration of justice shall be regulated by the *Veda*, the institutes of the sacred law and the laws of countries, castes and families provided they are not repugnant to the sacred records.[60] There are similar express texts recognising custom as a source of law (*dharmamoolam*) and also references both direct and implied to various customs in the *Dharmasutras* mentioned above, showing

56 See *Smritikars*, Introduction to the book.
57 A translation of *Vishnusutra* by Dr Jolly was published in the *SBE Series*, Vol VII.
58 Ushanas is mentioned as an ancient *seer* in the Bhagavad Gita Discourse X, 37.
59 *Na vyavaharika*.
60 I, 1, 2; XI, 19-21, *SBE*, Vol II.

that the law was traditional and that custom was a constituent part of it.[61] It may be of interest to underline some of the liberal rules relating to the status and rights of women, which found favour with these early exponents of law. Remarriage of widows and divorce are recognised in some of the old texts.[62] In *Vishnusutra*, it is stated that on partition between brothers after the father's death, not only are the mothers entitled to share equally with their sons, but unmarried sisters are also entitled to their aliquot shares.[63] These teachers of the Vedic schools brought a virile mind to the deposits of the legal thought and traditions of the past. Acclaimed propounders of the early *Smriti* law, these *Sutrakars* primarily sought to express the *communis sententia* of the Indo-Aryans and were unanimous in their appeal to customary law. This adherence to the doctrine of accepted usage and the enjoined duty of the interpreter of law to see that customs, practices and family usages prevailed and were preserved is one of the outstanding features of Hindu jurisprudence.

Chronology of Dharmasutras Of the *Dharmasutras*, we have some reliable history, though the task of the historian in fixing the chronology of these works has been indeed hard. However, the problem of determining the dates of the leading *Dharmasutras* and *Smritis* was so fascinating and opened up such a vast field for reconstruction, that during the last hundred years some jurists and scholars, both European and Indian, have critically and with meticulous care examined the available data and relevant criteria and assigned the approximate dates of the compilation of these works. There have been many handicaps to the task of fixation of the dates of the various *Dharmasutras*. A number of early *Dharmasutras* are not available. Nor are available the complete texts of all the extant *Smritis*. Then again, some texts attributed to some of the ancient exponents of law are to be gathered only from later works which quote them as authority. Of the available *Dharmashastras*, some quote with approval previous works but do not throw any light on the question of their age. In case of some of these *Dharmashastras*, it is not possible to rule out the existence of interpolations, and in case of one or two of them, there are manifest indications of subsequent remodelling of the texts. In these circumstances, the conclusions reached must often be of necessity rest with the fixation of the approximate century during which the particular *Dharmashastras* must have been compiled. There was a sharp controversy amongst some earlier Western and Indian scholars on the question of the

61 According to Roman jurisprudence 'customary law' obtains as positive law by virtue of the *consensus utentium*. Justinian states: *nam quid interest, populus suffragio voluntatem suam declaret, an rebus ipsis et factis*—Digest, 1, 3, 32.

62 Vasistha XVII, 72–74 *SBE*. Vol XIV. This was in consonance with *Rigveda*, 10M 18, 7.

63 *Matarah putrabhaganusarena bhagaharinyah anudhhasbacha duhitarah*—Vishnu, 18, 35.

chronology of the *Dharmashastras*. There is even now some difference of opinion amongst the Indian jurists and scholars themselves as to the time when some of the *Dharmashastras* were first reduced to writing in the form in which they are extant. According to some of the earlier Western writers, the *Smritis* were reduced to writing some centuries later than the dates assigned to them by Indian jurists and scholars. It has been the opinion of the Indian critics that on this point, some western scholars often indulged in a priori reasoning and based their conclusion on unsound analogy. An analysis of the reasons in support of their conclusions given by some eminent jurists and scholars, both European and Indian, would suggest that the *Dharmasutras* of Gautama, Baudhayana, Apastamba and Vasishtha must have been recorded between about 800 BC and 300 BC. Dr Jolly has tried to prove that *Apastambasutra* is the oldest of these. Mahamahopadhyaya Kane puts the time of *Gautamadharmasutra* before the spread of Buddhism and his opinion is that this *Sutra* cannot be placed later than the period between 600-400 BC.[64] The age of Chandragupta Maurya, which is reliably fixed as 321 BC to 297 BC is the sheet anchor of Indian chronology. Almost equally useful is the date of Panini who lived 'probably soon after 500 BC'.[65] Some Sanskritists on the other hand have made claims of greater antiquity for some of the extant *Dharmashastras*. They also rely on certain data. However, it seems unnecessary to join in the desire to go as far back as possible for the purpose of enhancing the importance of these ancient authorities on law.

Yajnavalkya's Enumeration In a verse of Yajnavalkya are enumerated 20 of the *Dharmashastras*, all bearing the names of the *rishis* to whom their authorship was ascribed. Manu, Arti, Vishnu, Harita, Yajnavalkya, Ushanas, Angiras, Yama, Apastamba, Samvarta, Katyayana, *Brihaspati*, Parashara, Vyasa, Sankha, Likhita, Daksha, Gautama, Shatatapa, and Vasishtha are mentioned as founders of *Dharmashastras*.[66] The verse obviously was penned by a later redactor and the list is illustrative and not exhaustive. Narada, Baudhayana and some others not mentioned here are among the recognised compilers of law.[67]

64 Vol I, p 19.

65 Macdonell, *India's Past*, p 136. Panini is the author of a work on grammar described as 'monument of thoroughness and algebraic brevity'. Panini gives some data of considerable importance to the historian (Dr RK Mookerji, *Hindu Civilization*, Ch VI).

66 *Dharmashastraprayojakah*, I, 4, 5. In his *Nirnayasindhu*, Kamalakara refers to over 100 *Smritis*. Many of those mentioned by him have not been found.

67 The *Padmapurana* lists 36 compilers of law. The name of Arti mentioned in *Yajnavalkyasmriti* is not mentioned. To the other 19, are added Marichi, Pulastya, Prachetas, Bhrigu, Narada, Kashyapa, Vishvamitra, Devala, Rishyashringa, Gargya, Baudhayana, Paithinashi, Javali, Samantu, Parashara, Lokakshi and Kuthumi.

Of the numerous *Smritis*, the first and foremost in rank of authority is *Manusmriti* or the Institutes of Manu. There is a striking resemblance and agreement among the *Smritis* on many questions, and they purport to embody one traditional law. All the *Smritis* in course of time came to be regarded as of universal application. No greater authority was attached to one than to another *Smriti*, except in case of *Manusmriti*, which was received as of the highest authority. It was not as if any one *Smriti* was taken as in substitution for another on any particular aspect or branch of law or as of greater authority in any part of the country, but they were all treated as supplementary to each other.

Manusmriti *Manusmriti* or Institutes of Manu is by common tradition entitled to a place of precedence among all the *Smritis*. The other *Smritikars* themselves subscribe to this view. Opinion, however, is divided on the question of the identity of Manu. It seems impossible to offer any strong data one way or the other on the somewhat fascinating riddle as to the identity of the original law-giver or to point out the specific rules of law promulgated by him and preserved as part of the extant Code. There is a striking resemblance and agreement among the *Smritis* and they purport to embody one traditional law often stated to be the pronouncements of Manu, who was accepted as the first expositor of law and often reverently referred to by the *Smritikars* in the *pluralis majestatis*. The ancient law existed before writing was invented and human memory had to be its sole repository. It was not static, but a growing system and was handed down for centuries from preceptor to disciple in succession. In course of time had come the *Gathas* and *Sutras* of the Brahmana period, and after that came the *Dharmasutras*. All these were supplementing, altering and gradually moulding the ancient traditional law into system. This evolution was going on for many centuries and so was going on the process of lawmaking with a body of customs taking and receiving recognition from time to time and itself forming a constituent part of the traditional law. The rules of law attributed to Manu, the first patriarch, were bound to come up continuously for consideration and application and the exponent or interpreter of law had to take account of the law at the time extant and also attach adequate importance to growing usages and customs. The accretions were naturally accepted as part of the same law and having the same obligatory force as the original rules. The fixation of these rules was obtained when the Code itself was compiled and bore the name of Manu, the original exponent of law. The Code is not in the language of Vedic times and it is obvious that it was reduced to writing at a later period. The date of this compilation in its extant form, can now fairly and reliably be fixed as about 200 BC, but there is little historical data about its actual author. The Code contains interesting parallels with other works and the author, whatever his real

identity was, appears to have compiled an exhaustive code binding on all and identified it with the most familiar and venerated name of Manu, the primeval legislator. The *Dharmashastras* right down from the Rig-Vedic age copiously refer to the opinions of Manu and of Manu *Svayambhuva*. Then again, there are references made to *Prachetasa* Manu and *Vriddha* Manu. References are also made to *Manudharmasutra*. Evidence about Manu traditionally accepted as the first exponent of law cannot altogether be said to be scanty, nor is there any conclusive data to establish his identity. There is not much reason however, for the student of Hindu law to make himself uneasy over the paucity or uncertainty of evidence regarding the identity of the real author of the extant *Manusmriti* or of the original Manu whose name it bears. What is of importance and consequence is the paramount authority of Manu. It has been repeatedly asserted and affirmed that the authority of the precepts contained in the *Manusmriti* was beyond dispute.

Commentaries on Manusmriti The extant Code of Manu compiled in about 200 BC was obviously an answer to a long-felt desideratum because the legal literature of the *Dharmasutra* period had not produced any work, which could meet the requirements of a compendium of law in all its branches. The unique position acquired by it as the leading *Smriti* and effectually of the most authoritative reservoir of law was due both to its traditional history and the systematic and cogent collection of rules of existing law that it gave to the people with clarity and in language simple and easy of comprehension. Analogy, though imperfect, of the *Codex Theodosianus*, a compilation promulgated in 429 AD and the *Codex Justinianus* compiled in 528 AD may serve to give and idea of the purpose achieved by the Institutes of Manu.[68] Virtually amounting to a recasting in a convenient and easily accessible form of the whole of the traditional law, it appears to have in practice replaced on matters covered by it the use of the rules of law stated in earlier *Gathas* and *Sutras*, and the chapters on *vyavahara* in the *Dharmasutras*, most of which it has practically embodied. The Code is divided into 12 chapters. In the eighth chapter, are stated rule on 18 subjects of law—intituled titles of law—which include both civil and criminal law.[69] In the later treatises, other

68 An examination of the departments of law dealt with in *Manusmriti* will show that it was a complete code embracing all branches of law and was suitable to conditions then prevalent and the exigencies of the time. The colonial expansion of India at one time embraced almost the world of South-east Asia. It may be of some interest to notice that the name of Manu was authoritatively associated with the laws of many countries in that vast region. On the facade of the legislature building in Manila, the capital of the Philippines, are four figures representing the culture of that country. One of the figures is of Manu.

69 Manusmriti, VIII 4–7. The 18 titles are: I. Recovery of Debts; II. Deposit and pledge;

continued on the next page

Smritikars have mostly followed this division and the nomenclature adopted in the Code except that the ninth division of Manu was dropped and the title of *prakirnaka* (miscellaneous) was supplemented.[70] The author of the extant *Smriti* may not have been the originator of the famous division, but it appears to have been a traditional classification accepted and popularised by him.

The rules of law laid down in *Manusmriti* and its most characteristic doctrines have today their practical importance in this that the Code is a landmark in the history of Hindu law and a reservoir to which reference may at times become necessary for the proper appreciation of any fundamental concept or any question involving first principles. Laws of inheritance, property, contracts, partnership, master and servant are some of the branches of law comprising the Code. The Code records many genuine observances of the ancient Hindu and gives a vivid idea of the customs of the society then extant. The ordinance of Manu is based on ancient usages. Predominance was to be given to approved usage in all matters: 'Let every man, therefore... who has a due reverence for the supreme spirit which dwells in him, diligently and constantly observe immemorial custom. Thus, have the holy sages, well knowing that law is grounded on immemorial custom, embraced, as the root of all piety goods usages long established. 'A King...must inquire into the law of castes (*jati*), of districts (*janapada*), of guilds (*shreni*), and of families (*kula*), and settle the peculiar law of each'.[71] In his survey of the duties of the King, Manu stresses the importance of *danda*, which connotes the sanction behind the power of the king to restrain transgressions of law and to inflict punishment on offenders. The *danda* 'alone governs all protected beings, alone protects them, watches over them while they sleep; the wise declare it (to be identical with) the law'.[72] Other leading *Smritikars* echo this punitive element of the theory of kingship. Of the numerous English translations of the Code, the one that has often been referred to is that by Dr Buhler, which was published in the *Sacred Book* of the *East Series* in 1886.[73] A number of commentaries were written on

III. Sale without ownership; IV. Concerns amongst partners; V. Resumption of gifts; VI. Non-payment of wages or hire; VII. Non-performance of agreements; VIII. Rescission of sale and purchase; IX. Disputes between master and servant; X. Disputes regarding boundaries; XI. Assault; XII. Defamation; XIII. Theft; XIV. Robbery and violence; XV. Adultery; XVI. Duties of man and wife; XVII. Partition (of inheritance); and XVIII. Gambling and betting.

70 For instance, see *Naradasmriti*, XVIII.

71 *Manusmriti*, VIII, 41, 46.

72 VII, 18.

73 Mention here may be made to the translation of *Manusmriti* by Sir William Jones, which came out in 1794. In his preface, he observed:
The style of it (*Manusmriti*) has a certain austere majesty, that sounds like the language of legislation and exhorts a respectful awe; the sentiments of independence on all beings but God and the harsh admonitions even to kings are truly noble....

Manu's Code during the post-*Smriti* period by Medhatithi, Govindaraja, Kulluka and others. Kulluka's text has been referred to for centuries in India and Dr Buhler's translation was made from a recension of Manu given by Kulluka. Mahamahopadhyaya Sir Ganganath Jha has published volumes on the *Manusmriti* with Medhatithi's commentary.

KULLUKA Of the commentaries on *Manusmriti*, the most notable is *Manvarthamuktavali* of Kulluka. In the preface to his translation of *Manusmriti*, Sir William Jones observed:

> It may perhaps be said very truly that it is the shortest yet the most luminous, the least of ostentatious yet the most learned, deepest yet the most agreeable commentary ever composed on any author, ancient or modern.

Obviously, this was superlative praise. Kulluka freely quotes Medhatithi and Govindaraja and attack some of their explanations and comments in a trenchant manner. He directed the shafts of his sarcasm against them and his remarks when he derides them are spiced with malice and made in poor taste. He refers to some of the observations of Govindaraja with sarcastic mockery and in a manner reminiscent of some of the neatest and most pointed of the eighteenth century English satirists. There was no limitation to Kulluka's egotism as might be seen from his own assessment of his exposition and ability as a commentator,[74] but it be said that he was a legist of the first rank. His forte was an ability to reduce difficult rules to the simplest language and logic. There is no obscurity about his style. Master of his subject, he is not altogether free from sophistry in his reasoning. There can, however, be no doubt that the merits of Kulluka's work and of his original technique as a critic are outstanding. His elucidations and amplifications of some laconic expressions and curious terms used by Manu and the occasional obscurity of Manu's texts have for centuries been of great assistance, and his *Manavarthamuktavali* is a very valuable production.

MEDHATITHI Of further commentaries of *Manusmriti*, which are many, reference may only be made to those of Medhatithi, and Govindaraja. Medhatithi, although he shows great veneration for Manu, states that *Prajapati* Manu of the *Smriti* was:

> ...a particular individual perfect in the study of many branches of the *Veda*, in the knowledge of its meaning and in the performance of its percepts, and known through the sacred tradition which has been handed down in regular succession.[75]

74 *Vyakhyataro na jagiraparepyanyato durlabham vab.*
75 I, 58.

Medhatithi sometimes resorts to general propositions, which expose him to the attack that he is begging the question. In matters of law, general statement, unless they weld a formidable mass of particulars, can rarely be convincing. They merely convey 'nothing but a benevolent yearning'. Kulluka does not fail to criticise Medhatithi for this tendency of his. As a rule, Medhatithi's interpretations and comments are instructive and dependable, although, sometimes he indulges in casuistic subtlety, as for instance, when he explains away the oft-quoted verse of Manu permitting remarriage of a widow. This not to disparage the merit of his work which is copiously informative and a landmark in the legal history of Hindu law, and it seems only right to add that most of his broad propositions are the result of reflective generalisations. Medhatithi shows perfect mastery of the *Mimansa* rules and admirable legal acumen. In his *Manubhashya*, he cites freely from earlier *Dharmasutras*. His citations are apposite and selected only for the purpose of elucidation and at times for extracting principles.

GOVINDARAJA The *Manutika* of Govindraja, despite some lapses, gives a faithful explanation of the texts of the *Smriti* and is a reliable commentary. There is not much subtlety. However, there is depth. Govindaraja sometimes illustrates the obvious and is rather elaborate in treatment. He is patiently analytic and pedestrian, but sound in his exposition.

Yajnavalkyasmriti *Yajnavalkyasmriti* or the Institutes of Yajnavalkya, it would seem from relative criteria, must have been compiled in about the first century after Christ. According to one tradition, *Rishi* Yajnavalkya was the grandson of the redoubtable royal sage Vishvamitra. In the introduction to the Code, it is mentioned that it was in an assembly of sages that this *Dharmashastra* was pronounced by Yajnavalkya. It is also stated in this *Smriti*, that the compiler was the same person who was the author of the *Brihadaranyaka Upanishad*.[76] The more acceptable view seems to be that the Code was not authored by the sage of that Upanishad, but was the work of a follower of Yajnavalkya, who hid his identity behind the name of the venerated *rishi*. Support is to be derived for his view from a statement in the *Mitakshara* of Vijnaneshvara, the celebrated expository treatise on this *Smriti*. The Code contains many parallels with other *Smritis* and draws upon and quotes from several of them. Yainavalkya states that the ordained foundations of *dharma* are: 'The *Shruti*, the *Smriti*, the approved usage, what is agreeable to one's self (good conscience) and desire sprung from due deliberation'.[77] The last part of

76 *Yajnavalkyasmriti*, III.110.

77 I.7, Yajnavalkya enumerates in a well-known verse, 14 sources of knowledge and *dharma*: The four *Vedas*, their six *Angas* or subsidiary science; the *dharmashastras*; the *Mimansa* containing rules of exegesis; the *Nyaya* or dialectic philosophy; and *Puranas* or records of antiquity—1, 3.

this text would seem to add one more source of law to those enumerated by Manu.[78] The oft-quoted words of Manu: '*Yet karma kurvatosya syat paritoshantaratmanah...*',[79] which emphasise satisfaction of the inner self as one of the indices of *dharma*, and the expression 'desire sprung from due deliberation' have no bearing on positive law and must be read as having references to *dharma* in its ethical sense. The 'self-satisfaction' mentioned in this context is not any one's self-satisfaction, but of those good persons who were learned in the *Vedas*.[80] The words 'desire sprung from due deliberation' do not incorporate any doctrine of private judgment in law.

The Code of Yajnavalkaya is in the main work founded on *Manusmriti*, but the treatment here is more logical and synthesised. On a number of matters and particularly on question of status of Sudras, of women's right of inheritance and to hold property, and of criminal penalty, Yajnavalkya, although a follower of conventional conservatism is decidedly more liberal than Manu. The influence, though not direct of Buddha 'the enlightened' and Buddhism on the *vyavahara* part of *dharma* of this *Smriti* and the *Smriti* of Narada cannot be minimised. Buddha's teachings, and particularly his message of universal compassion, naturally had effect on certain invidious and rigorous aspect of law and this is reflected in the *Smriti* of Yajnavalkya. Punishments prescribed in this Code are comparatively less severe in case of number of offences. There is greater recognition of rights of women and of the status of Sudras. Yajnavalkya deals with a number of subjects and deals exhaustively with the law of mortgages and hypothecation. He also deals with partnership and associations of person interested in joint business ventures:

> A number of traders, carrying on trade or making profit, shall share profit and loss according to their respective share or according to the compact made between themselves. If any member of a company does an act, forbidden by the general body, or without their permission or negligently, and thereby causes a loss, he shall have to indemnify the others for the same.[81]

(iii) The Post-*Smriti* Period

Adequate importance has not been given in *Manusmriti* to rules of procedure. There are quite a number of verses in *Yajnavalkyasmriti*, which shows that the law of procedure and evidence to be followed in civil disputes had made considerable progress by the time of Yajnavalkya. There are no arid technicalities, but it is clear that by that time some

78 *Manusmriti*, II, 12.
79 *Manusmriti*, IV, 161.
80 *Medhatithi*, II, 6.
81 II, 262, 263, cf Voet: '*Societas est contractus jurisgentium, bonoe fidei consensu constans, semper re honesta, de lucri et damni communione*'.

elements of strict procedure had been found necessary and desirable. Yajnavalkya endorses the rule of pleading, which insists upon all material facts on which a party relies being set out in his statement of claim or defence.

DEVELOPMENT OF LAW OF PROCEDURE

That which is not alleged does not in the eye of law exist even though as matter of fact it might so exist'.[82] Yajnavalkya does not confine justiceable matters to the 18 titles popularised by the author of *Manusmriti*. *Vyavaharapada*, a case for judicial proceeding, arises if any right of a person is infringed or any wrong is done to him in contravention of the *Smritis* or customary law.[83] There are some remarkable verses in *Yajnavalkyasmriti* which challenge any possible assertion of divine right of kings. He exhorts the king to be modest, even-minded and righteous, to give himself in service of his subject and to daily look after the administration of justice. The injunction is: 'whether a brother, a son, a preceptor...none can escape from the punishment of the king, if he deviates from the performance of his own duties'.[84]

Yajnavalkya on the whole is scientific and constructive. Although he is at times unduly elaborate, there is in his work on most of the matters, rigorous exclusion of the inessential. Most of his legal precepts though succinctly stated are full of juridical meaning and import.[85] Sometimes, he introduces in his language an audacious trick of phrase. He has enriched the vocabulary of law with some expressions remarkable for their precision and significance.[86] It is true that the authority of *Yajnavalkyasmriti* was greatly enhanced by the edifice of Mitakshara raised upon it by Vijananeshwara and which commentary is today of pre-eminent importance in the greater part of India.[87] That does not, however, detract from the merits of the work, which has always been accepted as one of the three principle Codes among the *Dharmashastras* and referred to as high authority by commentators of repute and in decisions of the Privy Council.

82 *Mitakshara*, II. 19.

83 I. 5 *Smrityachara vyapetena margenadharshitah paraih: Avedyati chedragne vyavaharapadam hi tat.*

84 I. 358.

85 For instance, the verses relating to partition and the texts about partition per stripes between the members of different branches of joint family. Division of property *rebus sic stantibus* is implicit in those rules. Also, the rule about priority of the title in case of successive hypothecations or sales—II, 23 and the rule about ascertainment of shares of partners—II, 259.

86 In stating the familiar examples of act of state and Act of God resulting in frustration of contract he uses only one word namely, the compound expression '*raja-daivika*'. For 'sources of law' he used the significant expression '*gnapakabetun*'.

87 For other important commentaries on *Yajnavalkya*, see Introduction to the book. For *Mitakshara*, see Introduction to the book.

Naradasmriti

Naradasmriti, also known as *Naradiyadharmashastra*, was compiled in about 200 AD. Narada purports to accord with the ancient writ when he professes merely to be a compiler of the traditional law handed down from the time of Manu.[88] In the introduction to his Code, Narada states that it is an abridgement of the larger work of Manu said to have originally been in one hundred thousand verses. The Code of Narada has come down to us in its integrity. It begins with an introduction and the treatment of the subject is divided into two parts. The first deals with judicature and the second enumerates and discusses with remarkable clarity, the 18 titles of law contained in the *Manusmriti*. Clarity and fidelity to the texts of Manu are not, however, the only merits of the Code. Although, there is a faithful similitude with certain texts of Manu, Narada differs from him on a number of interesting and important points. He is categorical and emphatic in his statement that custom is powerful and overrides and text of the sacred law.[89] His work is systematised and he is exhaustive in his treatment. He does not show any servile adherence to the views of his illustrious predecessors; nor does he shrink from stepping in and declaring rules in conformity with the changes that had taken place in social, economic and political conditions. One great merit of this *Smriti*, is that it states the law in a straightforward manner and logical sequence, which is readily assimilated and in a style which is both clear and attractive. There is euphony in a number of verses of Narada, but he never sacrifices precision to euphony. Narada is renowned for the advanced and progressive view expressed by him on a number of matters. A feature of his *Smriti* is that it deals solely with law (*vyavahara*) and does not contain sections on *achara* or *prayashchitta*. Some of the topics of law dealt with by Narada are inheritance, ownership, property, gifts and partnership. He also treats inter alia of the age of majority,[90] shares of widow and unmarried sister on partition between sons, and recognises separation and remarriage by a woman in certain circumstances.[91] Narada gives some detailed rules relating to payment of interest. After stating the general rules relating to interest, he adds that there can be special rules recognised by usage. There are some rules founded on principles, which are recognised as sound under the modern

88 The colophon in one manuscript in Nepalese character examined by Prof Jolly '*Iti Manavadharmashastre Naradaproktayam Sambitayam*'.

89 *Vyavaharo hi balavan dharmasten avabiyate*—IV, 40. Justinian's compilations are collectively referred to in modern legal literature as the *Corpus juris civils*. In the digest, which is a part of the same, sometimes called the *Pandects* in states: *Quare rectissime illud receptum est, ut leges non solum suffragio legislatoris, sed etiam tactio consensu ominium per desuetudinem abrogātur.*

90 Narada uses the expression '*Vyavaharajnah*' to denote one who is *sui juris*.

91 XII, 96–101.

law on the subject of interest. In certain cases of loans, where no interest is stipulated, interest can begin to run from the date of demand.[92] Narada condemns usury.[93]

An outstanding feature of this *Smriti*, is that it lays down a series of rules relating to pleading, evidence of witnesses and procedure. These rules make interesting reading and reference may be made to some of them. Narada speaks of the plaint as of the essence of a law-suit and stresses the rule that it must disclose a proper cause of action.[94] In dealing with the defendant's reply he states: 'The defendant immediately after having become acquainted with the tenor of the plaint, shall submit in writing his answer, which must correspond to the tenor of the plaint'.[95] 'An answer is four-fold: a denial; a confession; a special plea; and that which is based on a plea of former judgment.'[96] Reverting to the pleading of the plaintiff he adds: 'Before the answer to the plaint has been tendered by the defendant, the plaintiff may amend his own statements as much as he desires'.[97] 'These are called the defects of plaint; if it relates to a different subject; if it is unmeaning; if the amount (relief) has not been properly stated; if it is wanting in propriety; if the writing is deficient or redundant...'.[98] 'He who forsakes his original claim and produces a new one, loses his suit, because he confounds two plaints with one another'.[99] As to burden of proof he rules: 'what the claimant has declared in the plaint that he must substantiate by adducing evidence at the trial'.[1] 'Where the defendant has answered the plaint by means of a special plea, it becomes incumbent on him to prove his assertion, and he is placed in the position of a claimant'.[2] Referring to the decree of the court, Narada says: 'The victorious party shall receive a document recording his success and couched in appropriate language'.[3]

A striking feature of *Naradasmriti* is that it is the first of the *Dharmashastras* to accept and record the principle that King-made laws could override any rule of law laid down in the *Smritis*. The most glorious chapter in the history of ancient India has commenced with the reign of the Maurya dynasty (founded by Chandragupta in 321 BC). Ashoka *devanampriya*, as he is described in his edicts, was another Mauryan emperor who ruled an empire, the boundaries of which extended

92 I, 105, 108, 109.
93 I, 110, 111.
94 Intro I, 6—*Sarastu vyavaharanam pratijna samudahrita.*
95 Intro II, 2.
96 Intro II, 4.
97 Intro II, 7.
98 Intro II, 8.
99 Intro II, 24.
1 Intro II, 37.
2 Intro II, 31.
3 Intro II, 43.

from the Himalayas to the Vindhyas and the eastern ocean to the western ocean.[4] Other emperors and powerful kings who succeeded the Mauryans, while theoretically subscribing to the tradition that law (*dharma*) was mightier than the king, promulgated many laws and edicts and from the nature of things, the king-made laws were bound to be enforced.[5] The monarchs who flourished in that age might well have said like their Roman contemporaries '*Regia voluntas suprema lex*', but as a rule they took care not to say it aloud. Narada concedes the high authority and sanction of King-made laws.[6] He also adds: 'As the king has obtained lordship he has to be obeyed. Polity depends on him'.[7]

Naradasmriti affords great help in deriving reliable knowledge of the line of evolution, which Hindu law and jurisprudence had pursued during the remarkable era of the *Dharmashastras*, it being in point of time the last of three leading Codes. Bryce has observed: 'The law of every country is the outcome and result of the economic and social conditions of that country as well as expression of its intellectual capacity for dealing with these conditions'. There are intrinsic as well as other evidence to show that the work was compiled after there had been remarkable political, economic and social progress in the country, when the highest intellectual capacity of the people had already produced the philosophy of the *Upanishads*, out of which had been developed the doctrine of *karmayoga*, and when considerable advancement had been made

The compiler of *Naradasmriti*, according to Dr Jolly, probably lived in Nepal.[8] This *Smritikar* seems to have attributed the authorship of his compendium to *Devarshi* Narada, one of the great *rishis* of antiquity. That the author is of this and other important *Smritis* should not express their real identity has baffled some writers and the question had at times been posed as to whether some of them were not dilettanti. One reason suggested for this anonymity, a reason not very complimentary, was that by fathering their *Smritis* on ancient rishis in the opening stanzas of their works, they tried to get meretricious authority and age which would not otherwise have been their portion. The more acceptable reason for these jurist-theologians ascribing their works to other seems to be that they were unconcerned about personal fame and the fruits of their efforts and yet anxious to give the people standard works on *dharma*, when they fathered their institutes on the time-honoured sages of the past, some of

4 The country was often called *Aryavarta* and sometimes a part of it was mentioned as *Brahmavatra*—Manusmriti II, 17.

5 *Naradasmriti*, XVII, 25.

6 Intro I, 11–11.

7 'It is for the establishment of order that various laws have been proclaimed by Kings. A royal order is declared to overrule such laws even'—*gariyo raja shasanam*, XVIII, 24; XVIII, 25.

8 There is no reliable data for this opinion.

whom were regarded as the 'first path-finders'. The names of many great thinkers of the *Upanishads* remain similarly undisclosed.

Asahaya's Commentary on *Naradasmriti* Asahaya, who is himself quoted with esteem in a number of treaties and digests, has written the *Naradabhashya*, which is a very useful commentary on *Naradasmriti*. Asahaya lived in about the beginning of the seventh century and is probably the earliest of the leading commentators. A translation by Dr Jolly of the larger of the two versions of *Naradasmriti*, now generally accepted as the authentic text of the Code of Narada, was published in the *Bibliotheca Indica* in 1876. In his edition of *Naradasmriti*, published in the *Sacred Books of the East Series*, Dr Jolly has used Asahaya's commentary. Asahaya shares with other early commentators, the peculiarity of giving illustrations taken from everyday life of his period, with help to throw light on the practice and working of law in those times. The available commentary of Asahaya has not been preserved in its original shape and is not complete.[9]

Parashara

Parasharasmriti is mentioned in the enumeration of Yajnavalkya. Parashara also gives a list of the law-givers. Most of the names in Parashara's list are to be found in the enumeration of Yajnavalkya. He does not mention Yama, Brihaspati and Vyasa, but includes instead Kashyapa, Gargya and Prachetas. The author of this *Smriti* appears to have adopted the name of a revered sage of antiquity, who is referred to in the work as the father of Vyasa. *Parasharasmriti* deals only with the subjects of *achara* and *prayashchitta* and omits discussion of *vyavahara*. Adverting to civil law, Parashara says that certain questions are to be determined by the decisions of a *parishad* or an assembly of the learned. This statement is interpreted by Mr Mandlik to mean that Parashara found the civil law of the *Smriti*, so considerably modified by usage that he felt unsafe to refer his readers to those works and, therefore, invested the verdicts of the *parishads* or conclaves of the learned, versed in the current usages of the country with great authority.[10] Whatever be the reason for omission of *vyavahara* in his work, it does appear that Parashara recognised current usages and customs of the people as transcendent law.

Madhaviya

Madhavacharya's commentary on this *Smriti* is known as *Parashara Madhaviya*, and is often mentioned as the *Madhaviya*.[11] Being a great

9 *SBE*, Vol XXXIII.

10 See *Parishad, Hindu Law*.

11 An English translation of the law of inheritance and succession from this treatise was published by Mr A C Burnel. Other translations of the same are to be found in the publications of Ghosh, *Principles of Hindu Law*, Third edn, Vol II 1917; Setlur, *Collected Texts on Inheritence*, Vol II.

scholar and also the Prime Minister of the great Vijaynagar kingdom, his work is accepted as one of the leading authorities in the South.[12] Madhavacharya in his commentary deals with *vyavaharapada* as well as religious matters treated in the *Smriti* of Parashara.

Brihaspati

The *Smriti* of Brihaspati is unfortunately not available in its integrity. Brihaspati, like Narada, who preceded him is comparatively very unorthodox. A comparison of his work with *Naradasmriti* and other relative criteria would suggest that it must have been compiled one or two centuries after Narada and at a time when in many branches of it, the law had made further strides in its line of development. There are verses on the subject of 'concerns of a partnership', which illustrate this, though it is clear from the available texts that several of Brihaspati's rules on the subject have not been traced. The element of mutual agency in partnership, which is a product of the same commercial necessities as ordinary agency, requires that the business must be carried on by the partners or some of them acting for all. Brihaspati rules that every partner is in contemplation of law, the general and accredited agent of the partnership: 'Whatever property one partner may give (or lent) authorised by many, or whatever contract he may execute, all that is considered as having been done by all'.[13] He also deals with the right of a partner to be indemnified by the firm in respect of an act done by him in an emergency for the preservation of the common stock and the obligation of a partner in his turn to indemnify his partners for any loss caused to them by his negligence.[14] Brihaspati distinguishes civil wrongs and crimes from all titles of law: *Dvipado vyavaharashcha dhanahinsa samudbhavavah*. The content of the incomplete and somewhat scattered rules of this *Smriti* available to us is abundant proof of the reason for the lasting influence of this illustrious authority of Hindu law. Brihaspati gives a number of general principles on a variety of subjects. He is in full accord with the salutary rule that the meaning of words would be such as has been received by common acceptation,[15] and the preferable exposition of any rule of law should be that which is approved by constant and continual use and experience—*optima enim est legis interpres consuetudo.*

The rules of procedure and particularly those relating to pleadings laid down by Brihaspati are a great advance on the adjectival law in operation before his time and which had to be gathered from the sporadic rules of Manu on matters of procedure, the *Yajnavalkyasmriti* and the more

12 *Subbaramayya v Vankatasubbamma* ILR (1941) Mad 989, 1000; *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397, 437.

13 Brihaspati XIV, 5 (*SBE*, Vol XXXIII).

14 Brihaspati XIV, 9, 10, (*SBE*, Vol XXXIII).

15 'The sense attached by current usage is to prevail'—*Rudhiyogamapaharati.*

elaborate rules in the texts of Narada. Brihaspati speaks of four stages of a judicial proceeding: the filing of the plaint; the filing of the reply; trial of the suit having regard to burden of proof and passing of the decree.[16] The requirement of a plaint stressed by Brihaspati are that the pleading must be precise in words; reasonable; brief; rich in content; unambiguous; free from confusion; and devoid of improper arguments.[17] Of a written statement he says: 'One should not cause to be written and answer which wanders from the subject; or which is not to the point, too confined or too extensive, or not in conformity with the plaint, or not adequate or absurd or ambiguous'.[18] Disposal of a suit *ex parte* was discouraged and, if possible, the defendant was by processual law to be compelled to make his reply.[19] One of the processes adopted has its analogue in the writ of early English law *Capias ad respondendum*, under which an absconding defendant in a civil action was arrested or obliged to give special bail. Brihaspati laid down that it should be only in case of failure of the process of law that the decision should go against the defendant and give to the plaintiff the relief sought by him.[20] He gives a set of rules regarding witnesses and documentary evidence and treats of estoppel[21] and adverse possession.[22]

The author of this *Smriti* appears to have adopted inappropriately the name of Guru Brihaspati, the venerated *rishi* who according to Hindu mythology was the preceptor of the God and whose name was immortalised by associating it with Brihaspati, the largest planet of the solar system. That planet, it may not altogether be amiss to observe, is believed to be concerned with law. Brihaspati does not state masses of verses to be learnt by rote. He does not revel in the use of words, but prefers exactitude and his definitions are verily definitive. His rules are coherent and consistent and he does not give any undifferentiated details. Many of his original pronouncements are vested with concrete significance and he takes a spinozistic view of the whole system of law. Though available in parts, which are incomplete, and in some cases broken of, it is one of the most readable of the *Smritis* and is written in a arresting style. There is remarkably skilful use of assonance in some of the verses of Brihaspati, but nothing is given upto the exigencies of metre. In a verse of fundamental importance, he perfected the doctrine about invoking the aid of equity and enjoined that a decision must not be made solely

16 Brihaspati III. 12 (*SBE*, Vol XXXIII).
17 Brihaspati III. 5, 6. (*SBE*, Vol XXXIII).
18 Brihaspati IV. 8 (*SBE*, Vol XXXIII).
19 Brihaspati IV. 2, 3. (*SBE*, Vol XXXIII). There are some texts on procedural law, which are ascribed both to Brihaspati and Katyayana.
20 Brihaspati IV. 4 (*SBE*, Vol XXXIII).
21 Brihaspati IX. 9.
22 Brihaspati Ch IX.

by having recourse to the letter of the written codes.[23] M Kane has observed that the complete *Smriti* 'will be, when discovered, a very precious monument of ancient India, exhibiting the high watermark of Indian acumen in strictly legal principles and definitions'.[24] Dr Jolly undertook the arduous task of reconstruction of this *Smriti* from the available sources and collected and arranged the legal texts (verses) attributed to Brihaspati from the works in which they were quoted. An English translation of those verses is published in the *Sacred Books of the East Series*. Dr Jolly has observed: 'The fragments of Brihaspati are among the most precious relics of the early legal literature in India'.[25]

Katyayana

The *Smriti* of Katyayana also is unfortunately not available in its integrity. Texts from this *Smriti* are copiously quoted in all the principal commentaries. A noteworthy feature of this *Smriti* is the variety of subjects dealt with in it and the rules of adjectival law there stated and which go to show the progress made in that branch of the law by the time of Katyayana (4th or 5th Century AD). The topics dealt with by Katyayana have a wide range. In procedural law, they range from judicature and pleadings to means of proof and probative value of different types of evidence. Another notable feature of this *Smriti* is that the king, despite his lordship over the land, is not accepted as the owner of the soil. Ownership in land is declared to belong to the subject and the king is not entitled to claim anything more than one-sixth of the produce by way of land revenue.[26] Katyayana is emphatic when he says that the king should resort to the dictates of the *Dharmashastra* and exhort him not to be guided by considerations of policy favoured by the *Arthashastra*.[27] The most striking feature of this *Smriti*, however, is its treatment of the law of *stridhana*. The whole law relating to the rights of a woman over her *stridhana* has been evolved from a text of Narada and certain texts of Katyayana.[28] The available verses of Katyayana relating to woman's property and her power of disposal over the same became the subject-matter of elaborate critical study by later commentators, as he was probably the first of the *Smriti* writers to discuss the subject in some detail. There is discernible here a blend of empiricism and rationalism.

There are many interesting verse of Katyayana dealing with adjectival law. Rule of the law of pleading from *Katyayanasmriti*, quoted by the

23 *Kevalam shastramashritya na kartavyo hi nirnayah: yuktiheen vichare tu Dharmahanih prajayate.*
24 Vol I, p 207.
25 *SBE*, Vol XXXIII, p 211.
26 *Bhoolanam swamitwam.*
27 *SBE*, Vol XXXIII, p 271.
28 See § 113.

commentators, clearly go to show that this *Smriti* marks an advanced stage of development in adjectival law. In a verse in the Mitakshara, Katyayana is quoted as enumerating the form and nature of a reply (written statement) 'a confession, a denial, a special exception and a plea of former judgment (*res judicata*) are the four sorts of answers'.[29] Katyayana is more liberal than his predecessors in the matter of allowing amendments in pleadings. In considering probative value of evidence, Katyayana states that positive oral testimony should carry more weight than a mere inference, and documentary evidence speaks louder than oral testimony.[30] He treats of judicature at some length and lays down the requisite qualifications of a judge[31] and jurors who it seems assisted the judge in certain types of cases both civil and criminal. In dealing with adverse possession and limitation, he draws the necessary distinction between possession de facto and mere ostensible possession by any person amounting really to custody.[32]

There are numerous verses of Katyayana, which bear the impress of the rules laid down by Narada and Brihaspati and it is clear that he has rephrased, clarified and expanded a number of texts from their *Smritis*. Katyayana maintains unimpaired and distinctive qualities of the *Smriti* of Brihaspati to which he freely refers. His exposition is authoritative and remarkable for its freshness of style and vigorous approach. There can be little doubt that this *Smriti* must have been brought into line with current law. It must have commanded a wide appeal as may readily be gathered from the profuse manner in which it has been quoted in all the leading commentaries.[33] The *Smriti Chandrika*[34] alone, it has been reckoned, quotes nearly 600 verse of Katyayana. The arduous task of collecting all the available texts of Katyayana from numerous commentaries, and digests was accomplished by Mahamahopadhyaya Kane, who collated and published in 1933 about 1,000 verses of the *Smriti* on *vyavahara* with an English translation.

There are number of other *Smritis*, none of which can be said to have come down to us in a complete form. Praiseworthy efforts and research by western and Indian jurists and scholars during the last hundred years have resulted in the collection of a number of old manuscripts. Unfortunately, only fragments of some of these *Smritis* have been traced and in case of some others, all that we have are isolated references to

29 Katyayana describes these four answers in detail; Narada I, 4.

30 *Anumanad gurub sakshi: sakshibhayo likhitam gurub.*

31 Some of these are: he should be well-equipped in law; impartial; balanced; firm, temperate; industrious; free from anger; merciful and intelligent.

32 Enjoyment by any such person does not create any title in him—*Bhogat Tatra na siddhi syat.*

33 There are some texts which are ascribed both to Brihaspati and Katyayana.

34 See *Smriti Chandrika*, Introduction to the book.

and stray quotations from them in the commentaries and digests.[35] The authentic existence of most of these is not in doubt in view of the fact that they are mentioned in other *Dharmashastras* and referred to as recognised authorities by the commentators. Of these, mention may be made of the *Smritis* of Vyasa, Samvarta and Devala. Vyasa and Samvarta are included in the enumeration of Yajnavalkya.[36] Vyasa and Devala appear to have adopted the names of very ancient and venerable seers mentioned in Hindu scriptures.[37] The *Smriti Chandrika* is plentiful in citations from their works.[38] Apararka also quotes freely from these *Smritis* in his massive treatise.[39] According to Vyasa, all wealth given to a wife by her husband was her absolute property.[40] As to the contents of judgment and decree of a court, he states that it should give an abstract of the pleadings, of the evidence on record, discussion of the questions that arise for determination and the law applicable to the same. Devala is one of those progressive and liberal *Smritikars*,[41] who recognised remarriage of women in certain events.[42] Texts from his *Smriti*, and particularly those relating to partition of heritage and succession, have been quoted in a large number of works and in numerous decisions of courts. Texts from the *Smriti* of Samvarta are cited in many works. This *Smritikar* laid down some equitable rules relating to the law of interest.

Arthashastra of Kautilya

No conspectus, howsoever brief, of the sources from which knowledge of Hindu law and of the stages of its legal literature may be derived, can omit to notice the *Arthashastra* of Kautilya, who according to the most firmly established tradition, was the celebrated Chanakya whose praenomen was Vishnugupta. The work is not a *Dharmashastra*, but a masterly treatise on ancient Indian polity and a veritable reservoir of rule inter alia

35 In the 7th Century AD, Hsuan-tsang, the most famous of the Chinese travellers, who came to India, and qualified as a Master of Laws at the Nalanda University, wrote in a letter to an Indian friend 'Among the *Sutras* and *Shastras*, that I Hsuan-tsang, had brought with me I have already translated—in all thirty volumes'—Dr PC Bagchi, India and China. Hsuan-tsang spoke highly of the administration of justice in India. A number of works taken by him were lost on the way.

36 See *Smritikars*, Introduction to the book.

37 *Bhagavad Gita Discourse*, X, 13.

38 See *Smriti Chandrika*, Introduction to the book.

39 Ibid.

40 *Yachcha bhartra dhanam dattam sa tyathakamaam apnuyat.*

41 He is mentioned in the list of *Smritikars* given in the Padmapurana: The *Padmapurana* lists 36 compilers of law. The name of Arti mentioned in *Yajnavalkyasmriti* is not mentioned. To the other 19, are added Marichi, Pulastya, Prachetas, Bhrigu, Narada, Kashyapa, Vishvamitra, Devala, Rishyashringa, Gargya, Baudhayana, Paithinashi, Javali, Samantu, Parashara. Lokakshi and Kuthumi.

42 See Introductory Note to the Hindu Marriage Act 1955.

relating to the duties of a king, his administration including administration of justice, laws, courts of law, legal procedure, taxation, rights of women, marriage, divorce and numerous other matters, would form the subject-matter of philosophy,[43] sociology, economics and hygiene. In discussing the duties of a King, Kautilya said:

> In the happiness of his subject lies his happiness; in their welfare his welfare; whatever pleases himself he shall not consider as good, but whatever pleases his subjects he shall consider as good.[44]

Arthashastra means the science of polity. The word '*Artha*' is at times understood in a mundane and derogatory sense, but the connotation of *Arthashastra* is of *dandaniti* or the science of government. The compendium deals with matters worldly as distinguished from religious, and principally with the state and its governance. Kautilya stresses the importance of *dandaniti* and observes that according to the School of Ushanas, 'there is only one science and that is the science of government; for they say, it is in that science that all other sciences have their origin and end'. A number of Kautilya's precepts and maxims having bearing on the welfare of the state and the king are founded solely on considerations of policy. With scientific application of principles of utilitarianism, he builds up his theory and science of governance. Some of his tenets proceed on the assumption that human nature consisted not of social benevolence but of self-love, the instinct of self-preservation and of self-seeking activity. Like Hobbes, the English political philosopher, he would have the state supreme in all matters affecting the mutual relations of men and like the Leviathan encompass, all living beings. He endorses empiricism in philosophy and utilitarianism in politics and law. In some matters of politics, he endorses unscrupulous statecraft like the Florentine author of *Del Principe*. It is not necessary, however, to refer here to any of his Machiavellian propositions on the subject of polity.

The authentic text of the *Arthashastra* of Kautilya—although, it was mentioned and extracts from it were quoted in numerous ancient works and historical monographs—was not available until its discovery in 1909, when it was translated and published by Dr Shamasastri. Dr Jolly and Dr Schmidt also brought out an edition of Kautilya's *Arthashastra*. This monumental work has since its first publication started controversies about the work itself, its date and the identity of its author. Most historians are agreed that it was Vishnugupta Chanakya and author of Kautilya-*Arthashastra* who successfully helped and guided Chandragupta Maurya in establishing a mighty empire in the 4th Century BC. Megasthenes, the

43 Kautilya speaks of philosophy as 'the lamp of all sciences, the means of performing all the works, and the support of all the duties'.

44 Bk I, Ch XIX, para 39.

Greek ambassador at the court of Chandragupta, Justin the Greek writer and some others refer to Chandragupta as Sandrocottos. When, Alexander conquered Punjab, a large part of Northern India remained under the sway of the last of the emperors. The Nandas were exterminated by Chandragupta, who also defeated Seleukos, the general of Alexander, who on the death of Alexander had inherited the eastern countries conquered by the latter. Justin and many historians are agreed that India shook off the yoke of servitude soon after the death of Alexander in 323 BC and that the author of this liberation was Chandragupta. In his work, Kautilya points out how foreign ruler drains the country of its wealth (*apavahayati*) and squeezes out of it as much as possible by exaction and taxation (*karshayati*). At the end of his work, Kautilya claims that he has liberated the country from misrule and further states: 'Having seen discrepancies in many ways on the part of the writers of the *Shastras*, Vishnugupta himself has made (this) *Sutra* and commentary'. His approach being always practical, he is averse to theoretical speculations. He does not offer his homage to a number of earlier doctrines in matters of law and carries his legal propositions to their logical consequences.

One of the controversies that arose after the discovery of the *Arthashastra* was whether at any time, king-made law had higher authority than the law promulgated in the *Dharmashastras*. Some scholars were emphatic in their view that such was the case. The relevant text in the *Arthashastra* is: 'Sacred law (*dharma*), evidence (*vyavahara*), history (*charitra*), and edicts of king (*Rajashasana*) are the four legs of law. Of these four, in order, the later is superior to the one previously named'.[45] The question really falls within the purview of legal history. It may not be amiss, however, to observe that the *Arthashastra* was written at a period in the history of India during which law and politics were not accepted as wholly and strictly controlled by ancient rules of *dharma*, but as matters to be dealt with severally and freed from religious domination. In actual practice, the edicts and ordinances of the powerful Mauryan emperors like Chandragupta and Ashoka,[46] and the kings who succeeded them, were from their very nature and by reason of the sanction behind them, bound to be accepted and enforced without any challenge even when they did not accord with the *Smriti* law. Administration of justice (*danda*), vested in the king and those emperors and Kings laid down numerous law according to their own judgment and to suit the felt necessities of the people over whom they ruled at a time of remarkable political, economic and social progress. Yajnavalkya, although he does not recognise the authority of king-made law does refer to the same: *Dharmo rajakritaschayah* meaning, 'the law that is promulgated

45 III, Ch I, para 150.

46 See *Dharma*, Introduction to the book.

by the sovereign'.[47] Similarly Narada, as has already been pointed out,[48] concedes the high authority and sanction of king-made laws. Kautilya himself subscribes to the view that the king and the laws were created by the people and that laws were of popular origin. According to him, the king at the time of his coronation affirmed that his prerogatives and powers emanated from the people and his oath was really and oath of service to the people: 'May I be deprived of heaven, of life, and of progeny, if I oppress you'. Narada, after stating that the king had been appointed to administer justice and decide lawsuits, adds, 'Avoiding carefully the violation of either the sacred law or the *Arthashastra*, he should conduct the trial attentively and skilfully'.[49] This and other relevant data would seem to indicate that, as far as possible the edicts and ordinances of the kings so operated as not to disturb any fundamental concepts or rules of law embodied in the *Dharmashastras*, and it would seem from the *Arthashastra* itself that theoretically, at least Kautilya regarded king-made law and rescripts as a set of rules and announcements operating within the matrix and framework of the traditional law embodied in the *Dharmashastras*.

The work is not a *Dharmashastra* and is not to be understood as a source of Hindu law. Its very importance, however, is that it throws a flood of light on a number of matters including law and its administration before the time of the metrical *Smritis*. It gives invaluable information on a variety of subjects, such as social stratification and organisation of matters of administration, internal and foreign, civil, military, commercial, fiscal and judicial. The work is divided into 15 books (*adhikaranas*) and 150 chapters, which are admirably arranged. Book III deals with *dharmasthiya* that is with matters 'concerning law'. In Book IV, are discussed numerous matters affecting administration of justice including 'measures to suppress disturbance to peace', crimes and punishment in case of various offences. It may be of interest to note that some of the matters treated in this masterly compendium relate to municipal administration; co-operative undertaking; juvenile delinquency; investigation in case of sudden death; vagrancy; and superintendence of slaughter-houses, liquor shops, passports, etc. Punishments prescribed for certain offences relating to morality and social hygiene, were severe and in some cases, gruesome and unspeakable. Caste entered in a conspicuous manner and privileges and the disabilities of caste are reflected in the nature of offences mentioned in the *Arthashastra* and the punishments to be meted out to the offenders. Kautilya, however, adds:

> Whoever imposes severe punishment becomes repulsive to the people; while he who awards mild punishment becomes contemptible; but whoever

47 II, 186.
48 See p 26.
49 I, 37.

imposes punishment as deserved becomes respectable;... punishment when ill-awarded under the influence of a greed or anger or owing to ignorance, excites fury even among hermits and ascetics dwelling in forests, not to speak of householders.

The work is in the *Sutra* style. Kautilya prefers prose to verse and comparatively the number of verses in the *Arthashastra* is not large. There is economy of language, which is easily perceptible. There are some expressions, which the author admits to have been coined by him, and some expressions which are antiquated. The work bears on its face, the evidence of skilful and masterly treatment, and clearly shows that it is by an authority second to none on the subject. The style is singularly lucid, and at the same time felicitously forceful. Kautilya's generalisations are as precise as possible and many of his observations are of absorbing interest.

Judicature was a head to which some importance was attached by the authors of the metrical *Smritis*, though it is from the *Arthashastra* of Kautilya that it is possible to get more vivid and detailed information on the subject. Constituted judiciary as now understood did not exist in the Vedic era and there is hardly any data available on the subject of judicature from the literature of the pre-*Sutra* period. In ancient India, the bulk, if not the whole administration of justice was carried on in popular assemblies known as the *Sabha* or *Samiti*. These were deliberative bodies assembled for discussing public business and also served as the forum for the purpose of judging the cases which were brought to them.[50] The King mentioned in the very ancient works, is not a ruler of a large state but the head of any autonomous clan. There is no reliable history of the territorial kingdoms, which flourished before the establishment of the empire of Mauryas with its strong central government and duly constituted courts of law. Nor do we find any exposition of the subject of judicature in the *Dharmashastras*. Gautama, the earliest among the authors of the extant *Dharmasutras*, speaks only of the exercise of *danda* and of administration of justice by the king in conformity with the institutes of the sacred law.[51] Vasishtha enjoins the king to punish those who transgress the law and inflict punishment in accordance with the precepts of the sacred records and with precedents.[52] There is no reference to any centralised judicial system and there seems to have been little interference by the king with the traditional local tribunals, which functioned in matters of local importance including dispensation of justice.

The *Arthashastra* of Kautilya was written when India was politically and administratively unified and there was consolidation of power in the

50 A very exalted position was ascribed to the *Sabha* and *Samiti* in the *Vedas*: *Sabha cha ma samitischavatav prajapaterduhitarau samvidane* (*Atharvaveda* VIII, 12).

51 XI, 28; XI, 19.

52 XIX, 8, 10.

hands of the emperors,[53] whose writ ran in the whole country. Here, we have a comprehensive account of administration, which show that no *a priori* limitation was set on any state activity. Kautilya gives a vivid description of the King's courts of justice. There was the court for the *sangraha*, which was for a group of 10 villages; there was the court for the *dronamukha* which was for a group of 400 villages; and there was the court for the *sthaniya* which was for a group of 800 villages; and there was above them all the court presided over by the king's judges. A remarkable feature of the treatment of the subject by Kautilya is that he does not attach any importance to the local jurisdictions, which had been functioning for many centuries. He does not expressly mention any supplementary jurisdictions and only speaks of the establishment of the King's courts. The traditional local authority (village community) represented a national system of local self-government and local jurisdiction. It would seem that though a network of King's courts were established, the local jurisdictions had not disappeared. There was certain amount of institutional continuity, although the King's courts were naturally superior in their universal extent and stability and the sanction behind them.

During the *Smriti* period, there was remarkable progress in and unification of law both substantive and adjectival. This is noticeable in any texts of Manu and Yajnavalkya, but we get a much better idea of the adjectival law including judicature from the *Smritis* of Narada, Brihaspati and Katyayana. Manu speaks of the royal court (*sabha*) staffed by experienced councillors and directs the king to administer justice in the *sabha* and to decide cases which fall under the 18 titles of law according to principles drawn from local usages and from the institutes of the sacred law.[54] Manu also speaks of administrative units consisting of one, 10, 20, 100 and 1,000 villages,[55] and from this and other texts of these *Smritikars*, we get some information about the hierarchy of courts with the king as the final arbiter. The tribunals set forth by Yajnavalkya[56] and other later *smritikars* as *kula*, *shreni* and *puga* were not forums of private arbitrament but they functioned as tribunals noticed and approved of by the leading *Smritikars*, and accepted as part of the judicial machinery, both by the king and the people. Broadly speaking *kula* means an assemblage of persons of the same family or community or tribe or caste or race. The meaning of the expression in the present context is a family council. However, the word 'family' is to be understood as one of wide import and as inclusive of members of a caste of tribe. *Shreni* means a corporation or company of artisans following the same business. It also means a guild or association or traders in any branch of commerce. It

53 See *Smritikars*, Introduction to the book.
54 *Manusmriti*, VIII, I, 3-8; VIII, 9–11.
55 *Manusmriti*, VII, 115.
56 *Yajnavalkya*, II, 30.

may be observed *en passant* that by the time of Yajnavalkya, there was unprecedented progress in trade and industry and we read of Indian merchants sailing the seven seas. *Puga*, in its broad sense, means an association or a union or an assembly. The expression in the present context has the element of habitance and means persons living in a village or town or city. Narada uses the parallel expression *gana* instead of *puga*. The leader of the local assembly was designated *ganapati*. Narada says: 'Gathering (*kula*), corporations (*shreni*), assemblies (*gana*), one appointed (by the king) and the king himself, are invested with the power to decide lawsuit; and of these, each succeeding one is superior to the one preceding in order'.[57] Brihaspati also refers to this network of courts. He speaks inter alia of courts of itinerant judges functioning from place to place and describes the court headed by king's chief justice as *mudrita*.[58] The last mentioned court had the privilege of using the king's seal. He states:

> Let the king or a member of a twice-born caste officiating as chief judge try causes, acting on principles of equity, and abiding by the opinion of the judges, and by the doctrine of the sacred law. When a cause has not been duly investigated by *kula*, it should be decided after due deliberation by *shreni*; when it has not been duly examined by *shreni*, it should be decided by *puga*; and when it has not been sufficiently made out by *puga*, it should be determined by appointed judges. Judges are superior in authority to *kula* and the rest; the chief judge is placed above them; and the king superior to all.[59]

The King's court was the ultimate court and, in theory, presided over by the King, though in practice, it must have mostly been headed by the chief justice (*pradvivaka* or *dharmadhyaksha*).[60] These different component parts of the judicial machinery show that even under a strong centralised government, considerable autonomy was left in matters of local and village administration and in matters solely affecting trader's guilds, bankers, and artisans. The stubborn vitality of these functional jurisdictions of the village community and the guild of merchants withstood strong central government and anarchy alike, because they were deep-rooted in tradition. It is of some significance to note that modern legislative theory encourages arbitrament by domestic forum in case of members of commercial bodies and associations of merchant, and recent legislation in India confers jurisdiction of village *panchayats* to try certain causes. What at first sight may appear to have been parallel or competing jurisdictions, were really functional organisations rooted in autonomy and so dovetailed as to

57 *Naradasmriti*, Introduction, p 9.
58 Brihaspati 1, 2, 3 (*SBE*, Vol XXXIII).
59 Brihaspati 1, 24, 30, 31 (*SBE*, Vol XXXIII).
60 *Naradasmriti*, Introduction, p 24.

remain homologous with the supreme authority of the king's courts in the administration of justice. It is not possible to say from the texts of the extant *Smritis* or from the expositions of the leading commentators, that we have the complete picture on the subject; and it is true that none of the extant treatises gives complete rules of adjectival law. However, it would be inaccurate to say that they give nothing more than haphazard collections of precepts and precedents, as it would be inaccurate to suggest that they give an adequate and exhaustive code of coordinated rules affecting judicature and procedure.

However ponderous or exhaustive a code might be, it cannot provide for all varieties of matters or all situations that might crop up for consideration, and this is particularly so of rules of procedure. Attention has already been invited to some important and significant rules of procedure and to the development made in this branch of the law by the time of Narada, Brihaspati and Katyayana. For all, that it must be conceded that while the leading *Smritikars* gave elaborate rules on matters of substantive law, the rules of procedure which may be gathered from the extant work do not embrace all the heads of procedural law and are indeed wanting in fullness and even scanty on some topics. One reason for this paucity of rules seems to be that some of the topics were regarded as matters to be governed by practice of the court, rather than by inflexible and mandatory rules of procedure. There are some texts of the *Smritikars*, which go to suggest that the court ought not to be bound and tied by too many rules of procedure and that every court is the master of its own practice—*Cursus curiae est lex curiae*. The provisions contained in these ancient treatises do not give any comprehensive code of procedure and there are a number of rules which must seem defective when judged by modern concepts. A critical summation of the true position has been given by Sir S Varadachariar, the eminent jurist:[61]

> Whenever, wherever and so far as circumstances permitted, attempts were all along being made...to administer justice broadly on the lines indicated in the law books. The defects and deficiencies, sometimes serious, must have been the result of the geographical features and the political history of the country.

There were bound to be some variations and even conflicts between the texts of one *Smriti* and another, or even between some texts in the same *Smriti*. The *Smritikars* themselves were conscious of this and tried to deal with the problem in the first place by declaring: 'That *Smriti* (or text of law) which is opposed to the tenor of Manu is not approved'.[62]

61 Hindu Judicial System, p 258.

62 *Manvarthavipareeta ya sa Smritirna Prashasyate*—Brihaspati XXVII, 3 (*SBE*, Vol XXXIII).

In actual practice, this maxim was not strictly followed and effect was at time given to texts of later *Smritikars*, on the ground that they were more in accordance with approved usage or by availing of some principle of exegesis. Another rule of preference stated by Narada was that: 'in case of conflict between *Smritis* decision should be based on reason'.[63] Narada supplemented this rule of his by stating that: 'Custom is powerful and overrides the sacred law'.[64] As far as possible, attempts were made to reconcile the texts by taking the view that the conflict was not real, but only apparent.[65] At times, an apparent conflict was resolved by taking the view, not without some difficulty, that the less favoured text properly understood was of the nature of a statement of fact and not any rule.[66] Where, however, the contradictions were patent and irreconcilable, there was the option to prefer one of the contradictory matters.[67] However, the most salutary rule of them was stated by Yajnavalkya, who with his intrepidity and powerful sense of justice ordained that: 'Where two *Smritis* disagree, that which follows equity guided by the people of old should prevail'.[68] *Nyaya*, which is the context of this rule means natural equity and reason[69] was, therefore, to prevail in case of conflicting rules of law.[70]

Mimansakas

However, even apart from cases of conflicting texts, the fixed and authoritative formulae of which the *Smriti* texts were embodiments, suffered from the same defects to which any *litera legis* is subject. The *Mimansakas* gave rules of exegesis which, though primarily intended as aids for the interpretation of rules contained in the *Vedas* and other *Dharmashastras* relating to ceremonial observances and sacrifices, were applied, though not with uniformity, in construction of texts also of *vyavahara* or municipal law. Assistance was derived in the task of interpretation from the rules of *Mimansa* of which Jaimini was the greatest exponent. Aid was also sought from the *Nirukta* of Yaska who is the earliest of the

63 *Dharmashasra virodhe tu yuktiyukto vidhih Smritah* — IV, 40.

64 *Vyavaharo hi balavan dharmasten avahiyate* — IV, 40.

65 One of the leading aphorisms of Jaimini is: 'Contradictions should not be too easily assumed'. He asserts that apparent inconsistencies are at times not actually so; they merely consist in difference of application—*Prayoge hi virodhah syat*— II, i. 9.

66 Apastamba, II, 6, 14, 13.

67 This was referred to as *Vikalparupatadhikaranam*—Jaimini, X, viii.

68 *Smrityorvirodhe nyayastu balvan vyavaharatah*—IV, 20.

69 In the case of early statutes, English jurists and lawyers often appealed to the 'reason of the law'; see *Bacon's Abridgment of the Law*; Title Statutes. This way of interpretation, though not encouraged by rules of construction, application to modern statutes is not, however, altogether unknown.

70 For conflict between *Smritikars*, Introduction to the book.

known exegetes. The *Mimansakas* were not merely exegetes but also logicians.[71]

When the language of a text was not only clear and unequivocal, but admitted of only one meaning, such language was regarded as best declaring the intention of the lawgiver and accepted as decisive.[72] Where, however, the meaning was not self-evident, the sense could be gathered by availing of the principle of necessary implication.[73] Although, the foremost rule and one repeatedly stressed by the *Mimansakas* embodied the cardinal principle of literal construction,[74] words of sufficient flexibility and of doubtful import could be construed in the sense, which if apparently less correct grammatically, was more in harmony with the intent of the lawgiver; that intention, where possible, was to be gathered by recourse to the principles of syntactical[75] or contextual[76] construction. The *Mimansakas* have laid down some clear, logical and distinctive rules, which permit departure from the rules of literal construction and have also indicated the order in which those rules are to be applied. Those rules do not compare unfavourably with the rules stated in modern treatises on the subject of interpretation of statutes. Where not fettered by any mandatory rule, the judicial interpreter was free to accept that meaning of the text, which was supportable solely by the reason of the law. Then again, resort was had to suppositions of law by inquiring into what was implied by the text and giving it more rational interpretation. This was akin to what the later Roman jurists called *fictio juris*. Study of

71 In *Ramchandra v Vinayak* (1914) 41 IA 290, the Privy Council observed:
The Hindu law contains its own principles of exposition, and questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, but must depend for their decision, on the rules and doctrines enunciated by its own law-givers and recognised expounder. An observation to the same effect was made in *Ram Singh v Ugar Singh* (1870) 13 MIA 373.

72 This rule of literal construction was referred to as the *Shruti* principle—*Nirapekshah revah shrutih*.

73 Apadeva, author of a number of treatises on *Mimansa*, deals freely with this subject (*kalpya*), which is covered by the principle of interpretation called *linga*. Inference could be employed in settling the sense either of a word or sentence—*shabadsamarthayam lingam*. The meaning derived by necessary implication is by adopting the principle of *lakshanartha*.

74 Where this primary rule governed a case, no other rule of construction could be brought in aid—*Shruti linga vakya prakaranasthana samakhyanam samavaye paradaur-balyamartha viprakarshat*— Jaimini, III, iii 14.

75 Syntactical connection is referred to as the use of *vakya* principle: *Samabhiryaabaro vakyam*.

76 Construction by emphasising interdependence between passage is called *prakarana—ubhayakanksha prakaranam*. The *Mimansakas* also laid stress on the importance to be attached to sequence—*Sandigdheshu vakyasheshat*—Jaimini, I, iv 29.

Mimansa was regarded as an integral and essential part of the study of the *Shastras*. Of Jaimini's *Mimansa* Colebrooke observed:

> The logic of the *Mimansa* is the logic of the law—the rules of interpretation of civil and religious ordinances. Each case was examined and determined upon general principles; and from the cases decided, the principles may be collected. A well-ordered arrangement of them would constitute the philosophy of the law, and this is, in truth, what has been attempted in the Mimansa.[77]

Mention must here be made of the Mimansa treatise, *Tantra-Vartika*, the commentary of the versatile writer Kumarila Bhatta. The celebrated work of Kumarila is a commentary on certain important part of the *Mimansa-Bhashya* of Shabara Swami. Shabara's work treats of the *Purvamimansa Sutras* of Jaimini. The commentary of Kumarila is an encyclopaedic treatise and a veritable mine of information on *Dharmashastra*. Mahamahopadhyaya Sir Ganganath Jha's Translation of Kumarila's work was published in 1924 in the *Bibliotheca Indica*.

In the history of Hindu law, creative and critical period succeed each other and it was the post-*Smriti* period, during which Hindu law and jurisprudence reached a remarkable stage of progress and assimilation. If the productive era of the *Dharmashastras* was the golden age of Hindu law, then this was the period of critical inquiry, expansion and consolidation. The ancient aphorisms of the *Sutrakars* and the earlier *Smritis* were compiled when the spiritual motive dominated life. The *Smritis*, though accepted as 'revelations remembered', were themselves partially based on usages and practices and did not profess to comprehend every aspect of *vyavahara*. Questions of law were not decided by reference merely to the rules propounded by the early *Smritikars*. The salutary rule, that in course of time had come to be accepted and emphasised by the *Smritikars* themselves, was that cases were also to be decided agreeably to such usages and customs as were approved by the conscience of the virtuous and followed by the people. This, from its very nature, contributed to the growth of Hindu law by introducing innovations and modifications in what was in theory attributed to divine precepts, otherwise unalterable, owing to their emanation from the deity. Usage when established, outweighed the written text of law. The *Smriti* law had a rational synthesis and went on gathering into itself modified and revised concepts of jural relations and things.

An auxiliary to this process of development was the contribution of the commentators who did not hesitate to interpret and mould the ancient texts, so as to suit the needs of a progressive society. Without claiming any delegated authority of claiming paramount power, they of

77 *Miscellaneous Essays*, p 342.

their own initiative helped in the process of development that was going on. Questions grew up around situations, round matters of frequent occurrences and round the problems of interpretation and application that derive from every text of law. A comprehensive and homologous view of the contents of the *Smritis* required synthesising of what was at times presented in an unsystematic form and the bringing out of the mutual co-ordination or subordination of single texts and detached passages. The aphorism of the *Sutrakars*, though not intrinsically obscure, were often concise to excess and at times elliptical. Some of the rules of *Smriti* law expressed general principles without the necessary qualifications and exceptions and were therefore of the nature of propositions much too absolute. A number of rules were of the nature of maxims of the law, and had the merits and defects common to such maxims. Being brief and pithy statements expressed in form of metrical redactions, they often constituted a species of legal shorthand requiring interpretation and exposition in the light of expert knowledge. Moreover, the fixed and authoritative formulae of which the *Smriti* texts were embodiments, suffered from the same defects to which any *litera legis* is subject. Then again with so many recognised authors of the *Dharmashastras*, differences and even some conflicts of opinion on points of law were naturally to be expected. Reference has already been made to some of the principles of exegesis relied upon by the *Smritikars* themselves who realised the various difficulties in the way of evolving one system of law out of numerous *Smritis*.[78] Besides, the *Smritis* were not exhaustive. Points of law apparently not covered by the textual-law were naturally cropping up from time to time and many lacunae in the texts were clearly discernible. The commentaries being dissertations on law, had in the nature of things to take notice of all this. Under the guise of critical interpretations of the *Shastras*, the commentators resorted to construction by implication and inferences, or supplied such omissions, or did both. It was in this and in their task of reconciling some of the inconsistencies and occasional conflicts found in the *Smriti* texts and in their treatment of vague and ambiguous texts that the commentators really excelled. The import of some of the terms employed by the *Smritikars* was complex and the intimate and indissoluble connection, which existed between some of them, demanded dissertations, long, intricate and coherent. When dealing with the 18 titles of law, which they felt, bound to recognise the commentators, did not consider them as watertight compartments. They looked upon them as matters of classification and not necessarily legal treatment. In the task of interpretation, the rules of *Mimansa* were availed of by these commentators, but not invariably. What the commentators had recourse to were the

78 See *Smriti*, Introduction to the book.

principles of exegesis to be found in the *Smritis* themselves and the *Mimansa*; rules of logic (*tarka*); dialectic philosophy (*nyaya*); rules of grammar (*panini*) and approved methods of construction. The cardinal rule or literal construction,[79] and many of the crystallised exceptions to this rule discussed by modern English authors, with which exception laws in India are so familiar, were borne in mind by these commentators and many doubtful points were solved by suggesting the key to the true intent and meaning of the lawgiver. Nonetheless, difficulties did arise in the interpretation of texts not readily admitting of extended or restricted import and in getting over express texts, the application of which had become obsolete. There can be no doubt that the commentators at times stretched points, took precepts out of their context and on occasions gave strained interpretations to rules. As far as possible, they tried to bring out the true import of the ancient texts, but at times they made logic yield to convenience and clearness. Sometimes, the reason given in support of an accepted construction would seem to be a sophism, but their ingenuity was at times taxed to the utmost.

DEVELOPMENT OF LAW BY THE COMMENTATORS AND *NIBANDHAKARS*

The process of interpretation of law and through that process the declaration and exposition of law went on for a long time and naturally helped the rational development of law. There were established courts, but there was no system under the Hindu law of reference to authoritative or persuasive judicial precedents. Instead, a very large number of commentaries and digest (*nibandhas*) were from time to time written during the post-*Smriti* period. The commentators did not at any time, arrogate to themselves, the position of lawmakers. Many of the commentators with refined amenity of style disavowed all intention to make innovations. Their sole claim was that their works gave critical interpretations of the textual law of the *Smritis* and collated and declared the established textual and customary law.[80] Nevertheless, their thought was to fashion the law into as perfect an instrument of justice, as they could devise albeit within certain absolute formulae of the *Smriti* law, and as far as possible, by analogy to what was already settled and on lines parallel with usages and customs, which were springing unconsciously from the habits and life of the people in their part of the country. Although, in form merely commentaries on the ancient *Smritis* and complimentary to the same, these treatises were independent works, which embodied the law current at the time. Some of the commentaries

79 Where a proposition laying down a mandatory rule was stated in clear terms, resort to extrinsic aid was not permissible. In such a case, 'considerations of reasons are of no avail'—*Vachane hi hetvasamarthye*—Jaimini, IV, i. 41. The popular saying is '*yavat vachanam hi vachanikam*'.

80 For instance, in treating 'inheritance' Vijnaneshvara states: 'In this section of *Mitakshara* the texts are mostly narrations of well-recognised usages'. II, 118, 119.

were written under the patronage of kings or at their instance and must have assumed importance on that score. In case of one or two works ascribed to kings, it would seem that the real author stood in the same position as Tribonian did to Justinian.

SYSTEMATIC BUILDING UP OF THE LAW

In course of time, the commentaries appear to have acted with ever increasing force to give an impulse to the systematic building up of law. The commentators amplified narrow provisions of law, rounded off their angles and added a mass of relevant matter thereby materially contributing to the process of self-development of law. The veneration in which they were held and the acknowledgement of their scholarship was indeed so remarkable, that their opinions and conclusions became law by acceptance. The commentators, although they rested their opinions on the *Smritis*, were explaining, modifying, enlarging and even at times departing from the letter of the *lex scripta*, in order to keep the law in harmony with their environments and the prevailing notions of justice and to suit the felt necessities of the times. The law was basically and essentially traditional law and rooted in custom. As a result, the process of development and assimilation continued and the law had to be gathered not merely from the ancient texts, or solely from the commentaries, but mainly from the latter and always having regard to rules of conduct and practices reflected in the approved usage.

So, in course of time, the law came to be ascertained and accepted in the main from the commentaries and digests of which the leading ones acquired almost *ex cathedra* character. Composed in different parts of India, several of these gained ascendancy in those parts of the country, where the authors were accepted as of pre-eminent authority. Facts of geography were massive and in different parts of the country, different commentaries came to be referred to as the chief guides on law. The result was that the two principal schools of Hindu law, the Mitakshara and Dayabhaga sprang into existence and, furthermore, where Mitakshara prevailed, there came to be recognised a number of sub-schools of the parental authority.

TWO PRINCIPAL SCHOOLS OF HINDU LAW

An account of the origin and development of the schools of Hindu law was given by the judicial committee of the Privy Council in *Collector of Madura v Mootoo Ramalinga*:[81]

> The remoter sources of the Hindu law are common to all the different schools. The process by which those schools have been developed

81 (1868) 12 MIA 397; *Jagmohan v Official Liquidator* AIR 1956 All 145.

seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own glosses on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose. Thus, the Mitakshara which is universally accepted by all the schools except that of Bengal as of the highest authority, and which in Bengal is received also as of highest authority, yielding only to the Dayabhaga in those points where they differ, was a commentary on institutions of Yajnavalkya; and the Dayabhaga, which wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other schools, equally admits and relies on the authority of Yajnavalkya. In like manner, there are glosses and commentaries upon the Mitakshara which are received by some of the schools that acknowledge the supreme authority of that treatise, but are not received by all.

The Dayabhaga school prevails in Bengal; the Mitakshara school prevails in the rest of India. These schools, born of diversity of doctrines, mark a new stage in the evolution of Hindu law. One of the main differences between these two principal schools of Hindu law relates, as has been pointed out later on in some detail,[82] to the law of inheritance. The meaning of the doctrine of *sapinda* relationship in the law of inheritance insisted upon by Vijnaneshvara, whereby community of blood (propinquity) is to be preferred to community in the offering of religious oblations, is the governing factor whereby under the Mitakshara law, the right to inherit arises. Under Dayabhaga, the right arises from spiritual efficacy, ie, the capacity for conferring spiritual benefit on the manes of paternal and maternal ancestors. Another distinguishing feature relates to certain incidents of the joint family. According to Mitakshara law, each son acquires at his birth an equal interest with his father in all the ancestral property held by the father and on the death of the father, the son takes the property, not as his heir, but by survivorship.[83] The position of the son or grandson in Mitakshara is somewhat similar to that of *sui heredes*, who under the Roman law are regarded as having a sort of dormant ownership in the estate of their father ever during his lifetime. Their succession was not so much a succession as coming into the enjoyment

82 See Chapter IV.

83 But now, after the coming into force of the Indian Succession Act 1956, as held by the Supreme Court, this legal position has been materially altered; see notes under s 8 of that Act.

of what in a sense had already partly belonged to them.[84] According to Dayabhaga school, the son does not acquire any interest by birth in ancestral property. His rights arise for the first time on the father's death. On the death of the father, he takes such of the property as is left by the father, whether separate or ancestral, as heir and not by survivorship.[85] Partition is another branch of law on which there is some radical difference between the two principal schools.[86]

Sub-divisions of Mitakshara School

The Mitakshara is sub-divided into four minor schools:

(i) Benares school;
(ii) Mithila school;
(iii) Maharashtra or Bombay school (Western India); and
(iv) Dravida or Madras school (Southern India).

Benares, Mithila, Maharashtra and Dravida are old names of the territories in which these schools gained mastery. The Benares school covers practically the whole of Northern India,[87] with the exception of Punjab, where the Mitakshara law has on certain points been considerably modified by custom. The Mithila school prevails in Tirhoot and certain districts in the Northern Part of Bihar. The Bombay school covers Western India, including the whole of the old presidency of Bombay as also the Berar.[88] The Dravida or Madras school covers Southern India, including the whole of the old Presidency of Madras. These schools differ between themselves in some matters of detail relating particularly to adoption and inheritance. All these schools acknowledge the supreme authority of Mitakshara, but they give preference to certain treatises and to commentaries which control certain passages of Mitakshara. This mainly accounts for the differences between them.

Mitakshara of Vijananeshwara Mitakshara—a very modest title meaning a brief compendium—is a running commentary on the Code of Yajnavalkya,[89] and a veritable digest of *Smriti* law. It was written in the latter part of the eleventh century by Vijananeshwara, an ascetic also

84 Digest 28, 2, 11, Paulus.
85 See Chapter XVII.
86 See § 347.
87 The Benares school prevails in Orissa—*Basanta Kumar v Jogendra Nath* (1906) 33 Cal 371, 374, 375. The Benares school also prevails in the Central Provinces—*Ramchandra v Ramabai* AIR 1930 Nag 267; *Bhaskar v Laxmibai* AIR 1953 Nag 326; *Udebhan v Vikram* AIR 1957 MP 175; *Ramaji v Manohar* AIR 1961 Bom 169.
88 *Bajirao v Atmaram* AIR 1930 Nag 265.
89 As to the importance of the Mitakshara and *Yajnavalkyasmriti*, and the juristic weight to be attached to the same, reference may be made to *Surjit Lal Chhabda v Commr of Income-tax* [1976] 2 ITR 164.

mentioned as bearing the name Vijnana Yogin. In Mitakshara, which is more of a digest than a mere commentary on a particular *Smriti*, we find the quintessence of the *Smriti* law and its precepts and injunctions. The chief merit of the work consists in its comprehensive treatment of almost all important topics of the law and the synthesising of various *Smriti* texts. It is of supreme authority throughout India except in Bengal, where the Dayabhaga of Jimutavahana is given paramount importance. In Bengal, Mitakshara is more revered than followed, but its authority is not questioned on points on which there is no conflict between it and the works prevalent there. The Mitakshara is given general predominance in all the four minor schools, which are no more than sub-divisions of the Mitakshara school, but in Gujarat, the island of Bombay and North Konkan, Mayukha, a more modern treatise, is allowed to compete with it and even regarded as an overruling authority on certain points. In Mithila, there are some deflections from the parental authority. Vijananeshwara analyses and discusses the tests of Yajnavalkya sometimes at considerable length. As the Privy Council has observed: he 'explains the meaning of recondite passages, supplies omissions and reconciles discrepancies by frequent reference to other old expounders of law'.[90] He has the great merit of being unpontifical and being easily readable.

Mitakshara has for more than nine centuries occupied a place of ascendancy and unique and unrivalled authority in the annals of legal literature. Vijnaneshwara was one of the greatest of the juristheologians, who contributed to the making of Hindu law. The subjects he dealt with were reasonably well classified and he had no call to do what the canon lawyers were always doing. He did not take upon himself the task of endlessly arranging and re-arranging particular instances in an endeavour to deduce principles. He rather emulated the example of Confucius, who had a thread along which his experiences slid. Even though his treatment of certain matters is exhaustive and sometimes elaborate, he is mostly concise and precise and true to the brevity designated in the title of the work. However, on some points, which are indeed few, his expressions are so brief that they do not afford adequate guidance and it may be said of them that they suffer from 'obscurity from too much precision' as Dumont phrased it while complaining of some of Benthams' expressions. He is imbued with the *generalia* of law and there is no *ipse dixitism* in his treatment of any point. Nor is there any antiquarian trifling or wild philosophy about his discussions. In his Mitakshara, he produced a juridical work which is an institutional treatise. There can be little doubt that his treatise had, from a very early time, a large degree of practical

90 *Buddha Singh v Laltu Singh* (1915) 42 IA 208, 214, 220; (1915) 37 All 604, 611. As to Colebrook's translation of Mitakshara, reference may be made to *Shamlal v Amarnath* AIR 1970 SC 1643.

influence on many branches of Hindu law. The very wide range of its authority was only due to its intrinsic worth. A number of commentaries were written on the Mitakshara itself, of which mention may be made of the *Subodhini*[91] of Visveshvara Bhatta, and the controversial treatise of Balambhatta.[92] Nandapandita, an esteemed writer of the Benares school and the author of the *Vaijayanti*,[93] and a noted work on the law of adoption, the *Dattaka Mimamsa*, had written a commentary also on the Mitakshara. Mention was made of this work by the Privy Council in *Buddha Singh v Laltu Singh*,[94] but their work has not been published nor has it been found in its integral form.

It is of consequence to notice over again that the Mitakshara holds sovereign sway in the whole of India except Bengal. The sectioning of the Mitakshara school into the four minor schools nominated Benares, Mithila, Bombay and Madras schools, is no doubt of some importance and consequence, but it is apt to create confusion and even lead to error if it is not fully appreciated that essentially there are only the two schools of Hindu law, the Mitakshara and the Dayabhaga. These minor schools are not born of any diversity of doctrines such as exists in case of the Mitakshara and the Dayabhaga. There is no disagreement on any fundamental or constitutive principle and the differences that are to be found are mainly the result of variant interpretations given by different commentators to some texts of the *Smritis*, and particularly to certain tests in the Mitakshara and at times the result of conflict of opinion between different High Courts. It is also of importance to notice that, from some exceptions to be pointed out later, the commentaries and digests, to be immediately referred to as the leading authorities of these minor schools, were only intended to supplement the Mitakshara and not to replace or abrogate the same. Speaking broadly, therefore, the first thing is to inquire what Mitakshara has laid down on the question under inquiry, when it is not concluded by the judicial decision and then to turn to the other authorities. Error is almost sure to arise if this order of priority be changed. The first thing to be considered is what Mitakshara states. When reference is made to texts from any of the recognised authorities, it is always unsafe to examine a single paragraph or a single verse. It is necessary to see for what purpose the reference is to be made and with that view to turn to the verses immediately preceding the same and to study the whole chapter and in some cases, several chapters of the same treatise.

91 See *Mitakshara*, Introduction to the book.
92 Ibid.
93 See *Smritikars*, Introduction to the book.
94 (1915) 37 All 604, 618 (PC).

Viramitrodaya of Mitramishra *Viramitrodaya* of Mitramishra,[95] composed in the earlier part of the seventeenth century, is a commentary on *Yajnavalkyasmriti*, and accepted as an authority in many parts of India where the Mitakshara school prevails, and ranks as a special authority in the Benares school.[96] In *Girdhari Lall*'s case, the judicial committee of the Privy Council observed:

> Adhering to the principles which this Board lately laid down in the case of *Collector of Madura v Moottoo Ramalinga*,[97] their Lordships have no doubt that the Viramitrodaya...is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School.[98]

Where, however, Mitakshara is clear on a point, it must not be overlooked that the Mitakshara is the guiding authority of the Benares school and indeed of every other sub-school.[99] The *vyavahara* part of the treatise is sub-divided into four parts. The first treats of judicature and procedural law. The second treats mainly of the law of evidence. The third division relates to the 18 topics of litigation and the last gives some rules of criminal law. Mitramishra expresses profound respect for Yajnavalkya, whom he always calls the lord of the sages (*yogeeshwara*).

Mitramishra is a voluminous writer and master of analysis, though on certain points which are indeed few, his analysis is half-illuminating and half-obscuring. He was determined to use hard and empirical terms in his disputations with the writers of the Dayabhaga school and in his criticism of the reasoning of those with whom he was at loggerhead. A controversialist of no mean order, he does give the impression that he sometimes deliberately chose to indulge in barren logomachy. This pugnacity disregarded, there can be no doubt that in his very notable commentary, there is reliable discussion of the law on every useful subject and thorough exposition of every point was taken up by him. The work is documented with reference to most of the earlier writers. Of the utility of the work, there seems no end because for each dipping, one finds some useful discussion on the point under inquiry. Mitramishra

95 An English translation of the law of succession from Viramitrodaya called *Partition of Heritage*, was published by Gopalchandra Sarkar Shastri in 1879. Other translations of parts of the treatise have also been published.

96 *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397, 438; *Jagannath Prasad v Ranjit Singh* (1898) 25 Cal 354, 367–68.

97 (1868) 12 MIA 448, 466. Its value and importance has been repeatedly recognised by the Privy Council—*Girjabai v Sadashiv* (1916) 43 IA 151, 159.

98 *Jagannath Prasad v Ranjit Singh* (1898) 25 Cal 354, 367–68.

99 In *Moniram v Keri Kolitani* (1880) 5 Cal 776, 788, 789, the Privy Council observed that the *Viramitrodaya* may be referred to in Bengal in cases where the Dayabhaga is silent. In practice, in Bengal, this work is rarely relied upon. See pp 56–58, for the authorities of the Dayabhaga school.

does full justice to his themes and his work saves much research because the enormous task of research had been performed by Mitramishra himself. The *Viramitrodaya* has been cited in innumerable decisions of courts in India wherever the Mitakshara prevails. The Privy Council has observed: 'It supplements many gaps and omissions in the earlier commentaries and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions'.[1] This authoritative work of the Mitakshara school is a classic because of its direct approach to some of the most involved and difficult questions. Mitramishra is the last of the outstanding commentators who give reliable and authoritative guidance on Hindu law.

Apararka The *Apararka-Yajnavalkya-Dharmashastra-Nibandha*, although it purports to be a commentary on *Yajnavalkyasmriti* is more of the nature of a digest than a commentary.[2] In this digest, we find extracts from a number of *Smritikars*, whose works are not available to us in their integral form. Apararka, a Silhara king, flourished about a century later than Vijnaneshwara and references to his massive treatise are to be found in the works of many later writers and in some decisions of courts.[3] Apararka's work is received as of great authority in Kashmir. Its authority is also acknowledged by the expositors of the Benares school. Apararka is rather sprawling though not untidy. The usefulness and importance of his work cannot, however, be minimised and may be gauged from the circumstance that Vishweshwara Bhatta, the author of the *Madanaparijata*, and *Subodhini*, which is the leading commentary on Mitakshara, has used Apararka's work.

Vaijayanti The *Vaijayanti*, written by Nandapandita, an esteemed writer of the Benares school, is as already mentioned, is a commentary on the *Vishnusutra*. Nandapandita is the author of the *Dattaka Mimansa*, which is a standard treatise and a noted work on the law of adoption.[4] The *Vaijayanti* has been cited with approval in numerous decisions of courts in India and also by the Privy Council.[5] It is also known as *Kesava Vaijayanti*. Dr Jolly has given many passages from the same in his publication of the *Dharmasutra* of Vishnu.[6]

1 *Vedachela v Subramania* (1921) 48 IA 349, 362.

2 For a translation of a part of the work entitled '*Partition of Heritage*', Ghosh, *Principles of Hindu Law*, Vol II.

3 *Buddha Singh v Lallu Singh* (1912) 34 All 663, 673. (1915) 37 All 604, 617–18 (PC), *Chinnasami Pillai v Kunju Pillai* (1912) 35 Mad 147, 159.

4 See § 13.

5 *Buddha Singh v Lallu Singh* (1915) 37 All 604, 608, (PC); but see *Puttu Lal v Parbati Kunwar* (1915) 42 IA 155; *Pitra Kueri v Ujagir Raj* AIR 1958 All 101.

6 This commentary was composed by Nandapandita in the first quarter of the seventeenth century at the instance of his patron King Kesavanayaka.

(i) Benares School

The Benares school as already mentioned, prevails in the whole of North India with the exception of Punjab and the *Viramitrodaya*, to which reference has already been made above,[7] ranks there as especial authority. Of the other authorities to which great weight is attached, reference must be made to the *Nirnayasindhu* and the *Vivadatandava* of Kamalakara. Kamalakara is a versatile and an eminent writer of the seventeenth century, two of whose numerous works have acquired great authority. His Nirnayasindhu, which is the best known of his works, though not a work on civil law is accepted as of authoritative guidance in a number of decisions of various High Courts on questions involving ceremonies and on matters affecting devolution of property and heirship.[8] His *Vivadatandava* is a treatise on the law of inheritance. In most emphatic words, he deprecated the assertion of inheritance and heritable rights of women other than those expressly enumerated by certain earlier lawgivers.[9] Kamalakara, comparatively a modern author, is of the same time as Nikanta Bhatta (who is said to be his cousin), one of the great Hindu jurisprudentes[10] and Mitramishra, the author of the *Viramitrodaya*. Both his works, *Nirnayasindhu* and *Vivadatandava*, are entitled to weight wherever the Mitakshara prevails; but they are accepted as of particularly great authority in the Benares school when not in conflict with any higher authority.[11] The Benares school is sometimes called the most orthodox of the different schools of Hindu law.[12]

(ii) Mithila School

The Mithila school has at times followed almost implicitly the *Vivada Chintamani* and the *Vivada Ratnakara*.[13] Though the *Vivada Chintamani*,[14] the *Vivada Ratnakara* and the *Madana Parijata* are the

7 See *Viramitrodaya*, Introduction to the book.

8 *Khushalchand v Bai Mani* (1887) 11 Bom 247, 254 (marriage ceremonies); *Viswasundara Rao v Somasundara Rao* (1920) 43 Mad 876, 882 (*upanayana* ceremony); *Dwarka Nath v Sarat Chandra* (1912) 39 Cal 319, 331–33 (succession to *stridhana*); *Dattatraya v Gangabai* (1922) 46 Bom 541, 556, 557 (right to perform *shraddha*).

9 *Ananda Bibee v Nownit Lal* (1883) 9 Cal 316, 324.

10 See Hindu Jurisprudents in Introduction to the book.

11 *Dwarka Nath v Sarat Chandra* (1912) 39 Cal 319, 335, 336. 'The governing authority of the Benares school is the Mitakshara'—*Ram Singh v Ugur Singh* (1870) 13 MIA 373, 390. Of the commentaries on the Mitakshara, the *Vaijayanti* of Nanda Pandita is greatly respected in the Benares school.

12 *Ram Singh v Ugur Singh* (1870) 13 MIA 373, 390.

13 *Bhugwandeen v Myna Baee* (1867) 11 MIA 487, 507–08; *Birajun Koer v Luchmi Narayan* (1884) 10 Cal 392, 399; *Balwant Singh v Rani Kishori* (1898) 20 All 267, 290.

14 The *Vivadachintamani* has been translated by Setlur in his *Collection of Hindu Law*

continued on the next page

favoured Mithila authorities, it is of importance to notice that the law of the Mithila school is the law of Mitakshara, except in a few matters in respect of which the law of the Mithila school has departed from the law of Mitakshara.[15] Neither incidental dicta in any of those works nor any solitary interpretation or statements in them founded on any ambiguous texts from the *Smritis* can control the plain meaning of any rules laid down in the Mitakshara.[16] Of these Mithila authorities, the *Vivada Chintamani* is given the first place,[17] being a work of unquestioned merit written by Vachaspatimisra, a celebrated *nibandhakar* of the fifteenth century. Vachaspatimisra is also the author of *Vivida Chintamani* another work of allowed excellence. These two works of his are not commentaries on any code, but digests and are most probably parts of one and the same treatise. Weight is also attached in Mithila to *Vivadachandra* by Lakshmi Devi, the *Smritisara* by Shrikaracharya, the *Smritisara* by Harinathopadhayaya and the *Dwaita-parishishta* by Keshava Mishra.[18] The *Kalpataru* by Lakshmidhara is a work which is freely cited by the exponents of the Mithila school.

Vivada Ratnakara The *Vivada Ratnakara* mentioned above is a digest which has been referred to in numerous decisions. Its author was Chandeshwara, a minister of Harasinha, who was a Mithila king.[19] *Vachaspatimisra* has stated that he had considered the *Ratnakara* and it would seem that this work was written in the first quarter of the fourteenth century. Chandeshwara has given the year in which he had performed *Tula Purusha* in which he distributed his own weight of gold amongst Brahmins.

Madana Parijata and *Subodhini* of Vishweshwara Bhatta The *Madana Parijata* to which reference is made above is a work on civil and religious duties, by Vishweshwara Bhatta. It contains a chapter on

Books. Mahamahopadhyaya Sir Ganganath Jha, a distinguished jurist of recent times, has among various works to his credit translated this treatise. In the translation by Tagore, there are inaccuracies as noticed in several decided cases: *Rajrani v Gomati* (1928) 7 Pat 820; *Sabitri v Savi* (1933) 12 Pat 359, 413; ibid of that decision, AIR 1933 Pat 306, 342.

15 *Bhairab v Birendra* (1949) ILR 28 Pat 123, 127; *Sourendra Moban v Hari Prasad* (1926) 5 Pat 135, 155, PC; *Kamla Prasad v Murli* (1949) ILR 28 Pat 123, 127.

16 *Ram Khelawan v Lakshmi* (1949) ILR 28 Pat 1008; *Bhairab v Birendra* (1949) ILR 28 Pat 123, 127; *Bacha Jha v Jagmohan Jha* (1885) 12 Cal 348; *Kamla Prasad v Murli* (1949) ILR 28 Pat 123, 127.

17 *Mt Thakoor Deyhee v Baluk Ram* (1886) 11 MIA 139, 174–75.

18 *Kamani Devi v Sir Kameshwar Singh* (1946) 25 Pat 58, 63.

19 This work has been translated by Mr Golapchandra Sarkar Shastri and Justice Digambar Chatterjee. Of the other translations, reference is often made to the one given by Ghosh in his *Hindu Law*, Vol II.

inheritance and is treated as an authority in the Mithila school.[20] It is a digest, which quotes a number of works and was written a little before the fourteenth century. It was composed at the instance of Madanapala, a king of the Jath race, who ruled Kashtha on the banks of the *Jamuna*. This work has been referred to by a number of later commentators and in numerous decisions. It is written in language comparatively easy to understand. The tenacity of its style is one of its important features. Vishweshwara Bhatta is also the author of *Subodhini*,[21] which is 'the most celebrated commentary on the Mitakshara'.[22] It is not a running and exhaustive commentary but gives a very useful exposition of the difficult and obscure texts in the Mitakshara in a remarkably facile manner. The *Subodhini* has been referred to in a number of decisions of various High Courts.

(iii) Maharashtra or Bombay school

The Maharashtra or Bombay school, also known as the School of Western India, claims in respect of certain matters to be the most liberal of the different schools of Hindu law. In Western India, sometimes mentioned as the Bombay presidency, the pre-eminence of Mitakshara is generally admitted. The relative position of Mitakshara and the *Vyavahara Mayukha*, which are proximate authorities, as well as of the other works accepted as authorities in the old Bombay Presidency and in other parts of Western India, is discussed in several cases decided by the Bombay High Court. Such works as the *Samskara Kaustubha*,[23] and the *Subodhini*[24] are consulted and reference is made to the *Viramitrodaya*, *Nirnayasindhu* and other works of the Mitakshara school.[25] Reference has also been made by that court to the *Balamabhatti*,[26] and to the interpretations given there to certain expressions in Mitakshara. In the last mentioned

20 This work has been translated by Ghosh, *Hindu Law*, Vol II and Setlur. The earliest translation was made by S Sitarama Sastri and appeared in the Madras Law Journal. It was published in book form in 1899. A translation by the same author of *Vivada Ratnakara* originally published in the Madras Law Journal appeared in a book form in 1898.

21 The complete text and English translation of the *Vyavaharadhyaya* from this work have been published by Mr Gharpure in his *Hindu Law Texts Series* Vols III and IV.

22 *Lallubhai v Mankuvarbai* (1876) 2 Bom 388, 416 (FB).

23 *Bhagirathibai v Kahnujirao* (1887) 11 Bom 285, 293 (FB); *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397, 436. An edition of this work was published in 1914 in the *Gaikwad Sanskrit Series*.

24 The complete text and English translation of the *Vyavaharadhyaya* from this work have been published by Mr Gharpure in his *Hindu Law Texts Series*, Vols III and IV.

25 For instance, *Gojabai v Shahajirao* (1893) 17 Bom 114.

26 The text of Balamabhatti dealing with *achara*, *vyavahara* and *prayaschita* were published in separate volumes by Mr Gharpure.

work, it is stated that it was written by a lady named Lakshmidevi and at one time considerable importance was attached to the opinions of this author by the High Court of Bombay, till it was felt that some of those opinions were rather of the nature of what in case of judicial decisions would amount to not more than mere obiters. On certain points, the author has expressed very liberal views and given interpretations in furtherance of the rights of women and done so with cute reasoning and in an impressive style. Those interpretations, though welcome in themselves, do not derive support from any authoritative texts or opinions of other commentators and must be regarded as beautiful, but ineffective flutter of wings. Valuable as is the commentary of *Balambhatti*,[27] now generally regarded to have been written by the husband or son of Lakshmidevi, it is not treated in later decisions in Bombay as an authority to be accepted without question.[28]

While the parental authority of Mitakshara is never questioned, some of the rules there stated have not been accepted and preference has been given to those put forward in the *Vyavahara* Mayukha in certain parts of Western India. The Mitakshara ranks first and paramount in the Maharashtra, Northern Kanara and Ratnagiri district. However, in Gujarat, the Island of Bombay and North Konkan, Mayukha is considered as the overruling authority, where there is a difference of opinion between it and the Mitakshara.[29] The principle, however, adopted by the High Court of Bombay, and sanctioned by the Privy Council, is to construe the two works so as to harmonise them with each other wherever and so far as that is reasonably possible.[30] In Poona, Ahmednagar and Khandesh, Mayukha is considered to be of equal authority with the Mitakshara, but not capable of overruling it as in Gujarat, the Island of Bombay and North Konkan.[31]

Vyavahara Mayukha of Nilkanta Bhatta The *Vyavahara* Mayukha of Nilkanta Bhatta, written in the beginning of the seventeenth century is, as indicated above, an authority that strikes a dominating note in some parts of Western India. From the special and almost paramount authority,

27 *Buddha Singh v Lattu Singh* (1915) 37 All 604, 613, (PC); *Pitra Kueri v Ujagir Rai* AIR 1958 All 101, 103, for some of the cases where its authority was not accepted.

28 *Bhagwan v Waruibai* (1908) 32 Bom 300; *Dattatraya v Gangabai* (1922) 46 Bom 541, 558, 'cannot be accepted without due caution and examination'. Reference may also be made to *Pitra Kueri v Ujagir Rai* AIR 1958 All 101.

29 *Krishnaji v Pandurange* (1875) 12 Bom HC 65; *Lallubhai v Mankuvarbai* (1878) 2 Bom 388, 418; *Sakharam v Sitabai* (1879) 3 Bom 353, 365; *Balkrishna v Laksman* (1890) 14 Bom 605; *Jankibai v Sundra* (1890) 14 Bom 612 (Mahad is not within Northern Konkan); *Narbar v Bhau* (1916) 40 Bom 621; 36 IC 539; AIR 1916 Bom 206.

30 Ibid.

31 Ibid.

which the *Vyavahara* Mayukha gained in Gujarat and in the island and city of Bombay, it must not be supposed that *Vyavahara* Mayukha presents a development of Hindu law connected in any peculiar way with the religious or social system of Gujarat. Before the Maratha conquest of Gujarat, it had long been under Mohammedan rule. The customary law had almost dwindled away into mere caste usages and the Brahminical influence had almost perished. The *Vyavahara* Mayukha was one of the latest products of the Bombay school, and had gained the eminent position which it has retained in the Deccan. The Brahmins, following the Maratha chiefs into the newly conquered country, naturally took their law books with them. And of these, the *Vyavahara* Mayukha was the most comprehensive and characteristic. In Gujarat, it had virtually no rival; and, as a Hindu policy was revived there, it took a place analogous to that of the Roman law in mediaeval Europe,[32] with the Maharashtrian Brahmins as its expositors. Hence, arose the somewhat strange consequence that the doctrines of the Mayukha, gained a more undivided sway over Gujarat than amongst the Marathas themselves, who had men of wide learning and copious sources of information at hand.[33] Predominance was given by the High Court of Bombay and particularly by the older British courts established in Bombay to the Mayukha, partly perhaps because they found it more frequently quoted to them than the Mitakshara and partly because the Mayukha was very much praised and followed in Gujarat. Also, the Mayukha was the more modern treatise and embodied to a considerable extent, such variations in usage as had occurred during the long period which intervened between its composition and that of Mitakshara.[34] Both in Gujarat and in Maharashtra, the doctrines of the *Vyavahara* Mayukha and the Mitakshara are largely tampered by customs amongst the backward castes as may be seen from the collections of Steele and Borradaile to which reference is made in a number of decisions.

In form, the *Vyavahara Mayukha* is a digest and follows the usual pattern of discussion of the 18 titles of law. This treatise on *vyavahara* is really one of the 12 parts of his encyclopedic work entitled *Bhagvanta Bhaskara* and each part is called a *Mayukha* (ray of the sun). The dissertations wholly justify the claim made by the author that he was firmly grounded in the *Smritis* and had no equal in the mastery of the *Purva Mimansa* of Jainmini (Jaiminiye *advitiyah*). He is more than a scholiast or glossator and is accepted as the founder of a liberal school of law. In his discussions, we see the work of one of the greatest of the Hindu jurisprudents. His technique is valuable because he gives precision to words. In examining points where the law derives from usage or

32 *Sav Geschichte des*, RR, Ch XXVI.

33 *Bhagirthibai v Kahnujirav* (1887) 11 Bom 285, 294–95 (FB); *Ambabai v Keshav* (1941) 43 Bom LR 114, 117–19.

34 *Lallubhai v Mankuvarbai* (1876) 2 Bom 388, 418 (FB).

usage draws inspiration from law, he effectually brings out the important point that the law is more exact in the choice of words whether it be the source or the recipient of the ideas involved.

Nilakantha Bhatta was a Maharashtrian Brahmin born in Benares. In general, he follows the Mitakshara but there are number of matters on which he differs from Vijnaneshwara. In matters of succession and *stridhana*, the Bombay school is more liberal in giving recognition to the rights of women, and for this credit must in a large measure go to this great legist whose work is notable for his originality and open-minded views. Nilakantha Bhatta does not merely present traditional solutions in the traditional way but seems to suggest that he evaluates them in the light of what must have been the then current thought and current needs of the society. A translation of *Vyavahara* Mayukha was published by Mr Mandlik in 1880. Thereafter, Mr Gharpure and M Kane have also published their translations.[35] An interesting account of the life of Nilkanta Bhatta, his works and his family which produced some very learned authors, is given by M Kane in the introduction to his publication of *Vyavahara Mayukha*.

(iv) Dravida or Madras school

The Dravida or Madras school, also known as the school of Southern India, leans heavily on the *Smriti Chandrika*, which is intended to supplement and not to replace or abrogate the Mitakshara. The *Smriti Chandrika* of Devanna Bhatta,[36] who flourished in the close of the twelfth century has all along had commanding influence in the South. It is an exposition on the law of inheritance and was considered by Colebrooke to be a work of uncommon excellence, equal, if not superior, to *Parashara Madhaviya*, which also is a leading authority in the South.[37] Little, if anything, is known of Devanna Bhatta, but there is adequate data that the work was compiled some time in the beginning of the great Vijaynagar Empire. Devanna Bhatta cites copiously from Katyayana and Brihaspati, which shows the great eminence and authoritative status which had been achieved by the authors of those leading *Smritis*. However, for the *Smriti Chandrika*, some texts of Brihaspati and a number of texts of Katyayana would have probably been lost to us. The work also refers to a commentator spoken of as Sangrahakara to whom was attributed the

35 M Kane's translation has often been relied upon by the courts in recent cases. It is very useful both from the scholastic and the practical legal point of view, as the meaning of some abstruse texts has been brought out after referring to the technical *Mimansa* rules.

36 The first English translation of the law of succession and inheritance from this treatise was published by T Krishnaswamy Ayyar in 1867. Other translations of the same are to be found in the publications of Ghosh, *Hindu Law*, Vol II and Setlur. The work has been published in the *Hindu Law Texts Series* of Mr Gharpure.

37 See Hindu Jurisprudents, Introduction to the book.

authorship of an abridged edition of Manu's institutes. The *Smriti Chandrika* is not a commentary, but a *nibandha* (digest) and a work of especial authority of the Dravida or Madras school, in which it has originated. However, it is to be noted that it is accepted there in point of authority as next to Mitakshara.[38] Therefore, in the absence of any evidence of usage, indicating consciousness of the people governed by that school that any opinion expressed in the *Smriti Chandrika* is living law, the court would not be justified in departing from any doctrine of the Mitakshara,[39] and prefer any text of *Smriti Chandrika*. In *Buddha Singh v Lalta Singh*, the judicial committee of the Privy Council observed that the author of *Smriti Chandrika* 'differs from the author of the Mitakshara in several essential rules of law. It seems, to say the least, doubtful whether any enunciation in the *Smriti Chandrika* can be safely applied, except perhaps by way of analogy, to explain a dubious or interminate phrase or term in the Mitakshara'.[40]

It is true, that on some points, Devanna Bhatta differs from Mitakshara and there is occasionally about him the mere *ipse dixit* of the law-giver. Most probably, those interpretations and opinions were tinged by established usages or views, which found general favour in the South and this accounted for the very high authority there wielded by this work. Though not held in equal estimation by the other schools, it must be noted that the *Smriti Chandrika* is a treatise most freely quoted as a high authority in the works of almost all writers who flourished after the twelfth century and is approached by all the High Courts as a valuable source of Hindu law. There are in the *Smriti Chandrika* full and detailed discussions on a number of questions often running to several pages. Devanna Bhatta seems to be of the view that mere exposition of a word or phrase would often be barren and unsatisfactory, and on that account, takes particular care to see that his treatment of the important texts of the *Smritikars* is exceptionally complete. However, his notations are selective and his propositions are stated in a straightforward manner with a logical sequence. His style is impeccable.

Among the other works which are regarded as authoritative in the South are the *Parashara Madhaviya*, to which reference has already been made,[41] the *Sarasvati Vilasa*, the *Nirayasindhu* and the *Subodhini*.[42] The *Sarasvati Vilasa*,[43] ranks high in this school. It has been referred to

38 Reference may be made to *Kamalammal v Venkatalakshmi* AIR 1965 SC 1349, 1356 where the importance of this work was emphasised; *Sundaram Pillai v Ramasamia Pillai* (1920) 43 Mad 32, 34; *Raju v Ammani* (1906) 29 Mad 358.

39 *Simmani Ammal v Muttammal* (1880) 3 Mad 265, 269.

40 (1915) 37 All 604, 619, PC.

41 *Chinnasami Pillai v Kunju Pillai* (1912) 35 Mad 153, 156.

42 See authorities in Hindu Law, Introduction to the book.

43 A translation of this work was published by the Rev Mr Thomas Foulkes. Other translations of it are to be found in the publications of Ghosh; *Hindu Law*, Vol II, and Setlur.

in a number of decisions of the Privy Council. Undoubtedly, as pointed out by the Supreme Court, the foremost is the Mitakshara. That is followed by *Smriti Chandrika* and next by *Sarasvati Vilasa*. Where there is no text of Mitakshara, which directly contradicts the law as expounded in *Sarasvati Vilasa*, it cannot be discarded on the ground of any alleged defects in its reasoning.[44] Prataprudadeva, a king of a principality near modern Cuttack, who is the reputed author of this work, flourished some centuries after Devanna Bhatta, the author of the *Smriti Chandrika*, to which frequent references are made in his work. The *Sarasvati Vilasa* presents a picture of the actual working of the law and not merely a series of abstract statements of old rules. It has been referred to in decisions of various courts.[45] However, it is not regarded as a work of any particular authority in certain districts of Travancore-Cochin.[46] Of commentaries which rank high in the Madras school, mention must also be made of the *Vyavahara Nirnaya* of Varadaraja and Smritimuktaphala, which have been referred to in a number of decisions.[47] It has been repeatedly pointed out in the decisions of the Madras High Court that none of these and other authorities respected by the Madras school can outweigh the Mitakshara.

Bengal or Dayabhaga School

The Bengal or Dayabhaga school as it is generally denominated, prevails in the Bengali speaking states of Bengal and Assam and Dayabhaga, the celebrated treatise of Jimutavahana, is most respected and is of ascendant authority in these states. Dayabhaga is a valuable dissertation on the law of inheritance and partition and is believed to be a part of a larger work known as *Dharmaratna*. The other works of Jimutavahana entitled *Kalaviveka* and *Vyavaharmatrika* were also part of this larger work. Whether the larger work was wholly written or intended to be written has remained a matter of uncertainty. Dayabhaga is not a commentary on any particular code, but purports to be a digest of all the codes. Jimutavahana, the founder of the Bengal school, flourished in or about the beginning of the 12th Century. His doctrines on the law of inheritance and the joint family system controverted some basic rules stated in the Mitakshara of Vijnaneshwara.[48] It is difficult to say as to when the protestant

44 *Kamalammal v Venkatalakshmi* AIR 1965 SC 1349, 1356, 1357.

45 *Muthappundayan v Ammani Ammal* (1898) 21 Mad 58, 60.

46 *Neelmma v Perumal* AIR 1953 Tr & Coch 518, 521 (FB). *Krishna Kumar v Sheo Prasad* AIR 1947 Nag 205, 207.

47 *Simmani Ammal v Muttammal* (1880) 3 Mad 265, 267, 269; *Buddha Singh v Lallu Singh* (1915) 37 All 604, 618, PC. The *Smritimuktaphala* of Vaidyanatha Dikshitar has been published by Mr Gharpure. The *Vyavaharakanda*, however, remains to be published.

48 See Bengal School, Introduction to the book.

and advanced views of Jimutavahana were accepted as of binding authority in Bengal, but it seems that this treatise soon commanded recognition and acceptance as the fountain-head for a number of commentators on the same, the earliest of whom probably was Srinath Acharya Chudamani.[49] Not much is known about Jimutavahana, but there is reliable material, which goes to show that this eminent jurist-consult was a judge and a minister of the King of Bengal. His massive character must have run along lines and appears to have found its full and direct expression in his work.

Jimutavahana

Jimutavahana, although he does not break away from or gloss over any authoritative texts of the leading *Smritikars*, as will be seen from a comparison of the points of difference in the law of inheritance between Mitakshara and Dayabhaga, does break in upon the Mitakshara system, which favours a particular mode of devolution of joint family property in case of death of a coparcener. He introduces innovations in a number of incidents of the joint family and the rights of the members of such family. He purports to have found himself on certain precepts of Manu, the meaning of which according to him had not been properly comprehended by some previous commentators. He is not averse to and in fact is successful in the creation of adroit devices and the use of fictions based on legal sub-titles to relieve the pressure of traditional law. This, he does by expressing his disagreement with other commentators. Although, he does not expressly mention the name of the commentator with whom he really joins issue and is in particular disagreement, it is obvious that he is controverting some of the doctrines of Vijnaneshwara. He does not accept any set of propositions laid down by the other commentators on questions of inheritance as crystallised law and deals with his subject as an objective science. His appeal is more to reason and stern logic than to precepts or precedents and his approach to some of the controversial questions raised by him is forthright and direct. He plunges in *medias res* and is at the heart of the subject. Much can be learnt from this builder of a great edifice, whose radical turn of mind made him hunt back constantly to dig up a variety of standpoints and examine their roots. The criticism made by Mitramishra and others that Jimutavahana relies at times merely on postulations does not appear to do justice to this progressive jurisconsult some, of whose interpretations were in all probability tinged by established usages and must naturally have found favour with the Hindus of Bengal.

49 See the Introduction to the book.

Dayatatva of Raghunandana

Of other authorities of the Bengal school, formerly at times mentioned as the Gauriya school, the most notable is the *Dayatatva* written by Raghunandana Siromani of Nadia. It is a treatise on the law of inheritance and is generally accepted as giving the most reliable exposition of the doctrines of Dayabhaga and has become almost a textbook on law.[50] The authority of Raghunandana is acknowledged and respected universally in the Bengal school as only next to that of Jimutavahana and statements from his work, some of which have become *locus classicus*, are cited and relied upon in numerous decisions of the Calcutta High Court.[51] Srinath Acharya Chudamani and Srikrishna Tarkalankar are other exponents of the Dayabhaga law. The latter is the author of *Dayakarma Sangraha*, which is an excellent compendium of the law of inheritance. His elucidations have been of great assistance and guidance to the court in a number of cases. Achyuta and Maheshwara followed Srinath. All of them are expounders of stature of dignity and wide prestige. The *Vivada Bhangarnava* of Jagannatha Tarkapanchanana, a work commonly known as *Colebrooke's Digest*, is one of the authorities consulted in Bengal. With the exception of the three leading writers of the Bengal school, namely Jimutavahana, Raghunandana and Srikrishan Tarkalankar, the authority of Jagannatha is, so far as that school is concerned, higher than that of any other writer.[52] Mention may also be made of the *Dipakalika* of Shulapani,[53] which is one of the older authorities accepted in Bengal. It is a commentary on the *Yajnavalkyasmriti*. It has the merit of brevity and is remarkable for its neatness of style. Where the authorities of the Bengal school are silent or where there is no conflict between them and the leading authorities of the Mitakshara school, reference may be made to the latter in cases in Bengal.[54]

Reference must be made in passing to two special works on adoption—the *Dattaka Mimamsa* and the *Dattaka Chandrika*. Generally speaking, they are equally respected throughout India, but where they differ, the *Dattaka Mimansa* is preferred in Mithila and Benares, and the *Dattaka Chandrika* in Bengal. Both works have had a high place in the estimation of the courts in all parts of India, and having had the advantage of being translated into English at a comparatively early period, their authority was increased during the British rule. The law of adoption built up in decisions of the Privy Council has been in the main founded on

50 The *Dayatatva* was translated by Golapchandra Sarkar Sastri.

51 For instance, *Hiralal v Tripura Charan* (1913) 40, Cal 650, 668, 669, (FB).

52 *Kery Kolitany v Moneeram* (1874) 13 Bengal LR 1, 49–51.

53 A translation of the portion on partition is to be found in the publication of Ghosh, *Hindu Law*, Vol II.

54 *Moniram v Keri Kolitani* (1880) 5 Cal 776, 778, 789 (PC); *Collector of Madura v Mootoo Ramalinga* (1868) 12 MIA 397, 435 (PC).

these two treatises, which furnished almost exclusively the basis for the same.[55]

SYSTEMS OF LAW PREVALENT IN SOUTH INDIA

Apart from the two principal schools mentioned above, reference must also be made to certain systems prevailing among a considerable section of people inhabiting the West Coast of South India. These systems embodied a body of customs and usages, which had received judicial recognition. There was also legislation relating to the same. The three systems mentioned in the marginal note presented some interesting and common features, although, they differed from one another in certain respects. One essential difference between Marumakkattayam and the other schools of Hindu law is that it is founded on the matriarchate family and descent is from a common ancestor,[56] whereas under Mitakshara and Dayabhaga descent is from a common ancestor.

PRACTICAL IMPORTANCE OF THE COMMENTARIES

So the *lex scripta* of the *Smritis*, though in theory, it continued to remain the infallible guide and one of the effective sources of law, gave way on most points to the authority of the commentators, whose interpretations were received as authentic by the particular school. This evolution of Hindu law was at times apt to be overlooked by the courts owing to the fact that the *Smritis* were the axis of the law and the desire to turn immediately to the same was quite natural. Nearly a century ago, the judicial committee of the Privy Council observed,[57] that the early versions of the laws of Manu were very ancient and it might be doing great mischief to construe the words of the original texts literally, unaided by the gloss that had been put upon them by writers and commentators of authority. A number of the precepts of Manu have been undoubtedly altered and modified by modern law and usage. The duty, therefore, of the court is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which it has to deal, and has been sanctioned by usage these.[58] The tenacity with which people in different parts of the country clung to their

55 The leading decisions on the subject were referred to by the Privy Council in *Arumilli Perrazu v Subbarayudu* (1921) 44 Mad 656, 665–68: § 13.

56 Reference may be made to ss 7 and 17 of the Hindu Succession Act 1956 and the Notes thereunder.

57 *Pedda Ramappa v Bengari Seshamma* (1880) 8 IA 1; *Ramalaxmi v Sivanantho* (1872)14 MIA 570.

58 *Collector of Madura v Mootto Ramalinga* (1868) 12 MIA 397; *Atmaram v Bajirao* (1935) 62 IA 139.

age-long traditions and family and local usages are often reflected in the works of the commentators. Though, the commentators professed to interpret the law laid down in the *Smritis*, their conclusions were in a large measure permeated by the customs and usages, which they found in vogue around them. In the case of *The Collector of Madura v Moottoo Ramalinga* referred to immediately above, the Privy Council ruled that it is the duty of the courts to recognise the rules of the law enunciated in the commentaries, even if they appear to proceed on a wrong interpretation of the *Smritis*, 'the reason being that under the Hindu system of law, clear proof of usage will outweigh the written text of the law'. Indeed, the Mitakshara, Dayabhaga and the other works of authority fall subordinate in so many places to the language of the *Smriti* texts which reflect custom and approved usage and evolve rules thereby drawing inspiration from them.

The leading commentators and *nibandhakars*, although they purported to confine their task within the structure of the *Smriti* law accomplished the work of keeping the law abreast of the felt necessities and demands of the time through a long series of centuries during the post-*Smriti* period commencing from about the beginning of the 7th Century when Asahaya wrote his *Naradabhashya* and ending with the 17th Century when *Viramitrodaya*, the last of the leading commentaries, was written by Mitramishra. They originated and accomplished their task without permitting themselves to be fettered with orthodox prejudices and yet with disciplined sagacity. They combined intimate knowledge and mastery of the law and their awareness of its conservatism with gravities and a liberal readiness to move with the times. Even when they were expounding a particular *Smriti*, they constantly kept before their mind a map of the *Smriti* law as a whole. They have been adverted to in some decisions as mere glossators, or compilers of congeries of customs. It must have been seen from the foregoing observations that the leading commentators and *nibandhakars* were more than glossators or compilers of customs. At times they have been referred to not inappropriately as scholiasts obviously in analogy of the commentators of the Greek and Latin classics and the European philosophers of the middle age, whose great aim was to reduce the doctrine of the Christian church to a scientific system. During a long series of centuries, when legislation in the modern sense was not originated and judicial precedents as now understood had no established authority, these juristheologians were virtually law-makers, who systematised the personal law of the Hindus and accomplished legal innovations, and in doing so, combined all that legal philosophy could yield and substantially enriched Hindu law and jurisprudence.

Pursuing the order in which the indices of law are stated by the Hindu jurisprudents, reference must next be made to approved usage or custom. Ancient custom is generally regarded as a just foundation of many laws

in every system of jurisprudence and for reasons grounded on principle and justice. Cicero speaking of the generation of custom observes in a classical passage:

> *Justitiae initium est a natura perfectum. Diende quaedam in consuetudinem ex utilitatis ratione venerunt. Postea res, et a natura profectas, et a consuetudine probatas, legum metus et religio sanxit.*

'Justice has emanated from nature. Therefore, certain matters have passed into custom by reason of their utility. Finally, the fear of law, even religion, gives sanction to those rules which have both emanated from nature and have been approved by custom'. In Hindu law, immemorial custom has *proprio vigore* the efficacy of law. It is not merely an adjunct of ordinary law, but as has already been pointed out, a constituent part of it.

During the earliest stages of the development of Hindu law, custom was acknowledged and accepted as being the embodiment of principles and rules prescribed by sacred tradition. During the *Sutra* period also, the influence of custom upon law bore the same characteristic. Gautama, the most ancient of the *Sutrakars*, whose aphorisms on law are extant, states at the very outset of his work: 'The *Veda* is the source of the sacred law, and the tradition and practice of those who know the *Veda*'.[59] Gautama states in another aphorism relating to administration of justice by the king: 'The customs of countries, castes and families which are not opposed to the sacred records have also authority'.[60] Manu, as has already been pointed out, regards approved usage as direct evidence of law.[61] He stresses the importance of custom. The expressions generally used by the *Smritikars* for 'custom' are *achara*, *sadachara* and *shishtachara*. Broadly interpreted, they mean practices of good men, a concept which necessarily involves the element of reasonableness. In the context of civil law, *sadachara*, which is the most commonly used of these three expressions, requires that there must be no element of mortal turpitude or anything opposed to public policy about the custom. The *Mahabharata*, in one place, uses the expression '*lokasangraha*' meaning usages of the people and in another place states that usage is superior to all the *Shastras* taken together. Without retracing covered ground,[62] the

59 I, 1, 2, *SBE*, Vol II; *Apastamba*, I, 1, 1-2—*Athatah samayacharikan dharman vyakhyasyamah: dharmagnasamayah pramanam vedashcha.*

60 XI, 20, *SBE*, Vol II.

61 II, 12.

62 *Manusmriti* states: 'Here the sacred law has been fully stated...and also the traditional practices and usages of the four *varnas*'—I, 107. A popular verse from the *Mahabharata* is: '*Dharma* has its origin in good practices and *Vedas* are established in *Dharma*'—*Achara sambhavo dharmo dharme vedah pratishthitah*—*Vana Parva*, 150, Ch 27. Vasishtha observes: 'Manu has declared that the (peculiar) practices and usages of countries, castes and families may be followed in the absence of rules of revealed texts'—1,17 (*SBE*, Vol XVI).

importance and efficacy attached to custom by the Hindu juris-theologians may be summarised by reference to the oft-quoted verse of Narada: 'Custom is powerful and overrides the sacred law'.[63] There are in the *Smritis* numerous texts relating to the origin and binding nature of custom and the commentators and *nibandhkars* have critically discussed, considered and applied those texts.[64] Of those, the texts of Manu and Narada cited above and a quotative verse of Brihaspati exhorting recognition of local, tribal and family usages[65] are particularly notable.

In a long series of cases decided by the Privy Council and courts in India, the rule has been accepted that custom can override any text of *Smriti* law. In *Collector of Madura v Moottoo Ramalinga*, the judicial committee of the Privy Council observed: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of the law'.[66] It has been repeatedly stated that a custom may be in derogation of *Smriti* law and where proved to exist, may supersede that law.[67] The tenacity of family customs even under the strain of migration has been repeatedly recognised in decisions of the courts.[68] It may, however, be observed that though local and family custom, if proved to exist, will supersede the general law, the general law will in other respects govern the relations of the parties outside that custom.[69] The essential attributes of a custom are that it must be ancient, reasonable, must have continued or been observed without interruption, and must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect. It must be uniform and obligatory. It must not be immoral or opposed to public policy and cannot derogate from any statute unless the statute saves any such custom or generally makes exception in favour of rules of custom. In a catena of cases, the Judicial Committee of the Privy Council has observed that it is of the essence of special usages modifying ordinary law that they should be ancient and invariable, and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the courts can be assured of their

63 I, 40. Asahaya states that this verse accepts the rule that custom is superior to written law. The Romans took the view that an existing statute might even be replaced by adverse usage *'ea vers (ie jura) quaoe ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata'*.

64 Reference has already been made to some of them. Asahaya cites—*Deshe deshe ya acharah paramparyakaramagatah: Sa shastrarthobalannaiva langhaniyah kadachana.*

65 *Desha jati kulanam cha ye dharmah prak pravartitah: Tatbaiva te palaneeyah prajah prakshubhyatenyatha*: II, 28, *SBE*, XXIII.

66 (1868) 12 MIA 397, 436.

67 *Neelkisto Deb v Beerchunder* (1869) 12 MIA 523, 542.

68 *Parbati v Jagdis* (1902) 29 IA 82.

69 *Kali Pershad v Anund Roy* (1887) 15 IA 18; *Rao Kishore Singh v Gahenabai* (1920) 22 Bom LR 507 (PC).

existence and that they possess the conditions of antiquity and certainty on which alone their title to recognition depends.[70]

A subsidiary or auxiliary indice of *dharma* was *Nyaya* or *yukti*, expresses the juridical connotation of which included principles of equity. The *Smriti* texts, howsoever widely interpreted and usages of people though fully recognised, could not obviously provide for every conceivable question of law. Analogies drawn from established rules and fictions of law were therefore resorted to in order to cover such cases. One of the rules laid down by Jaimini in his *Mimansa* was *atidesha*, whereby any principle laid down with reference to one case was applied to other analogous cases.[71] It is well understood that the spirit of equity underlies many legal fictions,[72] and rules propounded by analogy. It was recognised by the *Smritikars* that the traditional law from its very nature could not be exhaustive and principles of justice had to be invoked in cases not expressly provided for by the *litera legis* or conventional law. Yajnavalkya enjoined that *nyaya*, meaning natural equity and reason, should prevail in case of conflicting rules of law.[73] Brihaspati gave a rule of fundamental importance when he recommended *yukti* in the well-known *versus memorialis* that decision must not be made solely by having recourse to the letter of the written codes; since if no decisions were made according to the reason of the law, or according to immemorial usage, there might be a failure of justice.[74] Narada also, although he does not in this context use the expression '*nyaya*', favours an appeal to *yukti*.[75] Even apart from any special or technical significance of these expressions, it does appear that the unified legal system aimed at by the *Smritikars* did envisage a department or aspect of law which would permit, within limits, interpretation of the sacred texts by resorting to something akin to what the modern lawyer at times does when he appeals to the 'equity of the statute'.[76] The expressions '*nyaya*' and '*yukti*' are certainly broad enough to allow the two sorts of equity described by Cowell: 'for the one doth

70 *Raja Rup Singh v Rani Baisini* (1884) 11 IA 149, 162.

71 Books VII and VIII. *Atidesha* is a relation in which one thing contains the indication of another thing and deriving its force from that other becomes (by derivation) an incident of it—*Yasya lingamartha-sanyogad abhidhanavat* VIII, i 2. Remote analogy, however, was not permissible.

72 *In fictione juris semper aequitas existit.*

73 See *Smritikars*, Introduction to the book.

74 *Kevalam shastramashritya na kartavyo hi nirnayah: yuktiheen vichare tu Dharmahanih prajayate.*

75 IV, 40.

76 They recognised that the rigour of the law often required to be moderated and that there was, at times, the possibility of litigants successfully evading operation of rules of law by recourse to subtleties and technicalities. A text of Yajnavalkya enjoined the King to do justice according to the pith and substance of the rule of law and disregard technical flaws and deceptive subtleties—*Chhalam nirasya bhootena vyavaharannayennrupath*—II, 19.

abridge and take from the letter of the law, the other doth enlarge and add thereto'. The *Smritikars* dealt with the perennial conflict between law and justice by emphasising the importance of right reason, good sense and equable justice by which alone any law can justify its existence.

Several Charters of the British Parliament directed courts in India to proceed when the law was silent in accordance with justice, equity and good conscience, an expression which was generally interpreted to mean rules of English law if found applicable in Indian society and circumstances.[77] These principles were invoked only in cases for which no specific rules existed.[78] Accordingly, it was laid down by the judicial committee of the Privy Council in the case of a will that because the case was new, the court would not take the view that it was not provided for at all. Where new combinations of circumstances arose, it was incumbent on the court to apply rules of law which could be derived from general principal. Nor would the court abandon all analogy to such principles and similar cases, but would keep them steadily in view not merely for the determination of the particular cases but for the interests of law as a science.[79] Applying this rule of jurisprudence, the Privy Council held in another case that a murderer was disqualified from succeeding to the property of the murdered person in case of intestacy. This rule of English law founded on public policy was applied to the case of a Hindu on grounds of justice, equity and good conscience.[80] However, care was taken to see that no refined distinctions essentially characteristic of English law and no technical rules of equity were introduced into Hindu law.[81] Though, there are no texts in the *Smritis* expressly recognising the right of an adopted son to inherit to his adoptive mother's relations, this right has been enforced on general principles of equity and good conscience and analogy deduced from texts applicable to similar cases.[82] In a case, the Supreme Court observed that it is now well-known that in the absence of any clear *Shastric* text, the courts have authority to decide cases on principles of justice, equity and good conscience, unless it is shown that the decision would be repugnant to or inconsistent with any doctrine or theory of Hindu law.[83]

77 *Waghela Rajsanji v Sheikh Masludin* (1887) 14 IA 89.

78 *Ram Coomar v Chunder Canto* (1876) 4 IA 23, 50–51.

79 *Juttendromohun Tagore v Ganendromohun Tagore* (1872) Supp IA 47; *Subramania Ayyar v Rathnavelu Chetty* (1918) 41 Mad 44, 74, FB.

80 *Kenchava v Girimalappa* (1924) 51 IA 368; s 25 of the Hindu Succession Act 1956, now inflicts this disqualification on the murderer.

81 *Juttendromohun Tagore v Ganendromohun Tagore* (1872) Supp IA 47.

82 *Subramania Ayyar v Rathnavelu Chetty* (1918) 41 Mad 44, 74 (FB).

83 *Gurunath v Kamalabai* [1951] 1 SCR 1135, 1147, 1148; *Peramanayakam v Sivaraman* AIR 1952 Mad 419, 472, 473 (FB). Reference may be made to *Kamalaksby v Narayani* AIR 1968 Ker 123.

Where there is absence of any express rule of law and any authority affording any real guidance and no rule of custom, appeal to the spirit of the law is not unknown. Some modern decisions of the highest tribunal in England go to show that, while judges do not legislate at large, they do subscribe to the view that only in the absence of authority, and when the spirit of the law suggests the affirmation of previously unknown or undetermined duties, the courts do commit themselves to novelty, though of course, very cautiously. Instances do occur from time to time, though they are not frequent, where the courts in examining any new situation or a new jural relationship have regard to the genius of the Hindu law,[84] and the consciousness of the community at large and also found the conclusions reached by them on the grounds that they were more in accordance with the reason of the thing and general principles.

Since the reduction of India under British rule, another element was added to the effective sources of Hindu law. The courts had to ascertain and administer the personal law of the Hindus in matters relating to succession, inheritance, marriage, adoption and religious usages and institutions except in so far as such law was altered by legislative enactment. The decisions of courts, founded on interpretation of the texts of the *Smritis* and principally on the views expressed by the commentators, accepted as leading authorities in the different schools, although they immediately affected only the parties, necessarily operated as binding on the entire community. Judicial precedents became necessary and useful for in them the courts found reasons to guide them and the authority of those who made them had to be regarded. Unfortunately, however, the importance of custom was at times not fully appreciated and decisions given on some points had the effect of disturbing what had been accepted by the community as established law. The *cursus curiae* was bound to be strong in these matters and there was little chance of retracing the steps already taken, because the obvious course was to follow the doctrine of *stare decisis* and to uphold a decision already given rather than overturn it, after it had stood unreversed and acquired increased strength by lapse of time. This, as will be presently pointed out, tended to impart a measure of rigidity to the law. With numerous superior courts administering law in different parts of the country, there grew up a mass of case-law and most of the important points of Hindu law are now to be found in the law reports and to this extent, it may be said that the decisions of Hindu law, though not in theory yet, in effect, have in part superseded the commentaries and limited and supplemented the rules of Hindu law. Modern jurisprudence endorses the importance of authoritative precedents and accepts them as legal sources of law being entitled to

84 For instance, *Tiruvengadam v Butchayya* (1929) 52 Mad 373, 379.

unquestioning obedience. The pronouncements of the Privy Council and now of the Supreme Court are final and in practice recourse to them is of the utmost importance and necessity. The decisions of the Privy Council and the Supreme Court are binding on all the other courts of India including the High Courts; but the decisions of any one High Court are not binding on any other High Court, though they are binding on the courts subordinate to it.

NATURE OF HINDU LAW

It is seen from the foregoing observations that Hindu law was not static or staid, but was empiric and progressive. Sir Henry Maine, author of *Ancient Law*, and some of his contemporaries, propounded the speculative theory that *Manusmriti* and other *Smriti* codes did not at any time constitute a set of rules of positive law actually administered in India. In their opinion, expressed with smug uncharitableness, the *Smriti* law, in great part, was merely the ideal picture of that which in the view of the Brahmins, ought to be the law. It was suggested by an eminent English author that Hindu law was 'a mere phantom of the brain imagined by Sanskritists without law and lawyers without Sanskrit'. All this naturally disturbed many Indian jurists and scholars who felt compelled to refute the charge. It is no more necessary to discuss that theory since it has now been securely interred and its perturbed spirit has ceased to wax the law. Some writers on Hindu law made observations of a like nature with lofty disdain or condescension and some captious critics could see in the *Dharmashastras* only primitive rules of rude simplicity. Dr Sen has observed that the critic who pretended to see nothing in the Hindu law but a stagnant mass of archaic rules, knew not what he said and only showed that he himself had a stagnant mind. This eminent jurist has, however, justly pointed out that for this attitude of those writers we ourselves are partly responsible. While foreign jurists, in spite of their many disadvantages have, out of a spirit of research, directed their attention to Hindu law, no matter with what success, we ourselves have simply looked on.[85] It must also be acknowledged that translations of many *Dharmashastras* by eminent orientalists of Europe in the *Sacred Books of the East Series*, and in other publications and the monographs written by them, are the result of untiring research and evince critical power of the high degree. Mostly based on leading commentaries, those translations of some of the *Smritis* have been of great help to the courts and generations of lawyers and students of Hindu law.

The slow and steady process of development of Hindu law was the result of innovations often imperceptible, as happens when old and

85 *Sen's Hindu Jurisprudence*, p 110.

obsolete rules become gradually displaced by growing usages and customs. In a large measure, impetus was given to that progress by the standard works of those leading commentators and *nibandhakars*, who did not permit themselves to be fettered by orthodox prejudices and showed liberal readiness to move with the times. However, as the Hindu Law Committee very appropriately observed: 'we have no longer *Smritikars* and commentators of the old type; we have the Legislature and the courts of law'. The courts of law, however, do not exercise the same freedom of interpretation in moulding the law as did the ancient commentators even when the interpretation was not deducible from the earliest authorities. This practically meant that Hindu law, excepting in so far as the legislature intervened, had to remain arrested in its growth at the point at which it was left by Vijnaneshvara, Jimutavahana and other recognised commentators, the latest of whom flourished in the 18th Century.[86] For more than two thousand years after the Code of Manu was compiled, Hindu law pursued the even tenor of its way without any real break in its continuity and was altered, improved and refined from time to time. However, the spontaneous growth of Hindu law was retarded if not wholly stopped, with the reduction of India under British rule. The difficulties of English judges, who did not know the language of the *Dharmashastras*, when called upon to administer a system of law which required understanding and appreciation of argumentative works, religious traditions, ancient usage and more modern habits of the Hindus with which they were unfamiliar, were indeed great. No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. The ancient work and commentaries dealt with and discussed texts which were mandatory as well as those which were directory and did not always draw a clear line of demarcation between matters religious and secular.[87] Texts which did not contain positive law were at times not distinguished from rules intended for positive laws and in a number of cases, the Privy Council sounded a note of caution while correcting such errors. In difficult cases, some of those judges were not unnaturally inclined to rely on their own concepts of what the law should be and in *praesumptiones hominis* and at times reached conclusions at variance with the spirit and substance of Hindu law. In some cases, doctrines of English law of doubtful applicability were pitchforked into Sanskrit texts and Roman law was laid under contribution. The Privy Council, not being unmindful of all this, observed in a very early case:[88]

> At the same time it is quite impossible for us to feel any confidence in our opinion, upon a subject like this, when that opinion is founded

86 Report of the Hindu Law Committee, 1941, paras 15–16.
87 See *Dharmashastras*, Introduction to the book.
88 4 MIA 1, 97–98.

upon authorities to which we have access only through translations, and when the doctrines themselves, and the reasons by which they are supported, or impugned, are drawn from the religious traditions, ancient usages, and more modern habits of the Hindoos, with which we cannot be familiar.

With their mastery of jurisprudential concepts and their unmatched forensic ability to expound and elucidate even the most complicated matters of unfamiliar laws affecting the personal status of the parties, their Lordships of the Privy Council evolved principles and laid down rules on varied and complex subjects in their own unique style, and generations of lawyers and judges in this country have acknowledged their indebtedness to that August Tribunal for the lead and guidance given by it. The principle was established that the duty of judge, who is under the obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities (*Smritis*), as to ascertain whether it has been received by the particular school which governs the district with which he has to deal and has there been sanctioned by usage. For, under the Hindu system of law, clear proof of usage will outweigh the written text of the law.[89]

However, 'clear proof of usage' of necessity required establishment of the usage by showing that it was ancient, certain and reasonable and where the attempt was to support any usage in derogation of the general rules of Hindu law, it had to be construed strictly. The lawyer familiar with rules of procedure and evidence knows the practical difficulties in the way of a party who undertakes the heavy burden of adducing satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has by common consent, been submitted to by a class or a district or local area. The course of practice upon which the custom is said to rest must not be left in doubt, but be proved with certainty. Moreover, custom in matters of personal law readily applies closure and does not permit of extension by analogy nor of any deductivity by *a priori* methods. Custom should occur substantially under conditions substantially similar and instances must indicate the probable general habit of persons under similar circumstances. The principles are indubitably sound, but the difficulties of proving modifications and variations in the old rules of law introduced by custom were at times almost insurmountable and the task often beyond the means of an average litigant. The effect of some of the pronouncements of the highest tribunal was to treat certain commentaries as having laid down the last word on every rule collocated and dealt with in them centuries ago and the task of the courts was no more than application of those self-same rules to a fast changing society. Referring to the arrest of progress suffered by Hindu

89 *Collector of Madura v Moottoo Ramalinga* (1868) 12 MIA 397, 435–36.

law, Mr Mayne wrote that 'no voices were heard unless they came from the tombs'. Some ancient texts and injunctions favoured by the commentators which had not been accepted as part of current law and virtually abandoned in practice, were in some cases received as binding law and given inflexible interpretation. All this tended in a large measure to unprecedented rigidity and to the creation of judge-made law, which from the inherent limitations on its scope could not be expected to respond adequately to all changing needs and circumstances. The only remedy was comprehensive legislation in the form of a uniform code.

Codification is a well-worn subject. Its chief apostle was Bentham and its greatest antagonist was Savigny. It has been said that they were both giants, to each of whom half his prayers were granted, whilst the other half was scattered to the winds. According to Savigny, 'law should be gradually developed by the silent internal forces of national consciousness with the least possible interference by the legislature'. Modern jurisprudence recognises the advantages of the transformation of a well-developed and long established traditional and customary law into statutory form. It accepts innovations on the substance of existing law and even extirpation and substitution of any part of that law to ensure that it accords with the actual circumstances in which the people of a country are placed. Idealist and totalitarians had most of them to agree that there existed large number of anomalies and inequitable rules in the complicated structure of Hindu law which could be dealt with only by legislation. It could no longer be denied that the fast moving conditions and the social, economic and political transformation in the country had rendered imperative substantial and radical changes in that law. It has to be admitted that far-reaching and fundamental changes had become inevitable, for they alone could furnish fair and equable solutions to some of the most controversial questions relating to the law of marriage and succession.

The question of codification of Hindu law has been debated for nearly a century both by law reformers, who like Bentham were staunch advocates of the theory of the utility of a code of laws and by others, who like Savigny exaggerated the defects of a code and declined to accept its practical utility. Bentham wrote that the great utility of a code of laws is to cause the debates of lawyers and the bad laws of former times to be forgotten and that its style should be characterised by force and harmony. The code of his dreams, one that would not require schools for its explanation or casuists to unravel its subtleties and be a complete self-sufficing enactment, was indubitably an ideal to be pursued but he pushed his theory too far when in his aim at finality he minimised all practical difficulties in the way of such legislation. Codification has all along been opposed by those who deprecated legislation in any shape or form in Hindu law on religious grounds and by some others on the ground that it would be impossible to give legislative form to the spacious and complicated structure that was Hindu law. Much of the opposition

was grounded in sentiment and not in reason. Some objection belonged to the class of uniformed and orthodox element, though it must be said that there was considerable sentiment born of reverence for an institution which had its roots in hoary antiquity. It was not realised by some dry traditionalists that the venerated authors of the *Dharmashastras* had themselves been progressive and tried to keep the law in harmony with their environments and in general responded to changing ideas, customs and the march of time.

RECENT ENACTMENTS

The Hindu Law Committee appointed in 1941 to examine Hindu law, recommended that it should be codified in gradual stages beginning with the law of intestate succession and marriage. The committee ceased to function after making considerable progress and was revived in 1944. The committee presided over by Sir Benegal Narsing Rau—known as the Rau Committee—made its report and presented a draft code. One of the objects of the committee was to evolve a uniform code of Hindu law which would apply to all Hindus by blending the most progressive elements in the various schools of law, which prevailed in different parts of the country. The draft of the Code presented by the committee was to be regarded as an integral whole, so that no part of it would be judged as if it stood by itself. The Hindu Law Bill remained on the anvil for a long time and ultimately those in charge of it decided to split it into certain parts and to move the Parliament after placing each part separately before it. The advantages of this were probably practical, but one disadvantage was that it meant legislation by instalments. Such codification, however carefully done, cannot derive the full benefit of a pre-conceived plan of the whole system to be wrought upon. Instalments of a law intended to be uniform and to operate as an organic whole have come into operation at intervals during 1955 and 1956, and this must raise some problems and create some anomalous situations and this apart, from the fact that the enactment which have so far found place on the statute-book leave an undetermined residue. The Hindu Marriage Act was enacted in May 1955, the Hindu Succession Act in June 1956, the Hindu Minority and Guardianship Act in August 1956 and the Hindu Adoptions and Maintenance Act in December 1956.

Fundamental Changes

The Changes brought about by the two principal enactments, the Hindu Marriage Act 1955, and the Hindu Succession Act 1956 are pointed out in the 'Introductory Notes' to the commentaries to those Acts. It will suffice here to state that the alternative conditions which had arisen in matters social, economic and political, made it imperative that polygamy

should not be permitted and rules of succession should be equitable. The outstanding feature of the new Hindu Marriage Act is that monogamy is now enforced as a rule of law and bigamy is rendered punishable as a crime. The conditions and requirements of a ceremonial Hindu marriage are considerably simplified and any two Hindus, which expression includes not merely Hindus by religion but Buddhists, Jains and Sikhs as well, can solemnise the ceremonial marriage recognised by the Act. Relief by way of judicial separation, declaration of nullity of marriage and divorce are permissible under the Act. There is considerable force in the remark belonging to times long past, that rules of succession to property being in their nature arbitrary, are in all systems of law mostly conventional and that even deeply rooted traditions may have to change with the march of time. The new Hindu Succession Act may seem to break violently with the past, but it has to be conceded that it is characteristic of the age which is one of great ideals and fast changing theories. One outstanding feature of this Act is that it lays down a uniform system of inheritance for the whole country and lays down some simple rules relating to succession of the property of a Hindu male and female. The property of a male Hindu dying intestate after the commencement of the Act devolves in equal shares between his son, daughter, widow and mother. Male and female heirs are now treated as equal without any distinction. Another notable feature of the new Act is that any property possessed by a female Hindu is not held by her as her absolute property and she has full power to deal with it and can even dispose of it by will as she likes. The restraints and limitations of her power have ceased to exist even in respect of existing property, so that any property possessed by a female Hindu whether acquired by her before or after the commencement of the Act, is not held by her as a full owner and not as a limited owner.

The objects achieved by the new legislation are substantial unification of Hindu law by blending much that was progressive in the various schools of law, which prevailed in different parts of the country and removal of many anomalies and incongruous injunctions. One aim of this legislation was to act, it is submitted rightly, on the principle that where the reason of the rule had ceased to exist there was little justification for insistence upon its perseverance. (*Cessante ratione legis cessa ipsa lex.*) Renascent India of the post-independence era appreciated the value of the fresh and broadened outlook in matters affecting the social, economic and political rights of the citizen regardless of sex. Adult suffrage and political parity were forerunners to the recognition of all that was implicit in the constitutional directives and fundamental guarantees of equality of status and equality before law enounced in the Constitution. The underscoring of the rights of women to be *in equali jura* finds concrete shape in the new legislation.