

ANCIENT INDIAN JURISPRUDENCE

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Speech delivered on 27.11.2010 at Banaras Hindu University, Varanasi

In ancient India not only was there tremendous development of mathematics, astronomy, medicine, grammar, philosophy, literature, etc. but there was also tremendous development of law. This is evident from the large number of legal treatises written in ancient India (all in Sanskrit). Only a very small fraction of this total legal literature survived the ravages of time, but even what has survived is very large.

It is said that all Hindu Law originated from the Vedas (also called Shruti). However, in fact this a fiction, and in fact the Hindu law really emanated from books called the Smritis e.g. Manusmriti, Yajnavalkya Smiriti and the Smritis of Vishnu, Narad, Parashar, Apastamba, Vashisht, Gautam, etc. These Smirits were not laws made by parliament or some legislature. They were books written by certain Sanskrit Scholars in ancient times who had specialized in law. Later, commentaries (called Nibandhas or Tikas) were written on these Smritis, e.g. the commentary of Vijnaneshwar (who wrote a commentary called Mitakshara on the Yajnavalkya Smiriti), the commentary of Jimutvahan who wrote a book called the Dayabhaga (which is not a commentary on any particular Smriti but is a digest of several Smritis), Nanda Pandit (whose commentary Dattak Mimansa deals specifically with the Law of Adoption), etc. Commentaries were

then written on these commentaries, e.g. Viramitrodaya, which is a commentary on the Mitakshara (which founded the Banaras School of Mitakshara). It is not necessary to go into further details about this as that would not be necessary for this discussion.

All law was originally customary law, and there was no statutory law in ancient India, for the simple reason that there was no parliament or legislature in those times. The problem with custom, however, was that it was often vague and uncertain, and did not go into details. Customary rules could of course tell us that when a man dies his property should go to his son. But what would happen if there is no son and the deceased only leaves behind him several relations who are distantly related to him e.g. second cousins, grand nephews, aunts, etc. Who will then inherit his property? This could obviously not be answered by custom. Hence text books were required to deal with this subject, and this requirement was fulfilled by the Smritis and commentaries in ancient India, just as it was done in ancient Rome. Custom no doubt prevailed over these written texts but for that clear proof was required by the person asserting its existence, which was not easy.

In ancient Rome most of the law was not made by the legislature but by the writings of eminent Jurists e.g. Gaius, Ulpian, Papinian, and ultimately the great Justinian Code. This trend was followed in the civil law system which prevailed in Continental Europe where the commentaries of eminent Jurists are cited in the law courts, unlike in the common law system (which prevails in England

and the former English Colonies including India, USA, Australia, etc.) in which court decisions are cited as precedents.

It is not necessary to deal with the various Smritis and commentaries in this short time, so I shall confine myself with some broad outlines.

The Hindu law, as we all know, got divided into two branches --- the Mitakshara and the Dayabagha. The Mitakshara prevailed over the whole of India except Bengal and Assam, while the Dayabhaga prevailed in Bengal and Assam. What was the basic difference between the two branches? The difference arose because two different interpretations were given by the commentators to one word 'pinda'. To understand this it is first necessary to know that according to the traditional ancient Hindu law approach, the person who had the right to give Shraddha to a deceased had the right to inherit the property of the deceased. The Shraddha is a religious ceremony to satisfy the needs of the spirit of the deceased. According to ancient Hindu belief, when a man dies, his spirit had still some needs e.g. the need for food and water. Hence, after his death, he has to be offered rice cakes (called 'pinda') and water.

There is a shloka of Manu stating that when a man dies his inheritance will go to his nearest sapinda (vide Manusmriti Chapter IX, Sloka 106 & 187). What is the meaning of the word 'sapinda'? That will depend on the meaning of the word 'pinda'.

According to Jimutvahan, the word 'pinda' means the rice cake offered in the shraddha ceremony to the ancestors (vide Dayabhaga Chapter XI, 32-33 & 40). Thus, according to the Dayabhaga, the person who has a right to give 'pindas' to the deceased (i.e. the person who has the right to give shraddha to the deceased) has the right to inherit his property.

This brings us then to the question who has the right to give shraddha? The answer to this question is given in the book called 'Parvana Shraddha' (which is also in Sanskrit). In this book a list of persons is given who have the right to give shraddha. At serial No. 1 in the said list is the son, at serial No. 2 is the son's son, at serial No. 3 is the son's son's son etc. The rule was that if any one higher in this list is alive then one does not have to go below the list, and the list terminates there. To give an example, if the deceased died leaving behind him one or more sons, then one does not have to go below that list and the entire property will be inherited by the son (if he is the sole son), and will be shared equally by all the sons if there are more than one sons (because if there are more than one sons each of them had the right to give shraddha to his deceased father).

It is only if a deceased dies leaving behind no son, that one can go lower in the list. In that case, if the deceased left behind him his son's son, then the property will go to that grandson, because he is at serial No. 2 in the list in the Parvana shraddha, and one cannot go further below in such an eventuality.

Thus the Dayabhaga has followed the traditional ancient Hindu law approach that the person who has the right to give shraddha to a deceased has the right to inherit his property.

It is for this reason, there is no inheritance at birth in the Dayabhaga (unlike in the Mitakshara). Thus, for example, if A dies leaving behind him his son B and B's son C, then, according to the Dayabhaga C will not inherit the property of his grandfather A, because C has no right to give shraddha to A since his father B was alive when A died. Since C has no right to give shraddha to A, (because B is alive), hence C cannot inherit his grandfather A's property, and the entire property goes to B or, if B has brothers, then it is shared equally by all the brothers.

For the same reason, there is no concept of coparcenary property in the Dayabhaga, because in coparcenary, there is inheritance at birth by the son in the ancestral property of his father.

In Mitakshara, however, Vijnaneshwar takes a wholly different approach. According to Vijnaneshwar, the word 'pinda' does not mean the rice cake offered in the funeral ceremony at all. It means the particles of the body of the deceased. In other words, inheritance is by nearness of blood or propinquity, and it has nothing to do with the right to give shraddha.

This was a completely revolutionary approach adopted by Vijnaneshwar, as it was a complete break from the traditional Hindu

law view that the person who has the right to do shraddha has the right to inherit the property of the deceased, and it is a good example how the law developed. Mitakshara is a much more secular law as compared to the Dayabhaga, since, according to the Mitakshara, the right to inherit has nothing to do with the right to give shraddha.

Thus we see that by giving two different interpretations given to a single word 'pinda' Hindu law got bifurcated into two different branches.

The Mitakshara, as already stated above, is a commentary on the Yajnavalkya Smriti. An interesting question arises as to why Vijnaneshwar preferred to write his commentary on the Yajnavalkya Smriti and not on the Manusmriti. The Manusmriti was better known and more prestigious than the Yajnavalkya Smriti. Yet, Vijnaneshwar preferred Yajnavalkya Smriti to Manusmriti. The question is why?

If we compare Manusmriti with Yajnavalkya Smriti, we will find a striking difference. The Manusmriti is not a systematic work. We will find one shloka dealing with religion, the next dealing with law, the third dealing with morality, etc. Everything is jumbled up. On the other hand, the Yajnavalkya Smriti is divided into three chapters. The first chapter is called Achara which deals with religion and morality, the second chapter is called Vyavahara, which deals with law, and the third chapter is called Prayaschit which deals with penance.

Thus we find that in the Yajnavalkya Smriti, law is clearly separated from religion and morality, unlike in Manusmriti where all these are jumbled up. Thus the Yajnavalkya Smriti was a great advance over the Manusmriti because in it there is a clear separation of law from religion and morality. We can compare this separation of law from religion, morality etc. with the similar separation made by the positivist jurists Bentham and Austin, who separated law from religion, morality etc. The Yajnavalkya Smriti was written later than the Manusmriti and it shows a great advance over the latter.

Apart from that, the Yajnavalkya Smriti is more concise and systematic. It has only about 1000 shlokas, whereas the Manusmriti has about 3000. Also, it is more liberal than the Manusmriti, particularly towards women, etc. Vijnaneshwar, who adopted a secular approach towards inheritance, naturally preferred Yajnavalkya Smriti to the Manusmriti since the former had clearly separated law from religion. The Dayabhaga, on the other hand, preferred Manusmriti because in it law is not separated from religion and the Dayabhaga takes a religious approach towards inheritance.

The separation of law from religion, morality, etc. was carried further by Narada and Brihaspati, who in their Smritis confine themselves entirely to law, particularly civil law.

I am not going into various details about the Hindu law of inheritance, adoption, partition, marriage, etc. However, to show how the law progressed I will only give some illustrations.

There is a text of Vashishta which says “ a woman should not give or take a son in adoption except with the assent of her husband”. This has been interpreted in 4 different ways by our commentators: (1) The Dattak Mimansa of Nanda Pandit holds that no widow can adopt a son because the assent required is assent at the time of adoption, and since the husband is dead no assent of his can be had at the time of adoption. Vachaspati Mishra, founder of the Mithila School of Mitakshara, is of the same opinion, but for a different reason. According to him, adoption can only be done after performing a ceremony called dattak homa, and since a woman alone cannot perform the homa a widow cannot adopt. (2) The Dayabhaga view is that the husband’s assent is not required at the time of actual adoption, and hence if the husband had given assent in his lifetime his widow can adopt after his death. (3) The view of the Dravida School of Mitakshara is that the word ‘husband’ in the expression ‘except with the assent of the husband’ is only illustrative and not exhaustive, and hence if the husband is dead the assent of his father or other senior male member of the family is sufficient.

In this connection it may be mentioned that the illustrative rule of interpretation is a departure from the literal rule which normally has to be adopted while construing a text. However, sometimes departures from the literal rule are permissible, and one of such departures is the illustrative rule. To give an example, in Sanskrit there is an oft-quoted statement “*Kakebhyo Dadhi Rakshitam*” which means “protect the curd from the crows”. Now in this sentence the word ‘crow’ is merely illustrative and not exhaustive. The statement

does not mean that one should protect the curd only from crows but allow it to be eaten up by cats, dogs or to get damaged by dirt or filth etc. It really means that one should protect the curd from all dangers. Hence the word 'crow' in the above statement is only illustrative and not exhaustive.

We can take another example. In the U.S. Constitution, Article 1 Section 8 states that Congress (the American Parliament) can raise Armies and Navies. There is no mention of an Air Force there, obviously because there were no aircraft in 1791 when the U.S. Constitution was promulgated. The first aircraft was invented by the Wright brothers in 1903. However, today's reality is that a modern Army cannot fight without air cover. Amendment to the U.S. Constitution is a very arduous and lengthy procedure because it requires two-third majority of both Houses of Congress and ratification by three-fourth of the States. By the time this is done, the enemy may invade and occupy the country. Hence the words 'Armies and Navies' have to be interpreted as illustrative and not exhaustive, and they really mean all armed forces necessary for the security of the country (which would include an Air Force, also).

(4) The Vyavaharmayukha and Nirnayasindhu of the Bombay school of Mitakshara hold that assent is required only for the woman whose husband is living, and hence a widow can freely adopt unless she had been expressly forbidden by her late husband, in his life time.

The above widely differing interpretations of the text of Vashishta shows how by creative interpretation the law developed in different parts of the country.

We may take another example. The son of a man from his legally wedded wife is called an '*aurasa putra*'. On the other hand, an adopted son is called a *dattak putra*. As regards the right of an auras putra, they are mentioned in various legal texts (the Smritis and the commentaries). On the other hand, there is no mention anywhere what would be the rights and duties of a dattak putra.

This legal vacuum was overcome by our ancient jurists by using one of the Mimansa principles of interpretation. It may be mentioned herein that the Mimansa principles of interpretation were the principles regularly used by our great jurists whenever they faced any difficulty in interpreting a legal text (because of ambiguity, conflict etc. therein). The books on Mimansa are all in Sanskrit, but there is a good book in English called 'Mimansa Rules of Interpretation' by Prof Kishori Lal Sarkar, which may be seen if one wishes to go deeper into the subject.

One of the Mimansa principles is called the atidesh principle, and this was used by our ancient Jurists to solve the problem of the rights and duties of a dattak putra. What is this atidesh principle? To explain this it may be mentioned that the rules for performing certain yagyas are given in religious books called the Brahmanas, e.g. Shatapath Brahmana, Aitareya Brahmana, etc. The yagyas whose

rules of performance are given in the Brahmanas are known as Prakriti yagyas. Thus, the Darshapaurnamas is a prakriti yagya, because the rules for its performance are given in the first chapter of the Shatapath Brahman. Similarly, the agnihotra is also a prakriti yagya, because its rules of performance are given in the second chapter of the Shatapath Brahman.

However, there were certain other yagyas whose rules of performance are not given anywhere e.g. the Saurya Yagya. Such yagyas are called Vikrit yagyas. How was a vikrit yagya to be performed ? For resolving this difficulty (in fact all the Mimansa principles were created for resolving the practical difficulties in performing the yagya) the atidesh principle was created. Atidesh really means going from the known to the unknown. Hence, it was held that a Vikrit yagya should be performed in accordance with the same rules as the Prakriti yagya of the same category. For instance, the Saurya yagya, which is a Vikrit yagya, belongs to the category of the Darshapaurnamas, which is a Prakriti yagya. Hence, the Saurya yagya has to be performed in accordance with the rules of the Darshapaurnamas.

Now, we may consider how the atidesh principle, which was created for religious purpose, began to be used in the field of law. As stated above, a son which a man has through his legally wedded wife is called an 'aurasa putra'. His rights and duties are given in the smritis. But as regards a dattak putra (adopted son) his rights and duties are not given anywhere. Hence the atidesh principle was used

and it was said that legally a dattak putra stands on the same footing as an aurasa putra, and hence he has the same rights and duties. Thus, an adopted son is legally exactly like a natural son (except that his prohibited degrees of relationship for marriage are on both sides, his natural family as well as his adoptive family). In other words, the aurasa putra is treated as a prakriti yagya, while the dattak putra is treated as a vikrit yagya.

The atidesh principle will have even greater utility in modern times because since society in the modern age is fast changing often cases will come up before the Court where the law is silent (because the legislature cannot contemplate all the situations which will arise in the future).

I am not going into the further details about the ancient Hindu law principles which would require a great detailed analysis. It can be said in brief that Hindu law was not stagnant but underwent continuous development as society developed, and this development was aided by the creative thinking of our ancient Jurists.

The basic structure of the ancient Hindu law was that laid down in the Smritis which was supplemented and varied by custom. This, however, was only its early character. Subsequently, it made remarkable progress during the post smriti period (commencing about the 7th Century A.D.) when a number of commentaries and digests (Nibandhas and Tikas) were written on it. These commentaries and digests were necessary not only because Smritis were written in

Shlokas which were very terse and concise, because of which it was sometimes difficult to understand the meaning, but also because society was undergoing changes and this required creative thinking by the later Jurists to make the law in consonance with social developments.

As stated by Mayne in his treatise on 'Hindu Law & Usage' :

“Hindu law is the law of the Smritis as expounded in the Sanskrit Commentaries and Digests which, as modified and supplemented by custom, is administered by the courts.”

The smritikars and commentators did not exercise any sovereign power such as is possessed by the king or the legislature. Their authority was based on their deep scholarship and the respect which they commanded by their writings.

In this connection, it maybe mentioned that in the guise of commenting on the Smritis, the commentators utilizing their creativity developed and expounded the Smriti text in greater detail and differentiated between the Smriti rules which continued to be in force and those which had become obsolete. They also incorporated new usages which had sprung up.

The Smritis and commentaries repeatedly stated that customs would override the written text. This principle made the Hindu law

dynamic, because customs kept changing as society progressed. Also, as explained by the Viramitrodaya, the difference in the Smritis was in part due to different local customs.

Medhatithi in his commentary on the Manusmriti wrote that the Smritis were only codifications of the existing customs, and the same has been said in the Smriti Chandrika (which is the basic text of the Dravid school of Mitakshara) and the Vyavahar Mayukh (which is a basic text of the Bombay school of Mitakshara). This, however, is not a very accurate view. Though no doubt the smritikars and commentators relied heavily on customs, they also used their creativity to develop the law to make it more just and rational according to their own notions.

The study of ancient Indian Jurisprudence really belongs to the school of Jurisprudence called historical Jurisprudence, whose father is regarded as the German Jurist Savigny (1799-1861), whose follower was the British Jurist Sir Henry Maine (see Maine's 'Ancient Law'). According to Savigny, law is not a consciously created phenomenon but was the gradual distillation of the volksgeist (the spirit of the people). Law was found, not made. Thus, Savigny was a strong advocate of customary law and was opposed to legislation. As law develops from a few simple principles in primitive societies to complexity in later society custom has to be supplemented with writings of legal scholars, but the writer should only bring into detailed shape what he finds as raw material i.e. the customary rules in society.

No doubt, the historical school made an important contribution to our understanding by suggesting that law is not merely a set of artificial rules imposed on society but is an outcome of the social system as it has evolved in history. However, the historical school was essentially reactionary in character inasmuch as it made a fetish out of custom. As Justice Holmes said, "It is revolting to have no better reason for a rule than that it was so laid in the time of Henry IV". Historical jurisprudence presented a determined reaction to the rationalizing of the eighteenth century. Savigny was inspired by his profound study of Roman law, whose development was to him the model of wise juristic guidance moulding the law through gradual adaptation for centuries before the *Corpus Juris* gave the final form of codification. This explains Savigny's preference for the jurist rather than the legislator as the medium of legal progress.

The historical school is entirely unsuited to the scientific era. In the age of rapid technical growth people are not prepared to wait for the slow growth of custom. Legislation is, in fact, the dominant source of law today, as it enables rapid change in the law, and this rapid change is necessary in modern industrial society which is fast changing in view of new scientific discoveries and inventions.

Savigny's views were coloured by his hostility to the French Revolution which destroyed the feudal order and spread the revolutionary ideas of liberty, equality and fraternity proclaimed by the French National Assembly and the National Convention. Savigny

was of the view that 'law comes from the people, not from the State'. This may be true of feudal or pre-feudal law, but it certainly is untrue of the modern industrial era where almost all law comes from the State.

Modern Jurisprudence

The first attempt to create a scientific theory in jurisprudence was the positivist theory of the English jurists Bentham and Austin. We may, therefore, discuss this theory at some length.

Science studies objective phenomena as it is, and not how we would like it to be. This was precisely the approach adopted by the positivist jurists in law.

There are two kinds of sciences (1) natural science and (2) social science. The natural sciences study inanimate matter (e.g. physics, chemistry, etc.) or living organisms like plants and animals (botany and zoology) and also the physical body of human beings (medical science, including anatomy, physiology etc.). The social sciences, on the other hand, study the social behaviour of human beings, e.g. economics, political science, sociology etc. Jurisprudence is also one of the social sciences.

The French thinker Auguste Comte is known as the father of positivism. What he did was to introduce the method of the natural

sciences into the social sciences. This method was careful observation, logical analysis, experimentation, logical inferences etc.

The British jurists Bentham and Austin utilized the positivist approach of Auguste Comte to the subject of jurisprudence. They insisted that we should study the law, including the legal structure, the legal concepts etc. as it is, and not how we would like it to be. This was the scientific approach because in science also we study objective phenomena as it is and not how we like it to be. For instance, when we study the atoms in physics we study the nucleus, the electrons orbiting around it, etc. We do not speculate how the atom should behave according to our own wishes, but we study it as it is. The same approach was adopted by Austin and Bentham in jurisprudence.

This was in sharp contrast to the preceding theory in jurisprudence which was called the natural law theory. The natural law theory postulated that along with the positive, man-made law there exists a higher law which emanates from God or reason or morality or some other source. According to the natural law jurisprudence, if there is a conflict between this higher law and the positive man-made law, the higher law will prevail. Thus, natural law was of the view that law is what it ought to be, and a bad law was not law at all.

St. Thomas Aquinas in his 'Summa Theologica' states, "A human law, in so far as it deviates from reason, is called an unjust

law, and has the nature, not of law but of violence”. In the words of Blackstone the great British jurist of the 18th century:

“Those laws must be obeyed which are accordant with nature; the others are null in fact, and instead of obeying them they ought to be resisted. Human laws must not be permitted to contradict natural law; if a human law commands a thing forbidden by the natural or divine law, we are bound to transgress that human law”.

In modern times the natural law theory was most vehemently advanced during the American and French revolutions. It was proclaimed that liberty, equality and fraternity are inherent and ‘natural’ to man. But these ideas would be unacceptable to the ancient Greeks and Romans, though they also believed in natural law. To a Greek or Roman, slavery was a ‘natural’ phenomenon, and therefore, equality or liberty would be ‘unnatural’. Thus what is regarded as ‘natural’ in one era and in one society may not be so regarded in another.

The basic difficulty with natural law is that it is vague. What is natural? The answer may differ not only from age to age but even from person to person. How can one frame a legal system on this basis? People wish to have clear-cut, known laws so that they may regulate their conduct accordingly. Natural law is such a hazy concept that, if sought to be enforced, it can only result in confusion. As Kelsen said, with natural law one can prove everything and

nothing. Bentham regarded natural law as metaphysical nonsense. Similarly, the Danish jurist Ross (1899-1979) in his book 'On Law and Justice'(1958) and logical positivists like Carnap (1891-1970) said that the metaphysical speculation underlying natural law was totally beyond the reach of speculation. They pointed out that natural law can be used to defend or fight for every conceivable demand, and it had been used to defend slavery (in Ancient Greece and Rome). Totalitarians have found support in the natural law writings of Duguit and Del Vecchio, while advocates of greater freedom have relied on the writings of the French Philosopher Maritain (1882-1973) and the American jurist Lucey.

Natural law theories arose during the periods of historical transitions and turmoils e.g. during the American and French Revolution. There was also a temporary revival of natural law after the World War II, particularly in Germany where jurists like Radbruch were of the view that Nazi racial laws were so bad that they could not be regarded laws at all. However, soon after this 'revival', the natural law theory collapsed because natural law was obviously too vague and uncertain a concept to be accepted in modern industrial society which requires clear-cut rules and ideas.

Positivism, therefore, replaced natural law as the predominant theory in jurisprudence. Positivism lays great emphasis on statutory law, i.e. the law made by the legislature or its delegates, and it is ideally suited to the industrial era (unlike historical jurisprudence which was the jurisprudence of the feudal and pre-feudal era).

The confusion and uncertainties in the feudal laws in most countries of Europe upto the 18th century were impeding the growth of industry, and had to be replaced by simplification, systematization, clarity, uniformity and precision in the industrial era.

Positivist jurisprudence was the response to this situation. The Austinian analytical school is widely regarded as the classical positivist theory.

According to Austin: (1) Law is the command of the sovereign, backed up by sanctions, (2) Law is different from morality, religion, etc.

Thus, positivist jurisprudence regards law as a set of rules (or norms) enforced by the State. As long as the law is made by the competent authority after following the prescribed procedure it will be regarded as law, and we are not concerned with its goodness or badness. We may contrast this with the natural law theory which says that a bad law is not a law at all.

The separation of law from ethics and religion was a great advance in Europe from the feudal era (in which they were all mixed up). "The science of jurisprudence" Austin says "is concerned with positive laws, or with laws strictly so called, as considered without regard to their goodness or badness". Thus, positivism seeks to

exclude value consideration from jurisprudence, and confines the task of the latter to analysis and systematization of the existing laws.

Austin regards law as the command of the sovereign, and since in modern society the most common form in which such command occurs is a statute, statutory law, and especially codification, were given the highest place in positivist jurisprudence.

Thus, in France, the Civil Code of 1804 (the Code Napoleon) evoked great admiration from the French lawyers. Before this Code there were scores of legal systems in France, each province having its own laws (often a hotch-potch of local customs, Roman Laws, decrees of the parliaments, etc.) and the result was total confusion and uncertainty in the law.

By simplifying the law, and standardizing it all over France, the Code Napoleon was a great step forward in history. It was followed by other Codes, e.g. the German Code of 1896.

Positivist jurisprudence was thus of great help in society's progress from the feudal to the industrial era. In the 20th century, the main positivist jurist is Kelsen, but it is not necessary to deal with his theory (The Pure Theory of Law) here.

While positivism was a great advance over natural law and was suited to modern industrial society, it had a great defect and that was this: it rigorously excluded a study of the social, economic and

historical background of the law. Positivism only studied the form, structure, concepts etc. in a legal system. It was of the view that study of the social and economic conditions and the historical background which gave rise to the law was outside the scope of jurisprudence, and belonged to the field of sociology.

However, unless we see the historical background and social and economic circumstances which give rise to a law it is not possible to correctly understand it. Every law has a certain historical background and it is heavily conditioned by the social and economic system prevailing in the country. The great defect in positivism therefore was that it reduced jurisprudence to a merely descriptive science of a low theoretical order. There was no attempt by the positivist jurists, like in sociological jurisprudence, to study the historical and socio-economic factors which gave rise to the law. Positivism reduced the jurisprudence to a very narrow and dry subject which was cut-off from the historical and social realities. Thus it deprived the subject of jurisprudence of flesh and blood.

This defect in positivism was sought to be overcome by sociological jurisprudence, which became an important trend in the twentieth century. Sociological jurisprudence studies the legal system not in isolation but as part of the social reality. This was definitely a great advance over positivism since, as already mentioned above, the law cannot be properly understood without knowing its historical and social background. Thus, sociological jurisprudence considerably broadened the scope of jurisprudence.

There are many schools of sociological jurisprudence e.g. 'Living Law' school of Ehrlich, the 'Institutional School' of Durkheim, the 'Harvard School' of Roscoe Pound etc. It is not possible in this short time to discuss all these schools. What is common in most of them is their de-emphasis on legislation and emphasis on judge made law. The most extreme school of sociological jurisprudence in the U.S.A. was the realist school. According to Gray, one of the founders of the realist school, statutes, rules etc are not law but the material which the judge uses in making law. Gray was of the view that although sometimes it has been said that law is composed of two parts, legislative law and judge made law, but in truth all law is judge made law. Frank regarded court decisions as 'actual law' while statutes, rules, etc. are only 'probable law'.

The realist school thus totally negated the normative nature of law, and thereby it negated law itself.

Normativism is an essential feature of a legal order. A law is a norm (or rule of conduct) meant for repeated application, and not exhausted by its fulfillment once. A law reflects a certain social or economic relationship, and this relationship is created by the productive forces then prevalent in a given society. Since over a course of time the cycles of economic production kept repeating themselves certain enduring social relationships came into existence which were reflected, formalized and protected by the law. Law, thus, consists of a set of rules reflecting these relationships. It is true that in

modern scientific society social relationships are fast changing, but that does not mean that there is instability all the time in society. There are periods of rest and consolidation, and periods of social advance, and the law will reflect both.

The basic mistake of the realists is lack of a true understanding of the nature of law. There are important areas in the law in which judicial discretion cannot be exercised. For example, after the Hindu Marriage Act, 1955 a Hindu can have (at a time) only one wife. This law is so clear that no Judge in India can possibly hold that a Hindu can have more than one wife. Also, it is an over-simplification to say that 'law is what the Courts do in fact'. Many matters never come to Court, and yet the law is usually complied with.

Since normativity was rejected by the sociological jurists, obviously something had to fill in the vacuum. This was done by the sociological jurists by giving free discretion to the judges, as if judges can solve all problems of society. Thus, sociological jurisprudence shifted the centre of gravity of the legal system from statute to judge made law.

Thus, having started off from a correct approach, sociological jurisprudence soon got derailed. It has been mentioned above that positivist jurisprudence laid great emphasis on statutory, i.e, man-made law (as contrasted to historical jurisprudence which emphasized on customary, i.e., non-man-made law). Sociological jurisprudence, however, pointed out that there were great gaps in the

statutory law which had to be filled in by the judges, and even the statutory law had to be interpreted by the judges in a manner as to fulfill the needs of society. Sociological jurisprudence, thus, shifted the centre of gravity of the legal system from statutory law to judge-made law. Whereas under positivism a judge is only a passive agent and it is none of his function to make law (that is the task of the legislature), sociological jurisprudence arms a judge with tremendous powers to play an active role and even make law.

Sociological jurisprudence, thus, overcame an important defect in classical positivism. However, it in turn, suffers from major defects, and is unable to satisfy the intellectual needs of modern society. After all, arming judges with wide discretionary legislative powers solves few problems. There are all kinds of judges, scientific and unscientific, intelligent and dull, active and passive. To give all power to judges is thus a superficial solution to the problems of the modern world.

At present, modern western jurisprudence is undergoing a deep crisis. Despite creating a host of schools and theories, it seems to have exhausted the possibility of any further development and is lying stagnant. However, solutions to vital problems still eluded. A new theory in jurisprudence is, therefore, required in the modern era.

Ancient Indian Jurisprudence and Modern Jurisprudence

Having given the basic feature of ancient Indian jurisprudence and modern jurisprudence, we may summarize the differences

between the two. Ancient Indian jurisprudence related to semi feudal and feudal society, whereas modern jurisprudence is related to industrial society. A feudal society is basically an agricultural society in which the productive techniques were primitive and changes in them were very slow. Thus the bullock (In India) and the horse (in Europe) were used for tilling the land for agriculture. This method of production did not change for centuries. The productive techniques being primitive, production was low, and hence changes in the productive technique could not be hazarded for fear that if the experiment failed people would starve. Since the economic cycle in feudal society kept repeating itself for centuries (e.g. the kharif crop during the monsoons, rabi crop in winter, then again the kharif crop in the next monsoon, and again the rabi crop thereafter, etc.), without radical changes in productive techniques, society was relatively stable. Consequently, the main form of feudal law was customary law supplemented by written texts.

In sharp contrast to this is the relative instability of industrial society. Modern industrial society is characterized by the revolutionary nature of modern industry. Since scientific and technical progress has no end (because of new scientific discoveries and inventions) social relations keep changing endlessly. For example, the invention of aircraft in 1903 and the launching of the first man made satellite in 1957 have brought revolutionary changes in society. Within a short period man has not only flown in heavier than air machine (thus ostensibly violating the law of gravity), but has

actually penetrated into the outer space. The internet was unknown ten years ago but is indispensable today.

Thus we see that while upto the feudal age society was relatively stable and human progress was very slow, and largely spontaneous (because for centuries the same kind of primitive productive technique was used for agriculture), the Industrial Revolution of 18th and 19th century in Europe and America, which later spread all over the world, has completely altered this situation. Machine production ushered in totally new kinds of social relations. The basic feature of modern society is its remarkable instability due to the revolutionary nature of modern industry. By continuously changing the techniques of production (by new scientific inventions and discoveries) modern industry is constantly causing major changes in social relations and, therefore, in the law. While feudal society was based on conservation of production techniques, industrial society is based on continuously altering and improving them.

As already stated above, the main source of law in modern times is legislation. By its very nature, legislation brings about at a particular moment abrupt change in social relations. This is in sharp contrast to customary law which evolved very slowly over the centuries without radical and abrupt departure from the past. Since each major technical advance in modern industrial society brings about a change in social relations, it calls for new legal norms, which

is not possible by slow customary growth. Hence, legislation has become the most important source of law in modern society.

However, as pointed out by the sociological jurists, there were often gaps in the statutory law, and also the statutory law did not always keep pace with the pace of social development due to advancement in technology. This required judge made law to fill in these gaps, in certain circumstances.

Hence, we can say that modern industrial jurisprudence while mainly positivist, in that it relies mainly on legislation, also uses the ideas of sociological jurisprudence by supplementing the legislation whenever there is a legal vacuum or when compelling social need arises. Also, it sometimes uses some concepts from natural law, e.g. the rules of natural justice (when there is no statutory rule).

Thus while ancient Indian jurisprudence can be said to belong to the historical school of jurisprudence, modern jurisprudence is a combination of positivism, sociological jurisprudence and natural law.
