CHAPTER I

AN INTRODUCTION TO ANCIENT INDIAN JURISPRUDENCE.

Ancient Indian jurisprudence is known as “Vyavahāra Dharma Śāstrās”, a term derived from the Vedas, Purāṇās, Smṛtis and other ancient works. Dharma means the science of righteousness and is derived etymologically from the root ‘dhr’ – to hold. There is no corresponding word in any other language for Dharma. It emphasizes justice (Nyāya), morality, religion, charity, obligations, law and usage. There is a natural transition from truth and reality to Dharma or law. A seer of Vedic Upanisād comments, “One who speaks the truth, is Dharma.” Law, for ancient Hindus means Dharma. The sense of R̐ta, Satya and Dharma are the essence of Hindu legal theory. Dharma embraced the principles and rules governing the entire life of man. This concept discusses the four- fold aims of human existence- Purusārtha, namely Dharma, Artha, Kama and Moksā. Dharma, Artha and Kāma are called Thrivarga. The fourth aim of
life is mokṣa or liberation of life and spiritual realization and is a state of pure consciousness, truth and bliss. A person’s Dharma consists of his moral and social obligations, both as an individual and as a member of society. The principal aim of Dharma is to regulate human behavior in its cosmic and human context. It is the stabilizing force of the universe- *Dharmō viśwasya jagathah pratisātāḥ*. It is through the principles of Artha that he has to secure economic well being for the enjoyment of life. The desire for happiness both mental and physical is Kāma or the gratification of the senses.

Dharma is divided in to Śrouta and Smārtha. Śrouta is concerned with the rites and ceremonies included in the Vedic *Karmakāṇḍa* (Samhita and Brāhmanā). They were concerned with the various classes of life- Āśramās. The Dh.S is mostly concerned with Smārtha Dharma.

Another comprehensive classification of Dharma is six fold- *Varna Dharma* – injunctions on Varnās alone. They are Āśramadharma–rules such as begging, *Varnāśramadharma* –
rules of conduct for a particular class at a particular stage of life, *Gunadharma* – welfare of subjects of the king, *Naimittika Dharma* – expiation on doing what is forbidden, *sādhāranādharma* – what is common to all humanity, Ahimsa and other virtues.¹ Smr̥ti in a larger sense includes all ancient orthodox non-Vedic works. Dh.S works existed before 600B.C. and had attained supreme importance by the second century B.C.²

‘Jurisprudence’ means theory of laws. ‘Juries’ means law, ‘prudence’ means knowledge. “The law in essence is a concrete realization of philosophy”³. Law and justice are two independent concepts linked together in the administration of justice. Justice is the natural urge of every living creature and is not completely captured by any law made by man.

Jurisprudence begins from actual facts where as rule exists on the basis of scientific concepts. It has two streams, one is practical and another is ideal. On the practical side jurisprudence is compulsory. Having ascertained the rule of law, jurisprudence

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¹ Religion as knowledge- Janaki Abhisheki-page-101  
² Ibid-page-101  
must proceed to work out its contents. As an ideal jurisprudence, it presents rule of law in the form of a number of abstract concepts and partially in the form of rights and duties.

In the primary sense, jurisprudence includes the entire body of legal doctrine. It is *jurisprudantia* – the knowledge of law – and in this sense, all law books are of jurisprudence. We use the term ‘science’– in its widest permissible sense and it includes the systematized knowledge of intellectual enquiry.

Jurisprudence in its specific sense is the theory or philosophy of law. It includes three branches – analytical, historical and ethical. Among them, ethical jurisprudence deals with the law from ethical significance. It is also the theory of justice in its relation to law. It also contains moral and legal philosophy of ethical jurisprudence, for e.g. Smrṭi literature. It includes the concept of justice, the relation between law and justice and the manner in which law fulfills its purpose of maintaining justice that contains morals⁴.

**Nature of Indian jurisprudence.**

The jurisprudence as dealt with in the *Smrīti* appears “complete and exhaustive, and includes all branches of law”. The law constitutes a code of duties which gave precedence to duties rather than rights. The *Smrīti* literature is called Dh.S. The works of the first period is called Dh.S and is composed in short, cryptic sentences compressing a lot of substances which enables easy memorisation. A few verses that deal with economics, politics, administration, civil and criminal laws, have been interpreted into prose. The writers are *Gouthama, Boudhāyana, Āpastambha* and *Vaśītā*. Authors attributed their works to ancient sages and rarely mentioned the events of their own lives. *Manu, Yājnāvalkya, Parāśara, Nārada, Brāhaspati* and *Kātyāyana* were famous authorities.

**Ideal society in krītayuga.**

Long ago, an ideal society existed during the satyayuga (krītayuga) in India. The following are its important features:- (1) There was no king, no government, no strong laws, or no
punishments, in that society. There were no disputes, quarrels among the people. People had no fear about punishments since there was nobody to meet out punishments. There was no need for a government to protect the nation, because

\[ \text{dharmēnaiva prajāsarvam raks\text{\textipa{ati \textipa{su parasparam.}}) \]

(1) People protected themselves through the deeds of Dharma. The peculiarity of kr\text{\textipa{tayuga is the culture and honesty of the people. Therefore it is called “Satyayuga”}}.

(2) It was a complete centralized society.

(3) It was a casteless society. All were Brāhmins.

(4) There was no private property. People considered property to be that of God or nation. Joint family possessed this property. This society of kr\text{\textipa{tayuga highly influenced the thoughts of Indian philosophers.}}

**The origin of legal system.**

There has been a great change in the ideal society as it is mentioned in *Sānti parvan* (59-14) of M.bh, Manusmr\text{\textipa{ti the beginning of Nāradasmr\text{\textipa{ti, Br\text{\textipa{haspati Smr\text{\textipa{ti and Arthaśāstra}}}}}}}}}
of Kautilya. Due to greed and lust the people moved away from Dharma and disputes arose in society. Dharma is derived from root ‘dhr’ meaning ‘to up hold’, ‘to support’, ‘to nourish’. P.V.Kane has found this word fifty-six times in the Rṣ.V.⁵. Dharma thus includes religious, moral, social and legal duties and can only be defined by its contents. The Vedas, the Smrītis also contain tenets of Dharma. The four sources of sacred law have been examined as mentioned by Manu-

\[ 
veda \text{ smrīti } \text{ sadācāra } \text{ swasya } c\text{ a priyamātmanah} \\
\text{ edate turvidham } \text{ prāhu } \text{ saksāt dharmasya } \\
laksānām.⁶
\]

This verse contains concepts of administration, religion and morality.

“Vedo akhilō dharmamūlam”⁷ not only implies law and usage, but entire knowledge is enshrined in the Veda.

The texts of law codes in Āryan civilization.

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⁶ Manusmriti.
⁷ Ibid-II-6
In ancient India, polity was known by several terms like the Rājya śāstra Danḍaniśṭa, Niśṣāstra, Rājadharma and Arthaśāstra. Some of these terms like the Rājadharma- Duties of the king, and Rājyaśāstra- science of the state. Monarchy was the normal form of the state. The science of politics and government naturally called Rājadharma or Rājyaśāstra. Niśṭi is derived from the root ‘niś’ to lead. Niśti is proper guidance or direction. It was held that the ethical course of conduct Niśṭiśātra was the science of ethics. Proper guidance or direction usually pre-supposes prudence and wisdom. Thus Niśṭiśātra also came to denote the science of wisdom. Greatest propriety, wisdom and careful thoughts have to deal the Niśṭiśātra. In shaping and guiding the internal and foreign policy of the state, shows the term Niśṭiśātra became very popular to designate the science of government from the fifth century A.D8. The important works of ancient Niśṭiśātras are Kāmandakīya Niśṭiśāstra and śukranīti. Lakshmīdhara’s

8 A.S.Altekar-State and government in ancient India- Motilal Bnarasidas publication- Delhi-page – 2-3
Nītikalpata (1150.A.D.), Annambhatā’s Nīticandrīka (1200.A.D), Nīlkandās Nītimayūkha and Mitramiśrās Vyavahāraprakāśa (1625.A.D) are another works of Nītiśāstra. During these periods the government was to secure all round progress and prosperity of society and those works were used for reference in jurisprudence. ‘Śukranīti’ points that the stability and progress of the society in all directions and it enables the realization of the four fold goals connected with Dharma-Artha-Kāma-Mōksa. Arthaśāstra is another text for the science of politics. Artha means the avocation of men, Koutīlya deals with the acquisition and protection of governance of territory. This explanation to justify the use of the term Arthaśāstra for the science of politics appears to be rather forced and far-fetched. So the term which is used primarily on the science of politics, is known as Arthaśāstra.

The origin and development of Nītiśātras in ancient India, was a notable feature of ancient jurisprudence. Even semi

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9 Manusyanamvtiritrathah, manusyavati bhumi rarthah tatprdhivyapalanebhyaḥ sastratamiti-Arthasastra of kautīlya- xv- chapter- 1.
secular and semi religious subjects like grammar, etymology and astronomy, began to be developed about the eighth century B.C. The science of polity existed much before the sixth century B.C. The earlier period when the political science was composed is usually called the age of Vedas and the Brāhmaṇas. During the seventh century B.C the science of politics began to be developed. The state was studded with small kingdoms. The advisors of kings, sages and scholars helped the king in the rule of state. Judgment was generally expected to discuss problems of administration, violation of laws etc. E.g. Sāntiparvan of Mahabhārata devoted to Rāja dharma or duties of the king and government. Chapters-63, 64, 56, 66, 67, 55, 57, 70, 76, 94, 96, 20.

The smṛṭi period from 200B.C- 200 A.D; Manusmrṛti, (chap VII-IX), Visnūsmṛti (chap-iii) Yajñavalkyasmrṛti (chap-1-304-67) introduced the topics of the duties of the different officer’s, rules of civil and criminal laws and the different theories concerning the foreign policy. They possessed

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10 Rigveda-X191,173,166 ; IV-42; IX-92-6; VI-28-6
additional information (knowledge) of the rules of Varna, Āśrama and prāyaścītta which are more useful manuals to the public.

The early period in south India had produced some references like Tirukkural and Śilappatikāram. They mentioned duties of the king and his officers as well as threw light on the political theories and the administrative structure of that period.

*Kāmandakiya Niśṭāstra* was composed probably in Gupta age. (500.AD). Śukraṇīti’s period was rather uncertain. It was very important for the students of ancient Indian jurisprudence. Civil administration was described in great details along with judiciary.

A number of compositions were written giving a comprehensive treatment of Dharma in its different branches during the period from 1000AD to 1700AD, most of these works helped the formation of modern jurisprudence.

The *RgVedic* evidence shows that the Āryan society in early period was divided in to families, janmans, viśās, and
Janmans consisted of villages claiming a common descent, and a number of such villages joined together by a kingship. Vis means vispati. Viśas were closely knit together and on the battlefields battalions were often arranged from they have been recruited. Several Viśas formed a Jana or tribe and which had its own Janapati or the king.

However Manusmrīti which is the basic text for many social norms, codes and contact contains many social principles of laws. These lead to caste system, reconstruction of the state and untold misery of common people. As a result communal tensions increased and torture reached its peak during that time. Above mentioned law codes continued for a very long time.

Indian judicial system.

Unless every citizen is not ensured of justice a nation cannot exist freely. So every citizen should be literate in the system of justice. To understand judicial system one should know the history of Indian judicial system. We had a domestic system of

\[ \text{Sa itanena sa visa sa janmana sa putairvajam dhanan dhananbhish - Rv II-26-3} \]
\[ \text{Rv - X-84-4} \]
safe guarding justice during the Vedic period of India and afterwards. It had its basis and features in Dharma. But today Dharma is on the verge of destruction. Yet it influences our judicial thoughts. Today Indian laws are mainly based upon British judiciary system. All those who are related to judicial system such as judges, advocates, legislative members, etc are the fans of British judicial system rooted in India\textsuperscript{13}.

The fundamental structure of judicial system is illustrated in the constitution. The history of Indian judicial system can be studied only after understanding the present and the past status of laws. The judicial system that prevailed in Kerala before independence was of various forms in each province. This variation was based on religion, caste, region and individual rights. The salvation of social justice lies upon the freedom of judicial system. In the Indian constitution, courts are the custodian of fundamental rights and safeguards laws and justice; however the supreme status rests with the judge.

\textsuperscript{13} Justice V.R.Krishna iyyer-Indian Neetipeedom-page-6
Veda, Smṛti, Puranā, Nibandha are the source of ancient law.

The Vedic age may be placed between 2000 B.C and 1000 B.C, the age of the Smṛtis commenced from about 1000 B.C or 800 B.C and continued up to 8th century A.D, and the Smṛti age is divided into two broad periods, one from 800 B.C to 100 B.C. and the other from 100 B.C to 800 A.D.¹⁴

The ancient law can be divided in two parts-one of them is religious texts, and others are Smṛtis, Dharmasāstrās and commentaries. These are special dealings in civil and criminal laws. Yaj. States that srutis and smṛtis are the source of law. Sruti means Vedas. Smṛti means Dharmasāstrās.

Sruti is the supreme source of authority of Vyavahāra for the following reasons- (1) Sruti was the supreme authority and origin of law. The Sāstrās and Smṛtis profess to bow down to the

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¹⁴ Outlines of ancient Hindu jurisprudence-M.S.Pandit tripathi-page-7
authority of the Vedas even when they were actually departing from the theories enunciated by them. Inheritance is one of the most important sections of law found in the Srutis and Smrītis.

In the Sruti, laws are arranged according to the topics and are called vyavahārapāda i.e. a branch or topics of Vyavahāra. The word vyavahāra is defined-

\[\text{vi nānārthevā sandēhe haranām hāra ucūyatē} \]
\[\text{nānā sandēha haranād Vyavahāra iti smrītāh}.\]


Vedas are purely religious works that was orally transmitted from generation to generation and they are known as Rūgveda, Yajurveda, Sāmaveda and Atharvaveda. Vedangās (part of Vedas) consist of śiksā, kalpa, vyākaranā, nirukta, jyotisā and cāndās. There are also eighteen Upanisāads considered as part of supplement to the Vedas.

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\[\text{15 Vyavaharamala- Page-4}\]
Scholars of social sciences have opined that in early times there was no organized system for the judicial settlement of disputes. In the Vedic age, the Sabha and Samiti played a vital role in the judicial sphere. The reference about the functions of the king in R.V discloses that in the early Vedic era the king performed the duties for the welfare of the people. For e.g. the people paid taxes to the king. There was no mention about the court for offenders in Vedic literature since life was simple and law and order was well organized. So the courts were not necessary. During the Smṛti period, the king himself performed the duties of a court – both civil and criminal. The Smṛti and Dh.S derive inspiration and guidance from certain ideas or injunctions laid down in the Vedas. Social conditions in those periods were centered on dharma. Hence more importance is laid on them in civil and criminal laws. The important Dh.S of high authority, was that of Gouthama, Boudhāyana, Āpasthambha, Hāriṇḍha, Vasisṭha and Visṇu. Their contributions are noteworthy in the legal system.
The two epics Rāmāyanā and Mahābhārata devoted the story of Surya and Kuru dynasties. The author of Rāmāyanā was Vālmiṅki and that of Mahābhārata was Vyāsa. The epics concretely define the value of life (Dharma) and recollect the needs to protect dharma and duties of everybody.

The Sūtrās, the Smrītis, the Purānās and the Nibandhās all recognize the Vedas as the supreme authority of law. Smrītis and Dh.S. are treated in detail in Vedic literature. Smrīti deals with the five great sacrifices pañcāmahāyajñās (Brhmayajña, pitrīyajña, dēvayajña, bhūtayajña and mānusāyajña). Besides, it deals with the various samskārās, the duties of four Āśramās (brhamacārya, grāhasta, vānaprasta, sanyāsa) and four varṇās. The concepts of four Āśramas and four castes are mentioned only in a solitary passage in R.V. Laws of debts, pledge, sureties, contract etc are discussed in the Vedas. Rules of prāyascītta (penances), rules of administration (Rāja dharma), the law of debt, sureties, contract and pledge, partnership and slavery and civil and criminal procedures are also mentioned in the above works.
The supreme authority of these Srutis continued to be recognized till the end of the Nibandha period (188.A.D.) As a matter of fact, if this authority were to be really followed today; it would be quiet possible for us to show by quoting Vedic passages, such as marriages, intercaste marriages, women’s rights to Vedic initiations and studies, unmarried daughter’s right in the patrimony, which are all recognized by our Dharma. The references to the old maiden getting her share from her father’s property contained in the R.V. (II 11-7) will prove that unmarried daughters could get a share in the patrimony.

Law in ancient India meant Dharma in the broader sense. Vedas regarded as a divine revelation, was the supreme source of authority for all justice contained Dharma. Jaimini defines that Dharma was the valuable flower of life to be attained by a man through the injunctions of the Vedas. The earliest of the law-givers, Gouthama also, declared the Veda as the source of Dharma. The same was emphasized by Boudhāyana and

16 Ibid-page-10
Āpastambha. However, Manu made a departure and mentioned Vedas as one of the sources of law. Veda is the first source, tradition is the second source, and usage by virtuous men, is the third source.

The *RgVedic* Āryan society was divided into four classes. The priestly class that later developed into the Brāhmanvantara is referred to frequently in the R.V as Brāhman, *Ṛṣi* and *Vipra*. The next class, the ruling or militant class is known as Ksatram, Kṣatriya, Rājan, and Rājanya and even as Rajaputra the administrative class that later developed into the ksatriya. The third class was known as Viśh Kṛṣṭi and Karsanth and constituted the masses the traders class that later developed as Vyṣya. The fourth class – the Śudrās is rarely mentioned in the early portions of R.V. the fourth class considered as the labors group of society. The Rg Vedic divinities are found to be differentiated exactly on the same pattern as the human society. As it has been pointed out, Agni is the typical Brāhman, the

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18 Evolution of the smrīti law-Dr. Sivaji singh-page-170
purōhitha the hōtrī, the pōtrī. Mitra and Varuna are the
two Kṣatriya rulers par excellence and Āditya are also
members of the ruling class. Indra is the great warrior as Agni is
the great priest. The other two clases Vyāsa and Śudra and their
duties in the society are rarely mentioned in Vedas.

The political system in ancient and medieval India rested on
monarchial system of government. Rājan and names of many
kings are mentioned in the R.V. More over various tribal chief and
heads of petty government were also prominent.

The references to the old maiden getting her share from her
father’s property contained in the R.V., prove that
unmarried daughters could get a share in the patrimony. Another
R.V. verse (III 31-2) that the son should not give any share to a
married sister, depict that daughters got no share in their father’s
property. The independent line of legal thinking, which may be
traced back to R.V., is that a man in old age should divide his
property among his sons- ‘pitrū kartrōkō vibhāgah’. Thus it became possible to trace Vedic authority to a number of smrōti rules and regulations.

The rules of Smrōti literature were really based on śrūtis. A few instances make this point clear.

1. In civil laws – right to inheritance to the ancestral property conferred on the sons had its origin in the Vedic principle of ancestral worship-e.g. duty of sons to pay obeisance to the parents.

2. R.V.-X-85 is a hymn relating to marriage rituals from which the law governing marriage has emanated.

3. Vedic literature refers to the king as a judge either in civil or criminal cases. The King in Vedic age functioned as a judge in private disputes.

P.V. Kane has brought together about fifty pages of Vedic passages that throw light on marriage, forms of marriage, and the different kinds of adoption of sons, partition, inheritance, and striōdhana.
Kingdom - formation

The state in *pre-Vedic* and *early Vedic times* was tribal and small and a popular assembly used to function at the capital. Even in R.V. there are some references to ēkrāt (sole) rulers, adhirāt (great rulers) and samrāt (emperors)\(^23\). The king was pre-eminently the protector of his people both against internal disturbances and foreign invasions. He was the upholder, of customs and traditions.\(^{24}\)

The basis of the political and social organization of the Rāgvedic people, was the patriarchal family. The successive high unit of R.V was styled grāma (jana) and in some rare passages ‘jana’ was mentioned. The grāma was normally a small unit. The leader called ‘grāman’ of grāma who is usually a Vyśya is clearly inferior to the lord or the king\(^25\). The Rāgvedic state (Rasstra) seems normally ruled by a potentiate styled Rājan (king) who was ‘without a rival and a destroyer of rivals, kingship

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\(^{21}\) Rigveda-11-28-1, VII-37-3, X-128-9, I-25-10

\(^{24}\) Rigveda-III-43-5-“GOPA JANASYA”

\(^{25}\) R.C.Majuindar M.A.Phd-An advanced history of India-Macmillan India LTD-1946 – page 27
was usually benedictory. Thus the “purus” and “thris[t]us” are among the most famous of the Rgvedic clans. In R.V, elective monarchies were unknown. In Atharvaveda and great epics we have several references to the election of the Rājan to the king ship by the people.

The foremost duty of the king was the protection of the tribe and tribal territory and he is responsible to keep the spiritual deeds and values of the society. He employed spies (spāśa) to watch all over the country to contact the people. He maintained a body of priests who performed the sacred rites and received a contribution as a fee (Daksīna) of the sacred rituals. The king was assisted by a number of Purōhitās who not only advised the ruler, but used his spells and charms to secure the success of his patrons, arms when victory was won\textsuperscript{26}.

The Vedic kulās or families were grouped in to larger units of Varnā, and Sājātya. The Sabhā gave decisions regarding

\textsuperscript{26} Ibid-page 28-29
matters of public movement and in later literature figures prominently in connection with the administration of justice.

The law is based on Dharma.

The laws of Smr̥ti are entirely dependent on Dharma. Ancient Smr̥ti theorists also pondered deep about Dharma. For e.g. Manu states that Vedas are dependant on different and opposite ideas expressed about Dharma in Smr̥ti. Manu says, “vedōkhilō dharmamūlam” 27 Other theorists like Hāritan said people enjoyed concepts of dharma without prejudice. Yāj. says the Dharma exist entirely for the welfare of the people.

śruti smr̥ti sadācāra swasya cā priyamātmanah

samyak sankalpaja kamō dharmamūlam idam smr̥tam

Dh.S dealt with Vyavahāra or law recognized and administrated by the king’s courts. It also deals with sin (pāpa) and expiation (prāyaścītta). The provisions are mainly a matter of religious observance but sometimes they acquired a legal significance in the administration of justice. The Smr̥ti writers

27 Ibid. II - 6
opined that the distinction between Vyavahāra, Ācāra and Prāyaścīttta are the arrangement of the separation of the law. They arranged Dharma under three heads:

1. Ācāra adhyāya.  
2. Vyavahāra adhyāya.  
3. Prāyaścīttta adhyāya.

Manu has classified dharma under three heads - Ācāra, Vyavahāra and prāyaścīttta. Ācāra deals with the behavior of man in his daily routine. It lays down guiding principles of good behavior. It gives elaborate rules relating to the course of life from conception to cremation. The principles and rules of ācāra are descriptive of Hindu social life. It describes elaborately the various stages of life from childhood to death during which a human being develops and full fills his functions as a member of society.

Vyavahāra or law was properly conducted and administrated by the king’s court. It is with this portion of Dharmaśāstrās that we are principally concerned. The prāyaścīttta deals with sin and expiation. The provisions are mainly a matter of religious observance, but sometimes they
acquired a legal significance in the administration of criminal justice.

Many religious works have their origin in India. These works were produced in different times and contained controversial ideas. These ideas are consistently undergoing changes in different periods. Manu mentions the following sources of Dharma, śruti, smṛti, sadācāra and the self-satisfying virtuous words.

\[\textit{veda smṛti sadācāra swasya ca a priyamātmanah} /\]
\[\textit{ēdaśe śatūrvidham prāhu saksāt dharmasya laksānām}.^{28}\]

According to Kautilya, the basis of the decisions taken by a court in judicial proceedings are of four categories - Dharma, Vyavahāra, Carita and Rājaśāsana. Kouṭīlya states that if the defendant confesses his guilt, the judgment should be on the basis of Dharma. Vyavahāra is where parties come out with conflicting statements and collect evidence in support of their respective

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28 manusmrīti
cases. The court has to record evidence after regular trial and hearing – such a case is called Vyavahāra. Çarita indicates the judicial proceedings in which the judgement to be made on the basis of earlier rulings of the court. Rājaśāśāsana is when there is no principle of law applicable, or no evidence is collected to prove the facts of a case, the king is authorized to decide according to his judgment by a royal command. Prof: K.V. Rangaswāmy Iyengār draws three logical conclusions from this basic assumption:

1. That there should be internal consistency in law.
2. The differences which appear are resolvable by enquiry.
3. For every rule of law a Vedic basis can be discovered.29

**Evolution of law through commentaries.**

Law could not remain static. The good customs and what was agreeable to men of virtuous conduct were also the sources of law. This gave scope for developing usages and customs by the people which ultimately got assimilated in to the legal system and modified the earlier laws on certain topics. The later Smṛti

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29 Hindu jurisprudence. K.R. R. Sastry-page -10
writers, who were sages of great eminence like their predecessors, did modify the provisions of the earlier Smṛtis and made such modifications as part of the Smṛti law. Instances of changes so brought about, are pointed out later while dealing with the relevant topics. Later the long line of Smṛti writers came to an end. There after the law had to grow and modify only through the other works, such as commentaries and digests written by eminent jurists. This was practically the only device for the development of law. The reasons are obvious. The Smṛtis continued to be the basic law of the Indian legal system. The king (state) was not invested with any legislative power. Therefore the Smṛtis which held the sacred and authoritative position could not be absolved by the state. In such a situation, owing to the compelling circumstances of changing society, jurists resorted to modifying the law through the device of interpretation. The Vedas and Dh.S. have included many customs and traditions based on the text of the Smṛtis. The specific provisions of the Smṛtis indicate that Sadācāra approved by
the society was one of the sources of law. The Hindu legal system has been evolved from customs and usages.

**Legal proceedings – Vyavahāraḥ.**

The word *Vyavahāraḥ* indicates a judicial proceeding or legal dispute. The word was even popularly used to denote litigation-both civil and criminal. When the ramifications of right contacts, which are collectively called Dharma, have been violated, there will be disputes among the people, which has to be solved by vyavahāraḥ. The reason to make law suits-

\[ \text{‘Nas} \text{t} \text{e dharmē manus} \text{yēs} \text{u vyavahāraḥ pravartitah} \]

Enforcing of law suits, were due to lack of Dharma in people. Yaj. States that the reason for the destruction of Dharma was lust and anger. According to Manu there were eighteen types of law suits. Those four, pertaining to murder etc were criminal

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30 vyavaharamala
31 V.M-page-1
and fourteen others were cases of property or civil. In law-suits of properties, punishments were meted out by the judge.

**Nature of Court ( Sabhā ).**

Indian philosophers say that the behavior of all members of the society should be based on ‘Yajña bhāvanā’ i.e. court (sabhā) equals to yajña. Practicing of law is not different from ‘Yajña bhāvana’. ‘Yajña sadrśī sabhā’ means court is equal to yajña is commented by Brh. Law suits should be solved through the following methods before bringing disputes in front of the king.

There was an unofficial sabhā or kulam among the relatives dealing and solving the disputes. A society was called ‘srēnī’ of the same categories of workers. The society of merchants was called ‘pūgam’. Still if the disputes were not solved, they could put the matter before the assembly (sabhā) and officials. The judge appointed by king, found out the solution for the disputes. If these steps failed, then only the matter could be brought before the king.
There was a particular judiciary system of India, which was instead of the plaintiff going to the court, the court presents before the plaintiff and takes decision itself. Witness would not tell a lie if the hearings were conducted in front of the people.

The policies of government or the wishes of the government employees did not influence the sabhā. Manu instructs that the king should not interfere in the clear decisions taken by the members of the sabhā according to dharma. Yaj. Says:

\[
\text{rāgadvēśaḥ bhayāt vāpi smṛtya pētādikārinah} / \\
\text{sabyah pradhak danḍya vivāda dwigunām smṛtam}^{32}//
\]

If the king found out that the member of the sabhā took a wrong decision prejudiced by love, hate, fear, the member’s punishment would be increased twice. He also commented that if the case reappeared before the court and was proved false, then punishments would be doubled by the judge. As narrated by Manu-‘dharma ēva hatō hanti dharmō raksati raksitah’. The

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32 Yajnavalkyasūtras-2:808.
king makes the plaintiff swear if Dharma is destroyed it will be destroyed by them. If it is saved then it will be saved by them.

**Manu’s explanation of crime.**

Crimes occur due to the ill deeds of thought and words. Intellectual crimes are divided into three – desire for the property of others, improper thoughts and crimes due to words – telling lies and abusing others. Crimes of deeds are stealing and physical abuse. Mind is the source of all sins. Therefore the ways to prevent crimes is control through cultural training. Manu says that man has three types of punishments namely the tridanādās33–

‘thridanādamēdāniksānyasarvabhūtēsu mānavah.’

Man has to resort to three punishments- mind, words, and deeds-tridanādahā. Man must attain complete victory over his emotions, Kāma, Krōdha and Lōbha. Thus attains perfection.

**Denial or refusal of punishments.**

The ancient Indian people expected equality in law. Their method of punishment was also practical. Some examples are:-

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33 Vakdando adha manodanda kayadandastadhaiva ca
Economic condition- Yāj. Insists that if a rich man or poor man commits the same type of crime, there should be some differences in punishment according to the economic condition of the culprits.

\[karsāpanām bhavēdandyo yatrānyaprakrōtō janah\] /
\[tatrōjanō bhavēdanyahō sahasramiti dhārana\]

For the same crime a rich man should be punished thousand times more than a poor man. This principle is not yet recognized by modern law. Yāj. and others say that more punishments should be given to educated people who commit mistakes.

\[yēne dwēsenō a śūdrasya dandō bhavati dharmatah\] /
\[tēna viśksāatra viprānām dvigunō dvigunō bhavēt.\]

In the caste system if they do the same type of crime, Brāhmin should be given highest form of punishment and Śudra should be given the lowest type. Brāhmins were given severe punishments for crimes such as crimes of drinking, cheating,

\[^{34}\text{Yajnavalkyasamriti-1-340}\]
stealing and immoral traffic. However the western jurisprudence accepted the principles that ‘ignorance of law’ is no excuse.

The Taithiriya Upanisad advises that only non refusal deeds should be done.

\[ yānyavadhyāni karmāni sēvitavyāni nō itharān i \]

Responsibilities of Dharma were enforced rather than acquired as rights. It is enshrined in Smrītis that punishments will be accorded to those who disobey the laws. Some examples of denial of judgments are given below-

(a) “satyam vada nō itharēt” tell only the truth do not tell a lie. According to this false witnesses will be punished.

(b) ‘na himsayēt’- do not kill any body. Killing or give trouble others is punishable. Troubling animals will also be punished.

(c) ‘dharmam cāra’- do as per dharma contracts. Acts against Dharma is not valid. Man has three liabilities such as rśi, pitr and deva r̄iṇa. (r̄iṇa trayah)

\[ Taithiriya Upanisad \]
(d) In Mbh. Ādiparva mentioned is about the fourth human liability. According to this, a son has liability towards his father.

(e) Give respect to ladies - No body can interfere on the rights of women or her property. It is a part of divine orders of jaimini.

(f) Marriage rights are seen in R.V. Āpastambha says that after marriage there should not be any division of property between husband and wife.

(g) The thought that all property belong to God is mentioned in Īśavasyōpanisad, We should not crave for even a small portion of property. M.bh. Śāntiparva says that those who desire more property should be considered as thieves. Yaj. and Manu say that the king will decide the value of property according to time. The king should take taxes as honey bees drink honey. Kat. prohibited gambling.

(h) Polygamy named by niyōga criticized by Āpastambhan gave warning that Vedas Should not be wrongly interpreted. But
Manu and Brh. objected this niyōga\textsuperscript{39}. Nār. gave permission for marriage of widows. Thus many lofty ideas can be seen in ancient jurisprudence.

**Indian approach about punishments.**

In ancient India, punishment was according to dharma or through atonement (Prāyaścīttta). Society benefited through morality and individual by atonement. ‘dharmēna pāpam apanudati’. In Jñānasādhana criticism of Taithirīya samhita, it is said that man is separated from sin due to morality or dharma. The main aim of punishment is to clean the sinner\textsuperscript{40}

Gouthama endorses that punishment should be meted out to reduce the sinner’s intellectual pride and to make him repent. Śāntiparva of M.bh. states that the fear of punishment makes man keep away from the crime\textsuperscript{41}. King gives punishments. Yaman (after death) arouse fear in the minds of the people. If a person commits a sin and he atones for his sin he should no longer be called a sinner, scandal mongers were severely punished.

\textsuperscript{39} Ibid-9-64-66
\textsuperscript{40} Manusmriti-8-318.
\textsuperscript{41} Mahabharatha santiparva-15.34
Modern law.

The relation of the medieval law with the modern law is more interesting after the dawn of independence. Moreover medieval law is specially prepared to meet the needs of Indian people. e.g. The ancient law regards the marriageable age of girl as from five years to ten years. In this respect, the ratio of the age between the marriageable girl and boy was indicated as 1:3. Dh.S. authors used the expression “Nagnika” - a girl who looks pretty when she is naked as most preferable for marriage. However the medieval Hindu law laid down the condition that there should be no child marriage.

Before the arrival of foreigners, systematic law was prevalent in India. The western thinkers thought that some laws were essential to control man. These laws should come from monarchy of a king. The orders given by the kings of Babylonia, Greece, Egypt since ancient times were considered as divine. Later it has become a part of western thought.
Although the English became the rulers of India, for centuries, they faced many difficulties in the interpretation of the juridical texts due to their lack of knowledge in Sanskrit to follow the ancient Indian jurisprudence. They were ignorant of Hindu Dharma Śāstrās also. Adopting the Hindu legal system, British judges have made remarkable contributions:

(1) The caste disabilities removal act-1850. Under this act the provisions of the ancient Hindu law which deprived the right of inheritance on the loss of caste was abrogated.

(2) The Hindu widows remarriage act-1856. Under this act the remarriage of a Hindu widow in certain cases was declared legal.

(3) The native converts marriage dissolution act-1866. This act provided for obtaining dissolution of Hindu marriage by a Hindu on his being converted to Christianity under certain situations.

(4) Transfer of property act-1882. This act modified the law governing certain kinds of transfer of property.

(5) The Hindu inheritance act-1928. This act put limitation on disabilities in the matter of inheritance.
(6) The Hindu law of inheritance, amendment act-1929. Under this act, the right to inheritance was created in favor of son’s daughter, daughter’s daughter, sister and sister’s son, as heirs next after father’s father, but prior to father’s brother. This act is since repeated by the Hindu succession act-1956.

(7) Indian succession act-1925. This act was made applicable to Hindus in so far as it related to testamentary succession vide-s-57-214 and scheduleIII.

(8) Child marriage restrained act-1929. This act put restriction on marriage of children below the prescribed age.

(9) The Hindu gains of learning act-1930. This act made the entire acquisition by a Hindu through learning, his self acquired property.

(10) The Hindu women-right to property act-1937. This act gave the right of inheritance to widows and to that extent affected the law governing mithakshra coparcenaries. This was repeated by the Hindu succession act 1956 in modern India also.
After the constitution came into force certain radical changes have been brought about by the following enactment introduced by the parliament.

1 The special marriage act, 1954, providing for marriage by registration.

2 The Hindu marriage act, 1956, providing inter alias for dissolution and divorce after marriage on specific grounds. This act has been further amended by the Hindu marriage (Amendment) Act, 1976, providing for divorce by consent.

3 Hindu succession act 1956 providing inter alia for converting the limited estate of a woman under ancient Indian law into an absolute one and providing equal share for daughters along with sons in share of property of the Hindu father, in case of intestate succession.


Even with all changes, the topic such as inheritance, succession, marriage, gifts, partition, pious obligation, the old laws
continue to operate subject to the legislative changes and are enforceable in courts of law.\footnote{Legal and constitutional history of India, vol-I-Ramajoys, N. M. Tripaty PLTD,Bombay-1990 – page-59}

**Conclusion.**

The study of ancient Indian jurisprudence thus includes the study of the sources of Dharmaśāstra, Smrītis, Vedas, Dharmasūtrās, commentaries on the Smrītis, the digest works of the Dharmaśastrās, Purāṇās, Srouta-grhīya sūthrās and the commentaries. Non-Dharmaśāstra authors have also interpreted the Dharmaśāstrās. Kenney’s History of Dharmaśāstrās running into eight volumes deal with the independent monographs or the collections of the articles of one author or by several authors. Dr. Kenney placed the matter in the historical perspective and had consulted all the possible sources of history, epigraphy, numismatics, manuscripts and presented the history of Dharmasastara.\footnote{Some aspects of the studies Dharmasastra- Dr. S.G. Mokhey-page-123} To conclude, it must be admitted that the ancient Indian jurisprudence is useful for the modern scholar giving some hints for real improvement upon the work of the predecessors in
the field. New changes are consistently being introduced in law. The significance of some of the expressions on the ancient Indian jurisprudence is not appreciated by the modern legislator. Hence whatever were the restrictions laid down previously, they are safely dropped by the moderners. However some of the practices still prevail and here in lies the worth of the old Smr̥tis and Vedas ingrained in the blood of the people of India. Vyavahāramālā occupies significant place in Sanskrit juridical texts.