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A Colonial Legal Laboratory? Jurisprudential Innovation in British India†

In this Article, I examine jurisprudence textbooks and related works written in British India in the late nineteenth and early twentieth centuries. Some of the jurisprudential works from India were not merely summaries of the leading English books, but were different from English works in three senses. First, the gap between English theories and Indian legal realities led some authors to question key English notions about the nature and development of law. Second, some of the works produced in India were more influenced by Continental and American legal theories than the equivalent English textbooks. Sometimes this was due to the fact that the authors of these works had some Continental training, and sometimes the non-English influence reflected a wider anticolonial nationalist move away from English culture. Finally, the influence of nationalism also led some Indian legal scholars to create a unique genre of jurisprudential works: Texts that used Western jurisprudential theories to describe the main features of Hindu (and, to a lesser extent, also Islamic) law.

These unique aspects of colonial jurisprudential works illustrate a broader phenomenon: the fact that legal scholars in imperial peripheries such as India were not always simply passive receivers of ideas produced at the center of empires, but in some cases created works containing interesting jurisprudential insights. The notion that India was a "legal laboratory" in which legal scholars experimented with new

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ideas has already been discussed in the literature, largely based on examples taken from the fields of legislation (the codification of English law in nineteenth-century India) or forensic science. This Article explores the extent to which India was also a site of jurisprudential innovation.

INTRODUCTION

In an article published in 2005, legal historian Neil Duxbury portrayed English jurisprudence (by which he meant jurisprudence produced in England, rather than in the British Empire more generally) in the period between the mid-nineteenth century and the mid-twentieth century as static and uninteresting. He characterized it as devoid of any major innovation, and mostly repetitive—basically a re-reading of a received canon of works, at the center of which stood John Austin's analytical jurisprudence.[1] In support of this argument, Duxbury cited a 1963 article by a Canadian scholar who pitied those who "toil[ed] their way through the grim and forbidding literature of English jurisprudence. Austin, Holland, Markby, Salmond, Paton, their names bring to mind the dismal litany of 'act,' 'right,' 'duty,' 'ownership,' 'possession,' which has been the subject-matter of English analytical jurisprudence."[2] Similar sentiments were expressed later in the *Oxford History of the Laws of England*, in which it was noted that the scholarly consensus is that "English jurisprudence in the late nineteenth and early twentieth centuries was in a pretty sorry state."[3]

This portrait of late-nineteenth- and early-twentieth-century English jurisprudence is generally accurate: the works produced during this period in England *were* often dull and repetitive. However,

1. Neil Duxbury, *English Jurisprudence Between Austin and Hart*, 91 VA. L. REV 1, 2–6 (2005) [hereinafter Duxbury, *English Jurisprudence Between Austin and Hart*]. *See also* Neil Duxbury, *Why English Jurisprudence Is Analytical*, 57 CURRENT LEGAL PROBS. 1 (2004). The fact that no major new jurisprudential school emerged does not mean that secondary works produced at the time did not contain interesting innovations. For example, John Salmond's major book on jurisprudence, first published in 1902, contained, in embryonic form, new insights that preceded some of the major ideas of thinkers such as Hohfeld, Kelsen, and Hart. *See* ALEX FRAME, SALMOND: SOUTHERN JURIST 61–68 (1995).

2. *See* C.R.B. Dunlop, *Developments in English Jurisprudence: 1953–1963*, 3 ALTA. L. REV. 63, 63 (1963). *See also* Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 2. For a specific discussion of one of the leading textbooks of the era, and its defects, see Richard A. Cosgrove, *Sir Thomas Erskine Holland and the Textbook Tradition: The Elements of Jurisprudence Revisited*, *in* LEARNING THE LAW: TEACHING AND THE TRANSMISSION OF LAW IN ENGLAND, 1150–1900, at 397 (Jonathan A. Bush & Alain Wijffels eds., 1999). On the nature of English legal scholarship in the late nineteenth century, see David Sugarman, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*, *in* LEGAL THEORY AND COMMON LAW 26 (William Twining ed., 1986).

3. William Cornish et al., *Theories of Law and Government*, *in* 11 THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 1820–1914 ENGLISH LEGAL SYSTEM 72, 130 (William Cornish et al. eds., 2010).

there were some interesting jurisprudential developments that occurred beyond England, in the British Empire. England and its colonies coexisted in a symbiotic relationship, and the intellectual history of the British Empire generally, and also the history of law, contain examples of the Empire as a "colonial laboratory" in which innovation thrived.[4] Legal innovation was sometimes the result of the desire of European rulers to govern colonial subjects more efficiently, or to test governmental practices or technologies on colonial subjects before importing them back to the metropole, as was the case with codification, legal education, and forensic science.[5] However, legal innovation

4. The term "colonial laboratory" can be used to designate the role of the colonies as testing grounds for new technologies that were later re-imported back to the metropole. However, colonial knowledge production was not limited to such practices. While the first wave of historical studies on colonial knowledge production, inspired by Michel Foucault and Edward Said, has indeed focused on critically examining the various ways in which European rulers tested new knowledge in the colonies, newer works have moved beyond this type of European-centered analysis to examine other reasons for colonial knowledge production. Colonies were, to use Peter Burke's words, "frontier zones" that were "the locus of cultural encounters, collisions and translations, often producing new knowledge and new ideas." I use the term "colonial laboratory" in this broader sense. *See* Suzanne Marchand, *Has the History of the Disciplines Had Its Day?*, *in* RETHINKING MODERN EUROPEAN INTELLECTUAL HISTORY 130, 143–44 (Darrin M. McMahon & Samuel Moyn eds., 2014); PETER BURKE, A SOCIAL HISTORY OF KNOWLEDGE II: FROM THE *ENCYCLOPÉDIE* TO WIKIPEDIA 207 (2012). *See also* DECENTERING EUROPEAN INTELLECTUAL SPACE (Marja Jalava et al. eds., 2018); Assaf Likhovski, *Peripheral Vision: Polish-Jewish Lawyers and Early Israeli Law*, 36 LAW & HIST. REV. 235, 239–44 (2018) (on the scholarship on the history of knowledge in colonies and other peripheral territories); DHRUV RAINA, IMAGES AND CONTEXTS: THE HISTORIOGRAPHY OF SCIENCE AND MODERNITY IN INDIA 10–13, 159–75 (2003) (a critique of the use of the center–periphery paradigm in the study of the history of modern science in India).

5. On the British Empire as a laboratory of legal innovation in the realm of codification, see Barry Wright, *Renovate or Rebuild? Treatises, Digests and Criminal Law Codification*, *in* LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE 181, 184 (Angela Fernandez & Markus D. Dubber eds., 2012); Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 LAW & HIST. REV. 631 (2005). On legal education, see Patrick Polden, *The Legal Professions*, *in* THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 1820–1914 ENGLISH LEGAL SYSTEM, *supra* note 3, at 1180 (on mid-nineteenth-century reforms in Irish legal education as a trigger for similar reforms in England); Paul Mitchell, *Law and India at King's College London*, 17 KING'S COLL. L.J. 27, 44 (2006) (on the relatively innovative nature of the legal training of the officials of the Indian Civil Service); Raymond Cocks, *"That Exalted and Noble Science of Jurisprudence": The Recruitment of Jurists with "Superior Qualifications" by the Middle Temple in the Mid-Nineteenth Century*, 20 J. LEGAL HIST. 62, 62 n.2 (1999) (the presence of students from colonial territories in the Inns of Court was correlated with reforms in the study of civil law and jurisprudence). On forensic science, see Binyamin Blum, *The Hounds of Empire: Forensic Dog Tracking in Britain and Its Colonies 1888–1953*, 35 LAW & HIST. REV. 621 (2017). *See also* GLOBAL FORENSIC CULTURES: MAKING FACT AND JUSTICE IN THE MODERN ERA (Ian Burney & Chris Hamlin eds., 2019) (containing several chapters on colonial forensic science). French colonial territories, too, often served as laboratories for legal innovation and reform. *See* Emmanuelle Saada, *Nation and Empire in the French Context*, *in* SOCIOLOGY AND EMPIRE: THE IMPERIAL ENTANGLEMENTS OF A DISCIPLINE 321, 325, 329, 332 (George Steinmetz ed., 2013); PIERRE SINGARAVÉLOU, PROFESSER L'EMPIRE: LES "SCIENCES COLONIALES" EN FRANCE SOUS LA IIIE RÉPUBLIQUE 300, 307, 312–13 (2011). On the Italian Empire, see, e.g., Alessia Maria Di Stefano, *Italian Judges and Judicial Practice in Libya: A Legal Experiment in Multinormativity*, 58 AM. J. LEGAL HIST. 425 (2018); Elisabetta Fiocchi Malaspina, *Techniques of Empire by Land Law: The Case of the Italian Colonies (Nineteenth and Twentieth Centuries)*, 6 COMP. LEGAL HIST. 233 (2018).

was not necessarily linked to colonial governmentality. This Article will analyze jurisprudential innovation, and will show that such innovation was sometimes the result of differences between local legal circumstances and those of the metropole, as well as the result of the impact of local anticolonial nationalism on jurisprudential thought.

The role of the British Empire in the history of English jurisprudence is often ignored.[6] For example, in a lecture celebrating the work of John Salmond, legal historian A.W.B. Simpson noted that, when Salmond's *Jurisprudence* was first published in 1902, there were only four other comprehensive treatises on jurisprudence in print—by John Austin, William Markby, Thomas Erskine Holland, and Frederick Pollock. It is interesting to note that Simpson failed to mention one important equivalent of these books written in India: William Henry Rattigan's *The Science of Jurisprudence*, first published in 1888.[7] In a similar fashion, the recent multivolume *Treatise of Legal Philosophy and General Jurisprudence* contains chapters on East European and Latin American legal philosophy, but there is no specific chapter devoted to legal philosophy in the British Empire.[8]

For several decades, historians have been aware of the need to provincialize Europe—to write histories of Europe (and its Empires) that decenter the conventional historical narrative, and take into account the interaction between metropole and colonies. One can provincialize the history of English jurisprudence, too, as part of an attempt to write a global history of modern legal thought.[9] Once we do so, we realize that some leading textbooks on English jurisprudence were actually written in places such as Australia or Hong Kong.[10]

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6. *See generally* Coel Kirkby, *Law Evolves: The Uses of Primitive Law in Anglo-American Concepts of Modern Law, 1861–1961*, 58 AM. J. LEGAL HIST. 535 (2018) (on the need to incorporate the Empire in the study of the intellectual history of English law).

7. A.W.B. Simpson, *The Salmond Lecture*, 38 VICTORIA U. WELLINGTON L. REV. 669, 670–71 (2007). The third edition of Rattigan's book was published in London in 1899. The fourth edition was published in Lahore in 1919. Rattigan and his book will be discussed below: see *infra* text accompanying notes 54–66.

8. *See* 1–12 A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE (Enrico Pattaro ed., 2005–2016). This does not seem to be a deliberate omission but simply the result of the Western-centric nature of the existing literature on modern jurisprudence. *See also* WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE, at xi, 6–7 (2009) (on the need to extend discussions of jurisprudence beyond the Western canon).

9. For a specific example of the relevance of such global intellectual history to the Indian context, see, e.g., C.A. BAYLY, RECOVERING LIBERTIES: INDIAN THOUGHT IN THE AGE OF LIBERALISM AND EMPIRE (2012) (dealing with political and social, rather than legal, thought).

10. John Salmond wrote his first book on jurisprudence in New Zealand, and his major book in Australia. *See* JOHN WILLIAM SALMOND, THE FIRST PRINCIPLES OF JURISPRUDENCE (London, Stevens & Haynes 1893); JOHN W. SALMOND, JURISPRUDENCE: OR, THE THEORY OF LAW (1902). *See also* FRAME, *supra* note 1, at 44–53, 60–72; Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 3 n.9. George W. Keeton's book on jurisprudence was based on a course of lectures that he gave to a class of Chinese, Indian, and Japanese students in Hong Kong. *See* GEORGE W. KEETON, THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE, at v (1930). *See also* George W. Keeton, *Chinese Law and Historical Jurisprudence*, 12 CHINESE SOC. & POL. SCI. REV. 511 (1928).

This Article focuses on British-ruled India. In it, I discuss comprehensive treatises on jurisprudence, and related works, produced in India from the mid-nineteenth century onward. The comprehensive treatise on jurisprudence is a unique subgenre of the legal treatise, aimed specifically at law students. Today it is "virtually extinct," but in the nineteenth and early twentieth centuries it was an important type of law book. The works I discuss in this Article have not, until now, been studied either by intellectual historians of law or by scholars interested in the history of the law book.[11]

I study these works as a legal historian rather than a legal philosopher. When I read these texts, I am not interested in ahistorical questions that a legal philosopher might ask, such as "how do the ideas that I find in these texts modify my theoretical understanding of nature of law?" This is a valid question, but not necessarily a question that intellectual historians of law are interested in. Instead, I read these texts in order to trace the development of jurisprudential ideas in space and time, linking ideas to the wider political and cultural context out of which they emerged (for example, to nationalist ideology), thus showing that jurisprudential ideas are related to the environment in which they appear, or to which they are transplanted.

In order to reconstruct the transplantation of jurisprudential ideas from the United Kingdom, the extent to which these ideas were transformed in the encounter with Indian legal reality, and also in order to contextualize these ideas and link them to the broader political and cultural context of India in the late nineteenth and early twentieth centuries, I created a corpus of the relevant texts.[12] I then read these texts chronologically, seeking to trace their relationship to English jurisprudential theories: To what extent were they uncritically repeating English ideas? What concrete examples taken from the local legal context were they using? What were the sources and

11. On the comprehensive treatise on jurisprudence, see Simpson, *supra* note 7, at 670. *See also* Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1; Cornish et al., *supra* note 3, at 123–31. For a survey of existing scholarship on the history of the legal treatise, see Steven Wilf, *Legal Treatise*, *in* THE OXFORD HANDBOOK OF LAW AND HUMANITIES 687 (Simon Stern et al. eds., 2020). On the role of India in the history of the law treatise, see Angela Fernandez & Markus Dubber, *Introduction: Putting the Legal Treatise in Its Place*, *in* LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE, *supra* note 5, at 1, 8–9. On the need for more studies of the history of the law book in South Asia, see generally Mitra Sharafi, *South Asian Legal History*, 11 ANN. REV. L. & SOC. SCI. 309, 323 (2015).

12. The selection of relevant works was undertaken by searching for all works containing the keyword "jurisprudence" in the catalogues of the British Library, and selecting those works with a South Asian connection. In addition, books in English containing the keywords "Hindu law," "Islamic law," or "Buddhist law" (and their various permutations), were selected, and those works that were not merely collections of the rules of personal law were then analyzed. I also examined the catalogues of the Library of Congress, N.Y. Public Library, and N.Y. University Law School Library for works containing the keywords "jurisprudence" and "India." The volume of materials discovered was relatively large, and this Article merely offers a preliminary analysis of these materials.

thinkers that they were citing? Who were the authors, and was it possible to find in the way they depicted law echoes of local political and cultural concerns? In addition to reading the texts, I also analyzed some of these texts using quantitative tools.[13]

What does one discover when reading jurisprudential texts written in colonial India? Many of the treatises I analyzed were derivative works, imitating and summarizing English textbooks.[14] However, some of the works produced in India during the British period were not merely summaries of English works, but were unique in three senses. First, in some of the works, the gap between English theories and Indian reality led the authors to critique prevailing English jurisprudential notions, which were supposed to be universal, but were actually only applicable to modern Western law. Second, some of the Indian works relied more heavily on contemporary Continental and American legal theories compared to English works produced at the same time. Sometimes this was due to the fact that the authors of the works produced in India had some Continental training. However, the turn to Continental and American legal theories may sometimes also have been a reflection of a wider, nationalist, anti-English reorientation that occurred in Indian culture in the early twentieth century. Third, in the first decades of the twentieth century, a new genre of jurisprudential works appeared in India: texts that used English jurisprudential notions to describe the principles and also the history of Hindu law (and, to a lesser extent, of Islamic law).[15] Such works also illustrate the impact of nationalist ideology on jurisprudential thought in India. There have been some works that have already studied the interaction between nationalism (or ethnic identity) and law, both in India and in other places in the British Empire.[16] However, the impact

13. *See* sources cited *infra* notes 42 and 58 and accompanying text.

14. Generally speaking, Indian legal research suffered even more than English legal research from formalism and lack of interest in theory. *See* Rajkumari Agrawala, *Indian Legal Research: An Evolutionary and Perspective Analysis*, 24 J. INDIAN L. INST. 470 (1982).

15. The term "Hindu law" is used in this Article to refer to what is sometimes called "traditional Hindu law"—the law found in ancient and medieval Indian texts—and not to the colonial descendent of this law, Anglo-Hindu law—the personal law of some non-Muslims communities in British India. Since the middle of the nineteenth century, the question whether "Hindu law" actually existed before the British conquest has been hotly debated. On this debate see the extensive literature mentioned in note 99. For a recent discussion of the terminological problems associated with the term "Hindu law," see also Timothy Lubin, Donald R. Davis, Jr. & Jayanth K. Krishnan, *Introduction* to HINDUISM AND LAW: AN INTRODUCTION 1 (Timothy Lubin, Donald R. Davis, Jr. & Jayanth K. Krishnan eds., 2010). For a general discussion of traditional Hindu law, see, e.g., DONALD R. DAVIS, JR., THE SPIRIT OF HINDU LAW (2010). For a discussion of Anglo-Hindu law, see Donald R. David, Jr. & Timothy Lubin, *Hinduism and Colonial Law*, *in* HINDUISM IN THE MODERN WORLD 96 (Brian A. Hatcher ed., 2016).

16. *See, e.g.*, MITRA SHARAFI, LAW AND IDENTITY IN SOUTH ASIA: PARSI LEGAL CULTURE, 1772–1947 (2014); Mitra Sharafi, *A New History of Colonial Lawyering: Likhovski and Legal Identities in the British Empire*, 32 LAW & SOC. INQUIRY 1059 (2007); ASSAF LIKHOVSKI, LAW AND IDENTITY IN MANDATE PALESTINE (2006).

of nationalism on *jurisprudence* has received relatively little scholarly attention until now.[17]

The Article has three parts. In Part I, I briefly discuss the history of legal education in British India in the nineteenth and early twentieth century. In Part II, I analyze jurisprudence textbooks produced in India during this period by English authors, and I show how the gap between the theories transplanted from England and the reality of India led some of the English authors to criticize English theories. In Part III, I examine works by South Asian authors. I begin this Part with a discussion of books by South Asian authors summarizing Western jurisprudential theories (English but also Continental and American), and I argue that sometimes the turn to non-English theories may have echoed a broader Indian nationalist rejection of English culture. I then discuss a new genre of works that appeared in India beginning in the twentieth century—theoretical works on Hindu jurisprudence and Hindu legal history. In both cases, Indian nationalism shaped the way these works viewed English theories. Finally, I discuss works on another major South Asian legal system—Islamic law. In the Conclusion to the Article, I briefly note two ways in which the story told in this Article can be expanded: to other places in the British Empire in the early twentieth century, and to the post-colonial era.

I. Legal Education in England and British India

Attempts to systematize modern English law using treatises began in the eighteenth century, accelerating in the second half of the nineteenth century.[18] One specific subgenre of legal literature that evolved in the nineteenth century was that of books on jurisprudence. Unlike other kinds of legal treatises, the audience of these books were mainly law students.[19] Side by side with leading authors such

17. This may be the result of the fact that since John Austin's time "General or Universal jurisprudence" was supposed to deal with "such subjects and ends of law as are common to all systems." *See* John Austin, The Province of Jurisprudence Determined, and the Uses of the Study of Jurisprudence 373 (Hackett 1998) (1832). Note that despite the claim to universality, Austin also stated that he was interested only in the "ampler and maturer systems of refined communities," adding that because it is impossible to become familiar with all legal systems "it is only the systems of two or three nations which deserve attention: the writings of the Roman Jurists; the decisions of English Judges in modern times; the provisions of French and Prussian Codes as to arrangement." *Id.* at 367, 373. We now know that another supposedly universal field of legal scholarship—international law—gave birth to different national traditions, each unique in some respects. *See* Anthea Roberts, Is International Law International? (2017). We can therefore also ask whether something similar occurred when English jurisprudence traveled abroad.

18. *See, e.g.*, A.W.B. Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. Chi. L. Rev. 632, 670–71 (1981); Sugarman, *supra* note 5.

19. For a history of English jurisprudence in the nineteenth and early twentieth century, see generally Michael Lobban, *Was There a Nineteenth Century "English School of Jurisprudence"?*, 16 J. Legal Hist. 34 (1995).

as Bentham, and later Austin and Maine, writers such as Markby (1871), Holland (1880), and Salmond (1902) began to gain visibility. However, the underdeveloped state of legal education in England, compared to that on the Continent or in the United States, hindered the progress of English jurisprudence. Until the closing decades of the twentieth century, English legal education remained limited in scope, relatively non-academic, and with little emphasis on research. As such, it was inconducive to the creation of a sophisticated body of works on jurisprudence.[20]

Just as in the United Kingdom, legal education in India during the British-colonial period was also technical, non-academic, and relatively indifferent to legal research. Until the late eighteenth century, there was no regulation of lawyers appearing before the British courts operating in the Presidency towns of the East India Company (Calcutta, Bombay, and Madras), and the number of legal practitioners was exceedingly small. Gradually, a nascent legal profession appeared, divided into several subcategories of lawyers and including British—and later a few local Indian—lawyers. However, the number of lawyers appearing before these courts, even in the mid-nineteenth century, was still small.[21] In addition, the British established courts in territories outside the three Presidency towns of the East India Company. Lawyers (*vakils*) appearing before these courts were Indian. These lawyers had to have knowledge of Persian (the language of the courts until 1826) as well as training in Hindu or Islamic law.[22]

After the end of Company rule in 1858, the dual court system that had operated up to that point was replaced by a unified system of courts, at the apex of which stood the three High Courts of Calcutta, Bombay, and Madras. Three additional courts were established later in Allahabad, Patna, and Lahore. Indian lawyers could plead before the High Courts, thus greatly expanding the scope and prestige of their work. In parallel, the requirements to practice as a *vakil* were expanded: these lawyers now had to acquire knowledge of English, study at a law college or university, and pass the High Court examination.[23]

Throughout the nineteenth century, legal education was viewed as a technical matter involving the study of rules, not a science based

20. Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 77–87. On English legal education during this period, see generally Michael Lobban, *The Education of Lawyers*, *in* THE OXFORD HISTORY OF THE LAWS OF ENGLAND: 1820–1914 ENGLISH LEGAL SYSTEM, *supra* note 3, at 1175, 1175–1201.

21. A detailed discussion of the regulation of the legal profession in nineteenth-century India can be found in M.P. JAIN, OUTLINES OF INDIAN LEGAL AND CONSTITUTIONAL HISTORY 765–81 (7th ed. 2016). *See also* Samuel Schmitthener, *A Sketch of the Development of the Legal Profession in India*, 3 LAW & SOC'Y REV. 337, 345 (1968); Agrawala, *supra* note 14, at 480–85; S. Dayal, *Legal Profession and Legal Education*, *in* THE INDIAN LEGAL SYSTEM 148, 155 (Joseph Minattur ed., 1978). On South India specifically, see JOHN J. PAUL, THE LEGAL PROFESSION IN COLONIAL SOUTH INDIA (1991).

22. Dayal, *supra* note 21, at 161; Schmitthener, *supra* note 21, at 349–55, 361–62.

23. Schmitthener, *supra* note 21, at 355–57.

on principles, and certainly not a discipline related in any way to the historical or social sciences. This was at least partly due to the acceptance of an Austinian understanding of law as a command imposed from above, and as consisting mainly of statutes (in the Indian case, codes imposed by the British). As a result, the type of legal scholarship produced in India was narrow. In the early colonial period (until 1858), the main genre of works produced by English jurists in India comprised collections of regulations, rules, and case law, and translations of Hindu and Islamic law books. In addition, digests and descriptive works attempting to summarize the rules on a given legal topic were also published.[24] Once the British embarked on the project of Indian codification, commentaries interpreting these codes also began to appear.[25]

Initial steps to create a formal system of legal education in India began in the early part of the nineteenth century. In Madras, the College of Fort St. George, established by the British in 1812, provided formal training for law officers and pleaders as early as 1816. While law classes in Madras were discontinued in the late 1830s, they were revived by George Norton, the Advocate General, in 1840, until Norton returned to England in 1853.[26] In 1855, law classes were established at Elphinstone College in Bombay, the Hindu College in Calcutta, and the Presidency College of Madras. In 1857, universities were established in the three Presidencies, and training in law was declared part of their functions.[27] Other universities followed (such as Punjab, established in 1882, and Allahabad in 1887). The actual role of these universities in the provision of legal education differed from place to place. In some cities (Madras and Lahore), law teaching was centralized via a law college affiliated to the local university. In others (Calcutta), there was no central school of law, and instead teaching was carried out by private law colleges affiliated with the university.[28] By the academic year 1886–1887, there were eighteen law schools or law colleges in India, and 1,716 law students. By 1896–1897, there were thirty-four such schools, teaching 3,020 students; and by 1939–1940, this number had risen to about 6,750 (in the United Kingdom there were only 1,515 law students at the time).[29]

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24. Agrawala, *supra* note 14, at 486–91; Dayal, *supra* note 21, at 162.

25. Agrawala, *supra* note 14, at 497.

26. PAUL, *supra* note 21, at 6, 31–33.

27. Arjun P. Aggarwal, *Legal Education in India*, 12 J. LEGAL EDUC. 231, 232 (1959); Dayal, *supra* note 21, at 161; JAIN, *supra* note 21, at 794; Schmitthener, *supra* note 21, at 362; ERIC ASHBY & MARY ANDERSON, UNIVERSITIES: BRITISH, INDIAN, AFRICAN: A STUDY IN THE ECOLOGY OF HIGHER EDUCATION 54–64 (1966); Raymond Cocks, *"Sustaining the Character of a Judge": Conflict Within the Legal Thought of British India*, 35 J. LEGAL HIST. 44 (2014).

28. T. RALEIGH ET AL., REPORT OF THE INDIAN UNIVERSITIES COMMISSION 1902, at 34, 82 (1902).

29. Dayal, *supra* note 21, at 148, 155, 161–62, 164; Schmitthener, *supra* note 21, at 364, 366, 372; Agrawala, *supra* note 14, at 480–85; C.L. Tupper, *English Jurisprudence and Indian Studies in Law*, 3 J. SOC'Y COMP. LEGIS. 84, 86 (1901); Duxbury, *English*

The gradual growth in the number of students did not change the nature of legal education in British India, and, generally speaking, "the study of law was not taken as a very serious exercise."[30] There was no standard program of legal education, and the duration of studies varied from law school to law school. Part-time teachers taught law to part-time students. Courses were often delivered in the evening, attendance was non-mandatory, and law libraries were limited or non-existent. While courses on jurisprudence were taught in these schools (as well as other "theoretical" subjects, such as Roman law), teaching was mostly technical and nonacademic, and was based on imparting rules of law, rather than on theoretical discussions of the law. Because legal education institutions in British India were geared to training lawyers rather than conducting legal scholarship, there was also little academic research or writing on law.[31]

One important exception to the general state of legal research was the Tagore Law Lectures, an annual lecture series that began in 1868. It was created by Prosunno Kumar Tagore, one of the members of the Tagore family, a family of intellectuals and nationalist activists in Bengal. The annual lectures were given by leading non-Indian jurists (including, eventually, figures such as Holdsworth, Pollock, and Pound), as well as many Indian ones (most of them practicing judges and lawyers, rather than law professors). The lectures were

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Jurisprudence Between Austin and Hart, *supra* note 1, at 79. *See also* Aggarwal, *supra* note 27, at 232 (mentioning slightly different numbers for the year 1886–1887). The number of U.K. law students is for the academic year 1938–1939. *See* Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 79. Beginning in the mid-nineteenth century, South Asian students also traveled to England to train as barristers at the Inns of Court. Naturally, once they returned, many of these students came to occupy leading roles in their local legal system. Some of these London-trained barristers, such as Mohandas Gandhi (who studied law at the Inner Temple), or Muhammad Ali Jinnah (trained at Lincoln's Inn), later became anticolonial nationalist politicians. However, because of the costs involved in traveling and living in London, the number of South Asian students trained in the Inns of Court was relatively small compared to those studying law in British India. *See* Schmitthener, *supra* note 21, at 365–67; Alan M. Guenther, Syed Mahmood and the Transformation of Muslim Law in British India 45–63 (2004) (unpublished Ph.D. dissertation, McGill University) (on file with McGill University Library) (focusing specifically on the legal education of one Indian lawyer and judge, Syed Mahmood, in late nineteenth century England); Sharafi, *supra* note 16, at 1060, 1082–83; SHARAFI, *supra* note 16, at 104–10. For lists of South Asian students admitted to three of the four Inns of Courts from the mid-nineteenth to the mid-twentieth century, see *South Asians at the Inns*, S. ASIAN LEGAL HIST. RESOURCES, https://salh.law.wisc.edu/south-asian-law-students-at-the-inns-of-court (last visited Mar. 1, 2021).

30. JAIN, *supra* note 21, at 794.

31. Agrawala, *supra* note 14, at 496; Aggarwal, *supra* note 27, at 235, 237–39, 246–47; JAIN, *supra* note 21, at 794; Schmitthener, *supra* note 21, at 362. *See also* William G. Rice, *A Quick Look at Legal Education in India and Pakistan*, 11 J. LEGAL EDUC. 364 (1958) (on Indian legal education in the early post-Independence period). One should note that the normative question (which this article in not concerned with) whether legal education *ought* to be focused on producing practicing lawyers or not is, of course, a hotly debated question in the literature on the nature and goals of legal education.

then published.[32] Most of the Tagore lectures were descriptive surveys of the law of British India (such as the laws pertaining to mortgages, minors, marriage, inheritance, gifts, agency, and so on). They were comprehensive and learned, but formalist, noncontextual and nontheoretical. In consequence, little use was made of history or the social sciences.[33] However, as I will show in Part III, this was to change in the early decades of the twentieth century.

II. Jurisprudence Texts Produced in British India by English Authors: The Gap Between Theory and Reality

In 1958, the Polish-Indian legal scholar, C.H. Alexandrowicz, prepared a bibliography of works on Indian law. In the section on jurisprudence, he wrote that, apart from some works on Hindu law, "Indian academic lawyers have made no original contribution in this field, and lawyers and law schools prefer to rely on the well-known treatises by Salmond, Paton and Bodenheimer."[34] Similar remarks about the unoriginality of Indian works can be found elsewhere.[35]

Why was English jurisprudence so dominant in India? Different reasons were given by different scholars. C.L. Tupper, the Vice-Chancellor of the University of Punjab (and a leading authority on the customary law of the Punjab), argued in 1901 that, just as Greek art and philosophy had "fructified" Rome, and Greek and Roman literature had led to the transition from the Middle Ages to the Renaissance, so English culture was playing the same role in "the Indian Renaissance now in progress." Specifically, in law studies, this role was to be played by English jurisprudence, which, claimed Tupper, "reigns alone" in this field (mentioning here specifically three thinkers, Bentham, Austin, and Maine).[36]

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32. On the series, see Agrawala, *supra* note 14, at 497–98; Rajeev Dhavan, *Legal Research in India: The Role of the Indian Law Institute*, 34 Am. J. Comp. L. 527, 529 (1986); Dolores F. Chew, Of "Unchaste" Widows and Tenants-for-Life: Legal Constructions of Gender and Property in Nineteenth Century Bengal 129 (June 14, 1994) (unpublished Ph.D. dissertation, University of Calcutta) (on file with Shodhganga: A Reservoir of Indian Theses @ INFLIBNET, http://shodhganga.inflibnet.ac.in/handle/10603/164657 (last visited Mar. 1, 2021)); Shahbaz Ahmad Cheema, *Tagore Law Lectures' Contribution to Islamic Legal Scholarship in British India*, https://www.researchgate.net/publication/312016787_Tagore_Law_Lectures'_Contribution_to_Islamic_Legal_Scholarship_in_British_India (last visited Mar. 1, 2021).

33. *See* Agrawala, *supra* note 14, at 497. One should note that some of the earlier lectures were broader in scope. *See* Nandini Chatterjee, *Law, Culture and History: Amir Ali's Interpretation of Islamic Tradition*, *in* Legal Histories of the British Empire: Laws, Engagements and Legacies 45, 53–54 (Shaunnagh Dorsett & John McLaren eds., 2014) (discussing Amir Ali's (older spelling Ameer Ali) 1884 lectures on gifts in Islamic law). For a list of the topics of the Tagore Lectures, see *E-book Catalogue*, Univ. Calcutta, https://web.archive.org/web/20200728114048/https://www.caluniv.ac.in/digital-lib/ebook/ebook_catalog.php?cat=12 (last visited Mar. 1, 2021). (Note that the list is incomplete. For example, Abdur Rahim's 1907 lectures do not appear in this list).

34. Charles Henry Alexandrowicz, A Bibliography of Indian Law 4 (1958).

35. Agrawala, *supra* note 14; G.S. Sharma, *Some Reflections on the Teaching of Jurisprudence in India*, *in* Studies in Law: An Anthology of Essays in Municipal and International Law 39 (V.V. Deshpande ed., 1961).

36. Tupper, *supra* note 29, at 84, 86. *See also id.* at 90–91. *See also* Neeladri Bhattacharya, *Remaking Custom: The Discourse and Practice of Colonial Codification*, *in* Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar 20 (R. Champakalakshmi & S. Gopal eds., 1996).

A different argument about the dominance of English jurisprudence in India—and specifically English analytical jurisprudence—was made after Indian Independence by S.N. Dhyani, a law professor at Rajasthan University in Jaipur. He wrote in 1985 that:

> [D]uring the hey days of British imperialism and absolute power no theory of law could fit in so eminently as Austin's Analytical positivism which meant despotism, status quo, police state, anti-people government and alien laws and judicial system—all rolled into one . . . Austin was [the] god-father of [the Indian legal community before 1947] and his philosophy of law was their Bible which they capriciously worshiped by sacrificing the good of the people.[37]

Whether one agrees with Tupper or Dhyani, English jurisprudence was not *entirely* dominant. A relatively large number of books on jurisprudence were produced in India during the British period. At first, these works were written by English lawyers, joined later by Indian jurists. The books produced in the late nineteenth century limited themselves to summarizing English works.[38] However, some works that did not merely copy or summarize English works also appeared. I will now discuss representative works showing how books produced in India differed from their English counterparts.

The first comprehensive treatise on jurisprudence written in India was William Markby's *Elements of Law*.[39] This book was published in 1871, less than a decade after Austin's *Lectures on Jurisprudence*. It was thus a pioneer in a long line of treatises that attempted to simplify Austin's lectures and make them more accessible to law students. Markby's book was based on a series of lectures he had given to a group of Indian students at the University of Calcutta in 1870.[40] Markby was related to John Austin's wife, Sarah Austin, and he helped her prepare

37. S.N. DHYANI, JURISPRUDENCE: A STUDY OF INDIAN LEGAL THEORY 19–20 (2d ed. 1985). *See also* V.R. Krishna Iyer, *Towards a Third World Jurisprudence*, *in* LAW VERSUS JUSTICE: PROBLEMS AND SOLUTIONS 132–37 (1981). On Austinian jurisprudence and colonialism, see G. Blaine Baker, *Popularizing the Rule of Law: Sheldon Amos and the International Scientific Series, 1874 to 1909*, 33 J. LEGAL HIST. 151, 165 (2012); Assaf Likhovski, *History of British Legal Education in Mandatory Palestine*, *in* EXPERIMENTAL LEGAL EDUCATION IN A GLOBALIZED WORLD: THE MIDDLE EAST & BEYOND 177, 189–97 (Mutaz M. Qafisheh & Stephen A. Rosenbaum eds., 2016).

38. Some examples of such works are found *infra* note 69.

39. WILLIAM MARKBY, ELEMENTS OF LAW: CONSIDERED WITH REFERENCE TO PRINCIPLES OF GENERAL JURISPRUDENCE (Oxford, Clarendon Press 1871). *See also* Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 7–8. For an earlier work, see JOHN BRUCE NORTON, TOPICS OF JURISPRUDENCE: OR AIDS TO THE OFFICE OF THE INDIAN JUDGE (Madras, J. Higginbotham 1862). Norton's book was essentially a collection of maxims on equity, accompanied by discussions of topics such as "mistake," "intention," or "agency." It was inspired by similar English works such as HERBERT BROOM, A SELECTION OF LEGAL MAXIMS (London, A. Maxwell & Son 1845). On Norton, see *John Bruce Norton (1815–1883)*, *in* 41 DICTIONARY OF NATIONAL BIOGRAPHY 1885–1900, at 216 (Sidney Lee ed., New York, Macmillan & Co. 1895).

40. MARKBY, *supra* note 39, at v.

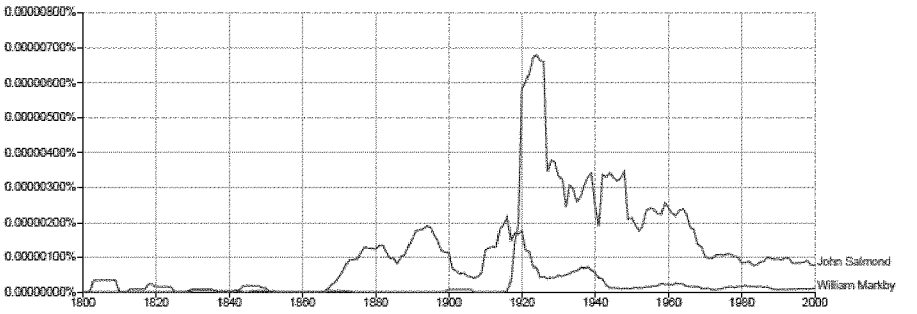
Austin's *Lectures on Jurisprudence* for publication in 1863. In 1866 he was appointed as a judge of the High Court of Bengal, and he later served as the Vice-Chancellor the University of Calcutta (1877–1888), before returning to England in 1878, and becoming the first Reader in Indian law at the University of Oxford.[41]

Markby's book seems to have been relatively influential (at least in the first decades after its publication), with six editions being published between 1871 and 1905. Another way to measure Markby's relative influence is to use, with all due caution, Google Ngram Viewer.[42] This tool can be used to compare Markby's popularity over time relative to that of other writers of jurisprudence textbooks (measured by the frequency of the appearance of Markby's name in Google Books compared to the frequency of the appearance of the names of other writers). Figure 1 compares the frequency of the use of the words "William Markby" in Google Books, and the frequency of the use of the words "John Salmond" between the years 1800 and 2000 using Google Ngram Viewer. (Please note that Google Ngram Viewer does not allow one to compare references to specific books by Markby or Salmond and so, as a proxy, I compared the frequency of mentions of their names.)

A comparison of the frequency of the appearance of Markby's name compared to that of John Salmond shows that he seems to have been relatively popular until the appearance of Salmond's book on jurisprudence in the beginning of the twentieth century.

Markby's book was published in the United Kingdom, and it was based on a structure that later became the conventional structure

FIGURE 1. FREQUENCY OF THE APPEARANCE OF THE WORDS "WILLIAM MARKBY" AND "JOHN SALMOND" IN GOOGLE BOOKS NGRAM VIEWER.



41. T.G. Watkin, *Sir William Markby (1829–1914)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), https://doi.org/10.1093/ref:odnb/50590. *See also* LUCY TAYLOR MARKBY, MEMORIES OF SIR WILLIAM MARKBY, K.C.I.E.: BY HIS WIFE (1917).

42. For a positive assessment of the utility of using digital tools such as Google Ngram Viewer by intellectual historians, see, e.g., JO GULDI & DAVID ARMITAGE, THE HISTORY MANIFESTO 89–95 (2014). For discussions of the problems associated with the use of such tools (e.g., decontextualization), see, e.g., Lara Putnam, *The Transnational and the Text-Searchable: Digitized Sources and the Shadows They Cast*, 121 AM. HIST. REV. 377 (2016); Mark J. Hill, *Invisible Interpretations: Intellectual History in the Digital Age*, 1 GLOB. INTELL. HIST. 130 (2016).

of late-nineteenth- and early-twentieth-century jurisprudence textbooks.[43] Markby believed the scientific study of law was universal, noting, for example, that his definition of law (based on John Austin's definition) was relevant not only to English law. "No theory of religion, or of morals, or of politics, is involved in these views of law," he said. "They are alike true for Hindoos, Mahommedans, and Christians."[44] In many places in his book, Markby referred to India and its laws, which is not surprising given the origin of the book in a series of lectures at the University of Calcutta. Markby's Indian references were mostly used to illustrate his general arguments.[45] However, when he discussed the role of customary law in deciding cases, he argued, contrary to Austin, that custom was "not merely a branch of judge-made law" but an "independent source of law," and, indeed, "a notion older than law itself." In support of this argument, Markby mentioned old German village courts and also "the village courts (punchayets) [*sic*] which exist to this day in Madras."[46] Indian examples provided to support general jurisprudential points were also used in other works by Markby.[47]

In the 1880s, several books similar to Markby's appeared in India. One of them was R.B. Michell's *Jurisprudence: With Special Reference to the Law of India*, published in Madras in 1883.[48] Michell was a barrister and also a professor of law at the Madras Law College, and his book was based on a course of lectures he had delivered there.[49] The book was divided into two parts: a discussion of "general principles and the division and classification of the law," followed by a discussion of private law (property, contract, family and

43. The book was divided into twelve chapters discussing the following topics: general conception of law; sources of law; relations which arise out of law; primary duties and obligations; liability; grounds of nonliability; ownership; possession; servitudes or easements; prescription and limitation; sanctions and remedies; and procedure. The second part of this structure may perhaps be traced back to the structure of Blackstone's *Commentaries*, and even further back to Roman law.

44. MARKBY, *supra* note 39, at 6.

45. *See id.* at xii (Indian students and Roman law); *id.* at 9 (the power of courts in India to review the acts of the Governor General); *id.* at 31 (comparing commentaries on English law to ones on Hindu law); *id.* at 39 (the "Koran and the Shasters" were a source of law in India, just as "the precepts of the Bible have been applied to the institutions of daily life by ourselves . . ."); *id.* at 58 (Indian examples of juristic persons); *id.* at 244 (imprisonment for debt in India).

46. *Id.* at 33–34. On Markby's understanding of custom and Austinian jurisprudence, see also Michael Lobban, *Legal Theory and Judge Made Law in England, 1850–1920*, 40 QUADERNI FIORENTINI 553, 581–84 (2011).

47. William Markby, *Analytical Jurisprudence*, 1 LAW MAG. & REV. & Q. DIGEST ALL REPORTED CASES 617, 625–27 (5th ser. 1876) (using the example of the recognition of interest by Muslim merchants in India, despite the koranic prohibition on taking interest, to illustrate the Austinian notion of a tacit command). *See also* WILFRID E. RUMBLE, DOING AUSTIN JUSTICE: THE RECEPTION OF JOHN AUSTIN'S PHILOSOPHY OF LAW IN NINETEENTH-CENTURY ENGLAND 161–62 (2005).

48. R.B. MICHELL, JURISPRUDENCE: WITH SPECIAL REFERENCE TO THE LAW OF INDIA (Madras, Higginbotham & Co. 1883).

49. *Id.* at v–vi.

labor law, as well as procedure). Like Markby's book, Michell's writings were also based on those of English legal theorists (Blackstone and Austin), but more illustrations were taken from Indian law. For example, when discussing custom, Michell explained that one of the requirements for the recognition of custom by the court was that it must not be immoral. As an example, he referred to a Madras case, *Chinna Ummayi v. Tegarai Chetti*, in which the Madras High Court had "declined to uphold a custom whereby certain dancing girls claimed a monopoly to themselves of the office of *deva dasi* (dancing girl) in a pagoda, on the grounds that the main purpose of the profession was prostitution . . . ."[50]

Another work similar to Markby's textbook was the *Law Manual*, by E. Woodall Parker, a judge and law lecturer at Punjab University. This book was first published in 1882, and a new edition, edited by Philip Morton (another Punjab University lecturer), was published in 1892.[51] Morton also published a condensed version of this book entitled *A Preliminary Manual of Jurisprudence for the Use of Students*, in 1898.[52] These works synthesized a number of English texts, such as those of Austin or Markby, adding some references to Indian law, although the basic approach was that this was not really necessary since the English theories were not particular, but universal.[53]

The most interesting jurisprudence book produced in late-nineteenth-century India was written by William Rattigan. Rattigan was born in India, where he also practiced as a lawyer (in Lahore in the Punjab). He then moved to the United Kingdom, studied at King's College and was admitted to the English Bar. He returned to Lahore, where he served as government advocate and as a judge of the Chief Court of the Punjab, later becoming a member of the Supreme Legislative Council of India. In 1885 he obtained a doctorate from the University of Göttingen, and in 1887 he became the Vice-Chancellor of Punjab University, serving in that role until 1895. Rattigan was a polyglot mastering several European and Indian languages. He published a large number of books including a translation of the second volume of Savigny's *System des heutigen römischen Rechts* (the first volume was also translated by an English jurist in India, William Holloway, a Madras judge), a work on Indian law, a book on the Roman law of persons, a textbook on private international law written for Indian law students, and a digest of the customary law of the Punjab (thirteen editions of this digest were published, the last edition was published in 1953).[54]

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50. *Id.* at 9. On this case, see also Kunal Parker, *"A Corporation of Superior Prostitutes" Anglo-Indian Legal Conceptions of Temple Dancing Girls, 1800–1914*, 32 MOD. ASIAN STUD. 559, 599 (1998).

51. OUTLINES OF JURISPRUDENCE (Philip Morton ed., Allahabad, Pioneer Press 1892).

52. PHILIP MORTON, A PRELIMINARY MANUAL OF JURISPRUDENCE FOR THE USE OF STUDENTS (Lahore, The "News" Press 1898).

53. OUTLINES OF JURISPRUDENCE, *supra* note 51, at 9.

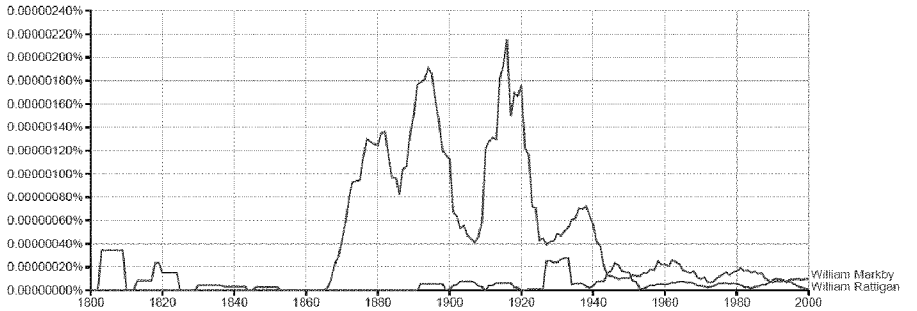
54. F.H. Brown, *Rattigan, Sir William Henry (1842–1904)*, OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004), https://doi.org/10.1093/ref:odnb/35680. Rattigan and his

In 1888, Rattigan published a book entitled *The Science of Jurisprudence: Chiefly Intended for Indian Law Students.*[55] This work, it seems, did not achieve the same prominence as Markby's book, at least if we rely on Google Ngrams. Figure 2 is a Google Ngram Viewer graph comparing the frequency of the use of the words "William Rattigan" in Google Books, and the frequency of the use of the words "William Markby," between the years 1800 and 2000.

One reason for the relative lack of impact of Rattigan's book may have been the fact that it was first published in India rather than in the United Kingdom (later editions were published in London), and was aimed mainly at Indian students. These students, Rattigan observed in the preface to the first edition, could not understand Austin, while Holland's book was "not simple enough" for them, as was also the case with Markby. Such low expectations of books published in India was also evident in a review of Rattigan's book where the reviewer condescendingly observed that "it is a learned and able work . . . [which] shows a profundity of learning hardly to be looked for in India."[56]

Rattigan disclaimed "any intention" of posing as "an original writer."[57] However, the book was indeed unique in some important senses. First, one unique characteristic of Rattigan's book was that it

FIGURE 2. FREQUENCY OF THE APPEARANCE OF THE WORDS "WILLIAM RATTIGAN" AND "WILLIAM MARKBY" IN GOOGLE BOOKS NGRAM VIEWER.



works were only briefly discussed in the existing literature. *See* Lobban, *supra* note 19, at 51–52; Amanjit Kaur Sharanjit, *La colonisation et la transposition des concepts juridiques: L'exemple du droit coutumier au Punjab (Inde)*, 6 CAHIERS JEAN MOULIN 1 (2020). On Holloway, see Duncan M. Derrett, *The Role of Roman Law and Continental Laws in India*, 24 RABELSZ 657, 670–82 (1959). *See also* Fernandez & Dubber, *supra* note 11, at 12–13 (mentioning another Anglo-Indian translation of Savigny, Sir Erskine Perry's translation of Savigny's book on possession). On the role of customary law in the Punjab, see generally Bhattacharya, *supra* note 36; Andrew Sartori, *A Liberal Discourse of Custom in Colonial Bengal*, 212 PAST & PRESENT 163 (2011).

55. My discussion is based on the third edition published in the United Kingdom. *See* WILLIAM H. RATTIGAN, THE SCIENCE OF JURISPRUDENCE: CHIEFLY INTENDED FOR INDIAN LAW STUDENTS (London, Wildy 3d ed. 1899).

56. W.D.T., Book Review, 23 AM. L. REV. 461, 461–62 (1889).

57. RATTIGAN, *supra* note 55, at viii.

TABLE 1. THE USE OF DIFFERENT KEYWORDS IN MARKBY'S AND RATTIGAN'S BOOKS.

Terms used in Markby's book	**Number of instances**	**Terms used in Rattigan's book**	**Number of instances**
English/England/British	272	*India / Indian*	382
Roman/ Rome	103	English/England/British	287
India / Indian	97	Roman/Romans/Rome	184
Austin/Austin's	75	*Hindu*	54
France/French	47	France/French	33
Savigny/Savigny's	38	*Allah*	32
Hindoo / Hindoos	29	Austin	23
America/American	21	America	23
Bentham	16	German/Germany	20
Maine	15	Justinian	19
Mahommedans	14	*Bengal*	16
German/Germany	8	*Madras*	14
Bengal	7	*Muhammadan*	13
Italian	6	Maine	11
Allah	0	Italian	9
Justinian	0	Savigny	9
Madras	0	Bentham	6
Total	**748**		**1,135**

was more "Indian" in focus than Markby's book, containing more mentions of topics related to India. This Indian aspect is evident from a quantitative analysis that compares the words most used by Markby and Rattigan in their books. Table 1 lists the number of occurrences of specific keywords in both texts, in descending order (the terms related to Indian law in both texts are italicized).[58]

As Table 2 shows, there is a marked difference in the prevalence of English-law-related terms versus Indian-law-related terms

58. The table was created by comparing the first edition of Markby's book, published in 1871, with the third edition of Rattigan's book, published in 1899, using the "wordclouds" software: WORDCLOUDS, wordclouds.com (last visited Mar. 1, 2021). While the two books are of different lengths, comparing the relative use of different keywords by the two authors reveals, I believe, the "Indian" orientation of Rattigan's book compared to Markby's book. Such quantitative analysis is, of course, of limited value if one is only interested in the content of the jurisprudential arguments made by both authors. However, it does illustrate the fact that Rattigan's book was more focused on Indian topics, and used more examples taken from Indian law and culture than Markby's book. For a general discussion of the problems involved in the use of digital tools by intellectual historians, see also *supra* note 42.

TABLE 2. A COMPARISON OF THREE LAW-RELATED CLUSTERS OF KEYWORDS IN MARKBY'S AND RATTIGAN'S BOOKS.

	Markby	Rattigan
Total English cluster	399 (53%)	350 (31%)
Total Continental cluster	202 (27%)	274 (24%)
Total Indian cluster	147 (20%)	511 (45%)

in the two works. In total, Indian-law-related keywords (the "Indian cluster") comprised just 20% of the total number of keywords counted in Markby's book, whereas the Indian cluster comprised 45% of the keywords in Rattigan's book.

A second unique feature of Rattigan's book was that, while Continental-law-related keywords appeared at a similar frequency in both texts (27% of the words counted in Markby, compared to 24% in Rattigan), Rattigan's book contained more *in-depth* discussion of Continental legal theorists than Markby's.[59] For example, Rattigan's discussion of the distinction between law and morality did not simply follow the conventional Austinian discussion. Instead, Rattigan devoted several pages to a survey of different Continental approaches to this distinction, mentioning both German legal thinkers (Krause, Jhering, Ahrens) and also Italian ones (Vico, Lioy), only then moving on to Austin's "narrower view" on the topic.[60] This Continental orientation was actually noted in a review of the second edition of the book published in the *Revue générale du droit* for July–August 1892.[61] Rattigan's personal educational trajectory, which included a doctorate from the University of Göttingen, may explain the more extensive references to Continental thinkers in his book.[62]

59. It should be noted that the source of inspiration for nineteenth-century English jurisprudential literature, Austin's *Lectures on Jurisprudence*, also relied heavily on Continental works (as indicated by the list of books that appeared at the beginning of *Lectures on Jurisprudence*). *See* 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW, at ix–xiii (London, John Murray 3d ed. 1869). For a somewhat similar openness to non-English sources ("cosmopolitanism") in another part of the British Empire, see, e.g., Eric H. Reiter, *Imported Books, Imported Ideas: Reading European Jurisprudence in Mid-Nineteenth-Century Quebec*, 22 LAW & HIST. REV. 445 (2004); G. Blaine Baker, *The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire*, 3 LAW & HIST. REV. 219 (1985).

60. RATTIGAN, *supra* note 55, at 5–10.

61. The review was cited on the opening page of the third edition of Rattigan's book. *See* RATTIGAN, *supra* note 55, at n.p. ("Press Opinions on the Second Edition").

62. Roman and Continental legal ideas reached India through various channels. Non-English European merchants and settlers were one group of actors involved in importing Continental legal norms and ideas, and in some localities in India such as Goa (Portuguese law), or Pondicherry (French law), these norms remained valid even after Indian Independence. *See* K.M. Sharma, *Civil Law in India*, 1 WASH. U. L.Q. 1, 11–13, 17–38 (1969); Subhash C. Jain, *French Legal System in Pondicherry: An Introduction*, 12 J. INDIAN L. INST. 573 (1970). British lawyers trained in civil and canon law, British administrators influenced by their classical education, British judges using Roman and Continental texts in their judgments, and British law reformers

Finally, another important aspect of Rattigan's book was that it relied on Indian examples to *refine* English theories of law. This is evident, for example, in his discussion of the Austinian definition of law. The second chapter of the book began with a summary of the theory of "Austin and his followers" on the nature of law as the command of a sovereign. Rattigan then provided some conventional counterexamples to the Austinian theory (such as international law), but he also attacked Austin's theory as relevant only to modern states where legislation was the main source of the law. As an example of law in other societies, he mentioned law in India, noting that Austin probably did not know that, in India, before the British conquest, life was governed by rules that were "as absolute as any" modern law, but that did not emanate from a political superior.[63] In this context, Rattigan mentioned examples such as the customary rules that governed the life of village communities in the Punjab (customary law was central to the British administration of the Punjab, and it was also a topic, it will be recalled, on which Rattigan wrote a digest), as well as Hindu laws, which were prescribed and reformed by Hindu sages (*rishis*), who had no temporal power. These sages, Rattigan continued, were able to introduce radical changes in the law using indirect methods. For example, "when they wished to abolish some prevailing practice or custom, they did not do so by an express injunction, but, by pretending to regulate the practice they subjected it to so many conditions and ceremonial requirements as in reality to render its observance impossible," thus giving the Hindu codes "elasticity which has not rendered them obsolete despite the lapse of centuries."[64]

What is remarkable about this passage is that, using Indian examples, Rattigan managed in just a few pages not only to show the problematic nature of Austin's theory of law (as the command of a political sovereign) when applied to nonmodern legal system—a point made earlier in Maine's *Ancient Law* and in other works by Maine—but also to attack the second dominant legal theory produced by nineteenth-century English jurisprudence, that of Maine himself (without naming him). In *Ancient Law* (first published in 1861), Maine described Hindu law as a law based on outmoded codes, which,

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emulating the Continental codification movement of the eighteenth and nineteenth centuries were other actors importing Roman and Continental law to India. Indian scholars and educators, such as Ashutosh Mukherjee, were also fascinated by Roman law, and urged Indians to study it. *See* Sharma, *supra*, at 5–11; Derrett, *supra* note 54. Thus, the examples of Continental influences in India that I give in this Article are merely a subgroup of a far wider phenomenon.

63. RATTIGAN, *supra* note 55, at 16. Markby also mentioned Indian village courts as an example of courts basing their decisions solely on customs. He also noted that the courts in India, when dealing with Hindus and Muslims, were directed by the legislature of British India to rule according to the "law and usages of Hindoos and Mahommedans, and not to the law alone." *See* MARKBY, *supra* note 39, at 34. However, Markby did not rely on these facts, as Rattigan did, to attack Austinian jurisprudence.

64. RATTIGAN, *supra* note 55, at 13–18.

because of the sanctity of religion, could not be reformed.[65] Rattigan argued that the conditions and requirements created by the *rishis* were *not* a mark of an outdated and problematic legal system, but just the opposite: an indication of its elasticity and vitality.

The emphasis on the importance of custom also appeared in other parts of Rattigan's book. For example, in the chapter on the sources of law, Rattigan said that one cannot "overstress . . . [the] importance of giving due effect to custom," especially in the Punjab, where peasants were "extremely simple in their habits" and where, therefore, Hindu and Islamic laws were foreign. Indian law, Rattigan noted, was a "mosaic" in which "English, Muhammadan, and Hindu" law existed side by side with the customs of towns and villages. Austin's view, that customary law was not positive law until its existence was declared by the courts was, therefore, he contended, "clearly erroneous."[66]

Rattigan's book can illustrate one outcome of the transplantation of English jurisprudential ideas to India—their modification due to the gap between English theory and Indian reality. In the next Part of the Article, I will discuss South Asian writers. In their works too, one sees the modification of English ideas due to the gap between theory and reality. In addition, however, in the works that I will now discuss, one can notice the impact of Indian nationalism. Nationalism may have led some of the Indian authors to be more receptive to non-English (Continental and American) jurisprudential theories. It also led some Indian authors to produce works that outlined the jurisprudential notions underlying local (Hindu and Islamic) law, and portrayed these notions positively, in contrast with the negative image of non-Western law prevalent in English works at the time.

III. JURISPRUDENCE TEXTS PRODUCED IN BRITISH INDIA BY SOUTH ASIAN AUTHORS: THE IMPACT OF NATIONALISM

English writers such as Markby and Rattigan were the dominant figures in late-nineteenth-century Indian jurisprudence.[67] However,

65. For Maine's critique of Austin's command theory and for his view of Hindu law, see HENRY MAINE, ANCIENT LAW 6–7, 15–18 (new ed. 1930) (1861). *See generally* RAYMOND COCKS, SIR HENRY MAINE: A STUDY IN VICTORIAN JURISPRUDENCE (2004); DAVID RABBAN, LAW'S HISTORY: AMERICAN LEGAL THOUGHT AND THE TRANSATLANTIC TURN TO HISTORY 115–49 (2013); MICHAEL LOBBAN, A HISTORY OF THE PHILOSOPHY OF LAW IN THE COMMON LAW WORLD, 1600–1900, at 198–99 (2007).

66. RATTIGAN, *supra* note 55, at 74–77.

67. Another, early-twentieth-century example, of an English jurisprudence book related to India is Carleton Kemp Allen's influential book, *Law in the Making*, based on the Tagore Law Lectures that Allen gave in 1926 at the University of Calcutta. Allen's book focused on sources of law, and discussed precedent, equity, and legislation; but the first, and most sizeable, part of the book was devoted to custom. Allen explains this emphasis on custom by saying that, while French jurists can ignore custom because codes are their major source of law, English lawyers, in India or in the Privy Council, "cannot be unconscious of the part which custom has played and still plays in the legal development of civilizations even more complex than [their] own." Indian customary law, therefore proves, Allen concluded, "the huge vitality of custom as a source of law and as a rule of conduct quite unrelated to any sovereign authority in the Austinian sense." *See* CARLETON KEMP ALLEN, LAW IN THE MAKING, v, 35–37 (1927). *See also* Simpson, *supra* note 18, at 650 n.117.

South Asian authors also wrote books on the subject. I will begin this Part with a discussion of works written by South Asian authors who summarized Western jurisprudential theories. I will then move to a discussion of new genre of works that appeared in India beginning in the twentieth century—theoretical works on Hindu jurisprudence. Finally, I will discuss theoretical works on Islamic law.

A. *Works on Western Jurisprudence by South Asian Authors*

In 1888, a young Burmese barrister who studied in London, Chan-Toon, published a book entitled *The Nature and Value of Jurisprudence*. The book was meant to "guide beginners in the law," and indeed it was a very basic survey of English jurisprudential notions prevalent at the time.[68] In the following decades, several similar works were published in India.[69] As these works were primarily meant to assist students in passing their exams, they adopted an uncritical approach to English jurisprudence. Thus, even when they mentioned Indian examples, these were not used to question the ideas of English thinkers.[70]

While most works produced in India (or by South Asians such as Chan-Toon) during the late-nineteenth century and the first decades of the twentieth century were derivative, merely repeating English theories, there were also works that were more unique. One such work was written by Karunamay Basu, the Chairman of the Board of Lecturers in Jurisprudence and Roman Law at the University Law College of Calcutta in the 1920s and 1930s.[71] Basu had a keen interest

68. CHAN-TOON, THE NATURE AND VALUE OF JURISPRUDENCE, ROMAN LAW AND INTERNATIONAL LAW (London, W. Clowes & Sons 1888). A second edition was published the following year. *See* CHAN-TOON, *Preface* to THE NATURE AND VALUE OF JURISPRUDENCE, at v–vii (London, Reeves & Turner 2d enlarged ed. 1889) (1888). For a snide review of the second edition, see Book Review, 5 LAW Q. REV. 322, 322 (1889). On Chan-Toon (and his infamous wife), see Gregory Mackie, *Forging Oscar Wilde: Mrs. Chan-Toon and for Love of the King*, 54 ENG. LITERATURE TRANSITION, 1880–1920, at 267 (2011); *Chan-Toon, Mrs. M.: Mabel Mary Agnes Cosgrove*, *in* EDWARDIAN FICTION: AN OXFORD COMPANION 62 (Sandra Kemp et al. eds., 1997).

69. ANON., A HAND-BOOK OF JURISPRUDENCE INCORPORATING MAINE'S ANCIENT LAW (1929); A VAKIL, PRINCIPLES OF JURISPRUDENCE: FOR THE USE OF LAW STUDENTS (7th ed. 1926); M. BARKAT ALI, A HANDBOOK OF JURISPRUDENCE (1919); B.R. AGASKAR & V.N. VEDAK, SUMMARY LECTURE NOTES ON JURISPRUDENCE: BEING A STUDENT'S PERSONAL BOOK OF NOTES COVERING THE MATTER GENERALLY REQUIRED FOR THE PAPER ON GENERAL JURISPRUDENCE AS SET AT THE FIRST LL.B. EXAMINATION IN BOMBAY (1917); KALANDAR ALLY KHAN, A SUMMARY OF THE SCIENCE OF JURISPRUDENCE WITH AN APPENDIX CONTAINING LEADING CASES AND EXAMINATION QUESTIONS (1912); P.C. SEN, A SUMMARY OF HOLLAND'S JURISPRUDENCE (Konnagar near Calcutta, J.M. Sen & Co. 1896).

70. One exception was Syed Mohamad, the author of a summary of Holland's book, who advertised himself on the title page of his book as the "author of 'Mind and Molecular Theory', 'Science and Islam' etc." In the preface to his book, he admitted that "I am yet a student myself." However, he continued, existing works summarizing the topic were of low quality, without explanation or critique, which "may have been useful to the rising sons of India in turning them out as Indian Jurists." He therefore added in the text, in brackets, notes questioning some of Holland's ideas that he summarized. *See* SYED MOHAMAD, THE STUDENT'S HOLLAND: AN ANALYTICAL EXPLANATORY AND CRITICAL COMMENTARY, at i (1912).

71. *See* UNIV. OF CALCUTTA, CALENDAR 1931, at 208 (1931); UNIV. OF CALCUTTA, CALENDAR 1922, at 9, 288 (1922); 1 KARUNAMAY BASU, THE MODERN THEORIES OF JURISPRUDENCE, at iii (1925).

in contemporary American and also Continental legal theories, and these dominated his 1921 Tagore Lectures, which were published in two volumes, in 1925 and 1929.[72]

One obvious reason why Basu's lectures made use of Continental theories was practical: the fact that these theories were now easily accessible in English. The source of many of the ideas found in Basu's series of lectures was an American project to translate Continental works on legal philosophy into English. Between 1909 and 1925, the Boston Book Company, and its successor the Macmillan Company, published English translations of major Continental jurisprudence books. In addition, leading American comparative law scholars John Wigmore and Albert Kocourek published a three-volume collection of excerpts on the evolution of law.[73] All of these works were heavily referenced by Basu in his book.[74] Basu's use of these works was rather unique. Another book published in India during the same period also referred to some Continental thinkers. However, it was far less comprehensive than Basu's book.[75]

In addition to practical considerations, however, it seems that Basu's shift from a wholly English jurisprudential orientation to a more international one may have reflected a broader trend in Bengali culture at the time, a trend associated with Indian nationalism. In the nineteenth century, Bengali thinkers mostly turned to the England for intellectual inspiration. This was certainly true for the mid-nineteenth-century "Bengali renaissance," associated with liberal thinkers such as Rammohun Roy, and later with the Young Bengal movement, both influenced by English utilitarian thought.[76] It was even true when liberalism was replaced by a neoromantic Hindu revivalism in the late nineteenth century, best expressed in the works of writers like Bankimchandra Chatterjee. Bankim's neo-Hinduism

72. BASU, *supra* note 71; 2 KARUNAMAY BASU, THE MODERN THEORIES OF JURISPRUDENCE: THE PLEA FOR A SYNTHETIC PHILOSOPHY OF LAW (1929).

73. On the translation project, see David S. Clark, *The Modern Development of American Comparative Law, 1904–1945*, 55 AM. J. COMP. L. 587, 599–600, 608 (2007); Kocourek and Wigmore's series of books is 1–3 EVOLUTION OF LAW: SELECT READINGS ON THE ORIGIN AND DEVELOPMENT OF LEGAL INSTITUTIONS (Albert Kocourek & John H. Wigmore eds., 1915–1918). On the influences of American legal scholarship on Indian law in the post-Independence period, see Jayanth K. Krishnan, *Professor Kingsfield Goes to Delhi: American Academics, the Ford Foundation, and the Development of Legal Education in India*, 46 AM. J. LEGAL HIST. 447 (2003); Jayanth K. Krishnan, *From the ALI to the ILI: The Efforts to Export an American Legal Institution*, 38 VAND. J. TRANSNAT'L L. 1255 (2005); Upendra Baxi, *Understanding the Traffic of "Ideas" in Law Between America and India*, *in* TRAFFIC OF IDEAS BETWEEN INDIA AND AMERICA 319 (Robert M. Crunden ed., 1985); Rajeev Dhavan, *Borrowed Ideas: On the Impact of America Scholarship on Indian Law*, 33 AM. J. COMP. L. 505 (1985).

74. Basu's book mentioned the works of non-English legal theorists such as Berolzheimer, Gareis, Gray, Korkunov, Miraglia, and Pound.

75. *See* K. KRISHNA MENON, OUTLINES OF JURISPRUDENCE (1929) (mentioning Savigny and Korkunov).

76. *See* ANDREW SARTORI, BENGAL IN GLOBAL CONCEPT HISTORY: CULTURALISM IN THE AGE OF CAPITAL 68–108 (2008). On Indian liberal thought, see generally BAYLY, *supra* note 9.

of the late nineteenth century may superficially be seen as a local reaction to English culture, but in fact it echoed contemporary English ideas about the nature of culture, nation, and religion. The late-nineteenth-century Bengali rejection of liberalism thus resonated with similar trends prevalent in England at that time.[77]

However, as historian Kris Manjapra has shown, during the first two decades of the twentieth century (partly due to the Swadeshi Movement, a movement of protest, economic boycott, and noncooperation with the British, following the partition of Bengal in 1905), and especially in the 1920s, Bengali intellectuals shifted their cultural outlook, replacing the Anglophilic tendencies of the previous generations of Bengali intellectuals with an international, multipolar, anticolonial vision of the world, turning Calcutta into "the epicenter of anti-British intellectual politics."[78]

The shift from an English to an international orientation was evident, for example, in literature. While Bankim's late-nineteenth-century literary magazine, *Bangadarshan*, still imagined the world through "the lenses of the British Empire," and the India–Britain axis, the equivalent literary magazine of the 1920s generation in Bengal, *Kallol*, offered its readers a multipolar internationalist perspective.[79] This move from an imperial to an international orientation was manifested in a rejection of the conventional English literary canon taught at the time at Indian universities, leading to the publication of literary works by non-English writers from places such as the United States, Germany, Northern and Eastern Europe, Russia, and Japan. It also echoed other trends in Bengali culture of the 1920s (and elsewhere in India), such as a marked increase in the translation, publication, and trade in books in European languages other than English, the growing connections between the University of Calcutta and German and Japanese scholars, and the international literary tours of Bengal's leading author, Rabindranath Tagore, during the interwar period.[80] Basu's lectures can be viewed as the jurisprudential manifestation of this broader movement, discussed in detail by Manjapra, away from following English intellectual fashions.

In his first lecture of the series, Basu declared his independence from English jurisprudence and the analytical method, stating that

77. SARTORI, *supra* note 76, at 97, 120, 126–29.

78. KRIS MANJAPRA, AGE OF ENTANGLEMENT: GERMAN AND INDIAN INTELLECTUALS ACROSS EUROPE 12, 41 (2014); Kris Manjapra, *From Imperial to International Horizons: A Hermeneutic Study of Bengali Modernism*, 8 MOD. INTELL. HIST. 327 (2011). On earlier, *fin de siècle*, French influences, see SARTORI, *supra* note 76, at 136–42. On Indians studying at American universities in the early twentieth century (and on the politics of this move as an expression of Indian nationalism), see MANJAPRA, *supra*, at 41, 52–54, 213; Sara Legrandjacques, *Global Students? The International Mobility and Identity of Students from Colonial India and Indochina, 1880s–1945*, 4 GLOB. HIST., no. 2, Oct. 2018, at 46, 53–55.

79. Manjapra, *supra* note 78, at 337–39.

80. *Id.* at 342, 345–46, 348; MANJAPRA, *supra* note 78, at 47–52, 98–102.

his Tagore Law Lectures were a reflection of "the new tendency" to study not only law but also "the science and philosophy of law." He also noted that this tendency had been adopted by the University of Calcutta, following the lead of the United States, where works by Continental jurists were being translated and studied. In recent years, he continued, the "limited" focus on the analytical school had changed, and Americans were studying French and German legal theory, thus leading to the "rise of a new unified school of Sociological Jurisprudence," which was needed "for the better and more effective solution of the serious social and legal problems which can no longer be disposed of . . . [by] . . . superficial and pragmatic treatment." He observed:

> India cannot help sharing in these problems of the civilised world, and it is but meet and proper that the study of jurisprudence from the points of view of all the schools, should receive the same impetus and encouragement from the premier University of India as it is receiving in the continent of Europe and in the United States.[81]

Later in the book, Basu also noted the resistance of English jurisprudence to "sociological thought," adding that, unlike England, in the United States "the sociological spirit ha[d] been awakened."[82]

Basu's statement on the relative absence of Continental (and American) legal theories from contemporary English works was correct.[83] For example, in the 580 pages of the seventh edition of Salmond's *Jurisprudence*, published in 1924, sociological jurisprudence is not mentioned at all, and Roscoe Pound was mentioned only twice, once in a footnote mentioning an article of his that contained a general survey of schools of jurisprudence, and once in the bibliography.[84] In a similar vein, the newest edition of T.E. Holland's *Elements of Jurisprudence*, at the time of Basu's Tagore Lectures in 1921, was the twelfth edition

81. BASU, *supra* note 71, at xi–iii, liii.

82. *Id.* at liii–iv. Other works published in India in the 1920s also showed an awareness of, and interest in, sociological jurisprudence. *See* SURES CHANDRA CHAKRABARTI, STUDIES IN JURISPRUDENCE AND INTERNATIONAL LAW (1924).

83. *See* Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 37–38. Perhaps the closest English equivalent to Basu's book, both in terms of the time it was published, and also of interest in non-English theories, was George Keeton's 1930 book. *See* KEETON, *supra* note 10. Keeton's book was based, it might be recalled, on lectures delivered in Hong Kong in 1924. On the influence of non-English legal theories on this book, see Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 9–13 (noting Keeton's awareness of American legal theories, such as legal realism, especially in the second edition of his book, published in 1949). One should also note the presence of Continental works by scholars such as Berolzheimer or Duguit in Keeton's book. *See also* Duxbury, *English Jurisprudence Between Austin and Hart*, *supra* note 1, at 54–69 (discussing the impact of American legal realism on English works).

84. JOHN SALMOND, JURISPRUDENCE 15, 564 (7th ed. 1924).

of the textbook, published in 1917, from which the notion of "sociological jurisprudence" was entirely absent.[85]

Another interesting point about Basu was his attitude to Hindu law. In the preface to the book, he mentioned a complaint he had received about the lack of attention to Hindu law in his lectures.[86] His somewhat puzzling answer to this criticism was that, actually, all the stages of the development of jurisprudence were already found in Hindu law: "My first impulse [in response to the criticized lack of attention to Hindu law] naturally was to find some excuse in the fact that Hindu Jurisprudence is not 'modern.'" However, Basu continued, he then realized that:

> Hindu juristic theories had in fact passed through almost all the phases which characterised the various stage of the juristic history of Europe and Anglo-America since the dawn of civilisation; and moreover had reached in its most developed form a synthesis which has not yet been attained in the modern world.[87]

Basu said in his book that the next step in the development of jurisprudence would be a synthesis of existing theories. In the preface, however, he explained that such a synthesis would "really been nothing but the adaptation of the synthetic philosophy and jurisprudence of the Hindus to modern conditions."[88]

Basu repeated this point in his preface to the second volume, which was subtitled "A Plea for a Synthetic Philosophy of Law." In the preface, he explained that the book was "only an expository study

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85. T.E. HOLLAND, ELEMENTS OF JURISPRUDENCE (12th ed. 1917).

86. Basu said in the preface to the first volume that "it was pointed out to me as a defect by a very high authority that my synopsis did not contain any reference to Hindu jurisprudence"; and in the preface to the second volume he mentioned in this context "the great patron of learning, whose words [were] uttered while he was at the helm of our University," and noted that he is now dead. BASU, *supra* note 71, at vii; BASU, *supra* note 72, at vi. Basu may have been referring here to Ashutosh Mukherjee, the Vice-Chancellor of the University of Calcutta between 1921 and 1923, and also Dean of the Law School. *See* UNIVERSITY OF CALCUTTA, CALENDAR 1922, *supra* note 71, at 5, 6–7. On Ashutosh Mukherjee's anticolonial nationalist politics, see, e.g., MANJAPRA, *supra* note 78, at 47–52. Ashutosh Mukherjee's son, Shyama Prasad Mukherjee, who, like his father, also trained as a lawyer, and also served as Vice-Chancellor of the University of Calcutta (between 1934 and 1938), was a leading right-wing Hindu nationalist politician, serving as the president of the Hindu nationalist Akhil Bharatiya Hindu Mahasabha party, a forerunner of the Bharatiya Janata Party. On S.P. Mukherjee, see CHRISTOPHE JAFFRELOT, THE HINDU NATIONALIST MOVEMENT IN INDIA 51 (1996).

87. BASU, *supra* note 71, at vii.

88. *Id.* at vii–iii. Another excuse Basu provided for not discussing Hindu legal theories was that:

> [T]he comparative study of Hindu legal philosophy and jurisprudence in all its phases in the light of modern juristic theories is a fascinating subject for juristic research, and is further, bound to be immensely useful in the practical field of legal reform which is now-a-days so much in demand all over the civilised world.

Id. at viii. Nevertheless, "it is a vast subject, more comprehensive and arduous than even the whole course of my lectures," and therefore:

of the modern theories," and that "the proposed reconstruction of the Synthetic Philosophy of Law in the light and spirit of our ancient Oriental Philosophy should be, if at all . . . taken up separately as an independent piece of work."[89]

In Basu's lectures, however, there were almost no references to India or to Hindu (or Islamic) law. For example, the first lecture, which was a survey of legal theories between antiquity and the early modern period, was based on a view of jurisprudence as a totally Western creation. It began with the Greeks and Romans, moving directly on to the Middle Ages in Europe. There were no references to Hindu law, or to other non-Western systems such as Jewish or Islamic law.[90]

Even more damaging to Basu's argument in the preface of his book, that Hindu jurisprudence was superior to its Western counterpart, was the fact that, in the book itself, Basu often repeated disparaging Western descriptions of non-Western law. For example, when discussing the critique of Austin's theory by what he called the "English Historical School" (i.e., Maine, Pollock, and Bryce), he noted that one of their objections to Austin's theory was that:

> Austin's definition of law may be true with regard to the laws of advanced civilized states like the Roman Empire or the modern European states . . . but can scarcely apply to the more backward states, past and present, *e.g.*, the Oriental States, where the central power concerns itself only with the gathering of armies and levying of taxes and leaves the administration of law entirely to local courts and [village councils, i.e.,] *panchayaets* [sic].[91]

Basu then mentioned the response of Austin's defenders (Holland, Markby, and Salmond) that:

> [T]he customary laws and rules of Oriental states . . . are not positive laws at all in the Austinian sense. They may be yet regarded as mere rules or laws of morality—defective and deformed predecessors of the more perfected type that

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> I trust it may be selected as a future subject of the Tagore lectures and undertaken by some worthier devotee (than myself) alike of Hindu and the modern social and legal philosophy; or better still, considering that the subject is capable of infinite expansion and research, a more permanent chair or institution may be founded under suitable conditions to promote its culture.

Id. at viii.

89. Basu, *supra* note 72, at v–vi.

90. There are only a few references to Indian terms. One example is the reference to the Hindu notions of "atman" and "manas" as equivalents of Western notions of soul and mind. *See Basu*, *supra* note 71, at 17, 323. Another example is the reference to *yoga* or *darsana* when explaining Neo-Platonism. *See id.* at 41, 42. Finally, in Basu's discussion of anarchism, a footnote said that "modern social anarchists of a religious or ethical type are represented by Tolstoy and Tucker, who do not advocate violence but passive resistance; cf. that advocated by Mr. Gandhi in leading the recent non-co-operation movement against the bureaucratic government in British India." *Id.* at 323.

91. *Id.* at 257–58.

> constitutes the positive laws of modern civilised states. You may historically trace the new modern type to the older as its source, as you can biologically trace the descent of man from the anthropoid ape; but the two logically belong to essentially separate species . . . .[92]

Rather than question this equation of oriental laws with apes, Basu repeated it, and this repetition seems to undermine his contention in the preface to the book, that Hindu law and jurisprudence were actually more advanced than Western ones.[93]

The tendency to uncritically summarize Western works was also evident in other places in the book. For example, when discussing racial theories of law (based on thinkers such as Houston Stewart Chamberlain), Basu said that "contact with superior foreign civilisations and legal systems develops the resources of a virile race and improves and reforms its indigenous social and legal fabric, as was the case with the Roman Republic; but similar influences would smother a weaker race and denationalise it."[94] Later, he talked about the common law's characteristics and commented that the "native characteristics of the Teutonic race . . . were strength, resolution, willful self-assertion, tempered by a marked degree of self-control, conservatism and practical common sense, as opposed to the impulsive and speculative Greek, Slav and Celtic race-characteristics."[95]

The unquestioning acceptance of Western theories sometimes led Basu to adopt contradictory positions. For example, in one place in the book, Basu criticized the classical economists of the early nineteenth century as if he were a Marxist. Thus, when he described the rise of economics in the late eighteenth and early nineteenth centuries, he noted that economic theory, and jurisprudence, during that period were based on an individualist ideology, and on the ideal of freedom of contract, and therefore ignored class distinctions and the "debasement" of the proletariat. The abstract idea of "freedom of contract," he said, leads in fact only to the "freedom to perish."[96] Later in his book he devoted several pages to a survey of socialist, communist, and anarchist social theories, including a summary of their critique of liberal law, a law which was designed, he said, to assist in the "economic enslavement of the masses."[97]

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92. *Id.* at 261.

93. In a somewhat similar fashion, when Basu discussed Spencer's sociology, he talked about "European nations . . . and of less civilised races, *e.g.*, the Polynesians, the Africans, and some Asiatic people." *Id.* at 378.

94. *Id.* at 429. See also the discussion of Chamberlain's pro-English racist sentiments: *id.* at 432.

95. *Id.* at 432.

96. *Id.* at 146–47.

97. *Id.* at 311–27. It is interesting to note that contemporary English works such as Holland's and Keeton's books contained no such discussions of socialist legal theory.

In another place in his book, however, Basu praised the historical school for undermining the revolutionary spirit of the French Revolution, as if he were a conservative thinker, arguing that this school's portrayal of law as the "historic product of popular life slowly . . . evolving . . . and incapable of being suddenly and spasmodically changed," represented a "safe, healthy and orthodox line of thought," against the "tide of revolutionary ideas" of the eighteenth century "and their accompanying evil."[98] Basu may only have been attempting to accurately convey the main ideas of the schools of thought that he was describing, but the terms he used (such as "healthy") pointed to a contradictory espousal of both socialist and conservative ideas about the nature of law.

Basu was aware of the *need* to include non-Western law in his work (as is evident from the preface to his book). However, he did not actually do so. Other works written at the time were more critical of Western theories and more interested in non-Western law, specifically in Hindu law and the theories on which it was based. I will now discuss such works, some of which were also based on Tagore Law Lectures, like Basu's book.

B. Works on Hindu Jurisprudence

Interest in digesting and codifying "Hindu law" goes back to eighteenth-century British officials in India, such as William Jones. The English brought with them specific jurisprudential notions about the nature of law, and these notions shaped how they constructed and represented local "law," whether Hindu or Islamic law (and later also Buddhist law in colonial Burma).[99] In the following paragraphs, I will

98. *Id.* at 174.

99. There is a large body of works discussing the extent to which the English invented local "law" in South Asia. Such discussions can be found in the nineteenth-century debate about the existence of "Hindu law" between James Henry Nelson and John D. Mayne. *See* JOHN D. MAYNE, A TREATISE ON HINDU LAW AND USAGE, at ix–x, 2–5 (7th ed. 1906); John D. Mayne, *Hindu Law in Madras*, 3 LAW Q. REV. 446 (1887); J.H. NELSON, A PROSPECTUS OF THE SCIENTIFIC STUDY OF THE HINDU LAW, at v–viii (London, C. Kegan Paul & Co. 1881); J.H. NELSON, A VIEW OF HINDU LAW AS ADMINISTERED BY THE HIGH COURT OF JUDICATURE AT MADRAS, at i–iii, 1–16 (Madras, Higginbotham 1877). On this debate, including antecedents and later discussions, see NANDINI BHATTACHARYYA-PANDA, APPROPRIATION AND INVENTION OF TRADITION: THE EAST INDIA COMPANY AND HINDU LAW IN EARLY COLONIAL BENGAL 3–10, 30–32 (2008); Lloyd I. Rudolph & Susanne Hoeber Rudolph, *Barristers and Brahmans in India: Legal Cultures and Social Change*, 8 COMP. STUD. SOC'Y & HIST. 24, 36–38 (1965); J.D.M. Derrett, *J.H. Nelson: A Forgotten Administrator-Historian of India*, *in* HISTORIANS OF INDIA, PAKISTAN AND CEYLON 354 (C.H. Philips ed., 1961); RADHABINOD PAL, THE HISTORY OF HINDU LAW IN THE VEDIC AGE AND IN POST-VEDIC TIMES DOWN TO THE INSTITUTES OF MANU 1–2 (1958). Twentieth-century discussions include BERNARD S. COHN, COLONIALISM AND ITS FORMS OF KNOWLEDGE: THE BRITISH IN INDIA 57–75 (1996); Marc Galanter, *The Displacement of Traditional Law in Modern India*, 24 J. SOC. ISSUES 65, 69–76 (1968). A relatively recent summary of the debate in the literature about the nature of British codification of Hindu Law is Sharafi, *supra* note 11, at 319. *See also* GEETANJALI SRIKANTAN, IDENTIFYING AND REGULATING RELIGION IN INDIA: LAW, HISTORY AND THE PLACE OF WORSHIP (2020); Davis & Lubin, *supra* note 15; Geetanjali Arcot Srikantan, *Secularisation and Theologisation: Examining the Inner*

not discuss works dealing with the practical aspects of Anglo-Hindu law (that is, the personal law of most non-Muslims in India), works whose main audience were legal practitioners.[100] Rather, I am interested in texts on Hindu *jurisprudence*—that is, in works produced by Indian legal scholars, whose main concern was to discuss the more general aspects of Hindu law, whether its sources, the classification scheme used by Hindu jurists, major concepts (such as ownership, contract, crime, and so on) or the history of Hindu law. This type of literature, which was a hybrid entity, applying Western jurisprudential theories to a non-Western legal system, represented a new genre of jurisprudence. It evolved at the beginning of the twentieth century, and it was associated with scholars who were linked to the University of Calcutta.[101]

I will first discuss three scholars whose works appeared in the 1910s and 1920s: Priyanath Sen, Surendra Nath Sen, and Nares Chandra Sen Gupta.[102] I will then move to the 1940s and discuss two articles with somewhat similar content, by a Madras jurist, A.S. Panchapakesa Ayyar, and by a judge from the United Provinces, Thakur Prasad Dubey.

Dynamic Behind the British Colonial Encounter with "Hindu Law," 4 J.L. RELIGION & STATE 49 (2015); ELEANOR NEWBIGIN, THE HINDU FAMILY AND THE EMERGENCE OF MODERN INDIA: LAW, CITIZENSHIP AND COMMUNITY (2013); RACHEL STURMAN, THE GOVERNMENT OF SOCIAL LIFE IN COLONIAL INDIA: LIBERALISM, RELIGIOUS LAW AND WOMEN'S RIGHTS (2012); Jean-Louis Halpérin, *Western Legal Transplants and India*, 2 JINDAL GLOB. L. REV. 14 (2010).

100. *See, e.g.*, DINSHAH FARDUNJI MULLA, PRINCIPLES OF HINDU LAW (1912); JOHN D. MAYNE, A TREATISE ON HINDU LAW AND USAGE (Madras, Higginbotham 1880); STANDISH GROVE GRADY, A MANUAL OF HINDU LAW FOR THE USE OF STUDENTS AND PRACTITIONERS (London, Wildy & Sons 1871); THOMAS STRANGE, HINDU LAW: PRINCIPALLY WITH REFERENCE TO SUCH PORTIONS OF IT AS CONCERN THE ADMINISTRATION OF JUSTICE, IN THE KING'S COURTS, IN INDIA (London, Parbury, Allen 1830); 1–2 WILLIAM HAY MACNAGHTEN, PRINCIPLES AND PRECEDENTS OF HINDU LAW (Calcutta, Baptist Mission Press 1829).

101. One can also find a few older works discussing some jurisprudential aspects of Hindu law, for example, whether the secular Austinian definition of law fitted the notion of law in Hindu law. *See* Chew, *supra* note 32, at 132–33, 148–50 (discussing books based on Tagore Lectures from the 1870s and 1880s, in which the Indian authors criticized the Western, secular definitions of law as inapplicable to Hindu law).

102. Another important scholar, whose work will not be discussed in this Article (because of the difficulty of disentangling his pre- and post-Independence thought), was Radhabinod Pal. Pal, a law professor at the University of Calcutta, is usually remembered because of his controversial opinion as one of the judges in the post-WW II International Military Tribunal for the Far East (the Tokyo Trial), or because of his book on the income tax law of India. However, Pal gave two cycles of Tagore Law Lectures on aspects of Hindu law, one set of lectures was on "The History of the Law of Primogeniture: With Special Reference to India, Ancient & Modern," and the other set was on "The History of Hindu Law in the Vedic Age and in Post-Vedic Times." The second set of lectures (designated as the "Tagore Law Lectures, 1930") was first delivered in 1932, and published in 1958. See PAL, *supra* note 99, at i, iii. For biographical information on Pal, who studied Sanskrit as a child in a traditional Bengali school (*tol*), as well as the argument that Pal's views on Hindu law (and Hindu philosophy) influenced his controversial dissent in the Tokyo Trial, see Ashis Nandy, *The Other Within: The Strange Case of Radhabinod Pal's Judgment on Culpability*, 23 NEW LITERARY HIST. 45, 58 (1992).

The works I will discuss now were based on Western jurisprudential theories, accepting some of the basic premises of English jurisprudence (for example, the fact that there was indeed an entity that could be called "Hindu law," or that this entity could be described by using concepts taken from "universal" or "general" jurisprudence). However, these works were also critical of English descriptions of Hindu law, especially those found in the works of Henry Maine. I have selected these particular works despite the fact that they seem to have had little lasting influence in their own right, either in India or elsewhere.[103] But they illustrate extremely well how Indian nationalist discourse shaped Indian jurisprudential works in the early twentieth century.

Criticizing English jurisprudential theories was a way for these authors to indirectly criticize British colonial rule. Specifically, these works sought to challenge two major themes found in English jurisprudential works that tended to legitimize British colonial rule in India. First, the Austinian association of the term "law" only with norms created by a sovereign in a top-down manner. Second, the Mainian portrayal of Hindu law as static and "perverted" (and therefore in need of replacement by English law), an idea that was also associated with a broader theme, the view that oriental societies were inherently despotic.[104]

Some aspects of the relationship between Indian nationalism and law have been explored in past literature—specifically, the fact that many of the leaders of the nationalist movement were lawyers by training, a feature that was typical of many third-world nationalist movements.[105] Another link between Indian nationalism and law is found in the attempt, before and after Indian Independence, to replace the alien British legal system of the colonial period with indigenous justice based on adjudication by village councils (*panchayats*).[106] Here

103. For example, none of the works I will discuss are mentioned in modern works on Hindu law, such as WERNER F. MENSKI, HINDU LAW: BEYOND TRADITION AND MODERNITY (2003).

104. *See generally* Likhovski, *supra* note 37 (on the use of Austinian jurisprudence to legitimize British colonial rule). *See also* KARUNA MANTENA, ALIBIS OF EMPIRE: HENRY MAINE AND THE ENDS OF LIBERAL IMPERIALISM 33–35 (2010) (on James Mill's argument that British colonial rule was meant to free Indians from their "stagnant" customs). The argument that the Austinian approach served to legitimize British colonial rule also appeared in works by post-Independence Indian writers. *See* DHYANI, *supra* note 37, at 19–20. On the image of Hindu law as frozen and "perverted," see MAINE, *supra* note 65, at 19–20. On the image of oriental societies as despotic and frozen, and the role of this image in legitimizing colonial rule, see generally EDWARD W. SAID, ORIENTALISM 32–33, 102, 172, 208 (Vintage 1979) (1978).

105. *See, e.g.*, Schmitthener, *supra* note 21, at 376–81; MITHI MUKHERJEE, INDIA IN THE SHADOWS OF EMPIRE: A LEGAL AND POLITICAL HISTORY, 1774–1950, at 105–49 (2010).

106. MARC GALANTER, *The Aborted "Restoration" of "Indigenous" Law in India*, *in* LAW AND SOCIETY IN MODERN INDIA 37 (1997). On the history of British and nationalist attitudes to the *panchayats*, see generally JAMES JAFFE, IRONIES OF COLONIAL GOVERNANCE: LAW, CUSTOM AND JUSTICE IN COLONIAL INDIA (2015). *See also* Deepa Das Acevedo, *Developments in Hindu Law from the Colonial to the Present*, 7 RELIGIOUS COMPASS 252, 257–58 (2013) (a brief discussion of the attempts by nationalists to reform specific aspects of Hindu law during the colonial period); Smita Narula, *Law and Hindu Nationalist Movements*, *in* HINDUISM AND LAW: AN INTRODUCTION, *supra* note 15, at 234 (a discussion of the relationship between Hindu nationalism and Hindu law after Indian Independence).

I discuss an aspect of the links between law and Indian nationalism that, until now, has been overlooked—the attempt, during the colonial period, to use Hindu law to criticize Western jurisprudential notions.

The first scholar whose work I will discuss is Priyanath Sen. Priyanath was appointed Tagore Law Professor at the University of Calcutta in 1908 at the age of 35. He was due to deliver the 1909 Tagore Law Lectures, but died that very year. His lectures, collected and entitled *The General Principles of Hindu Law*, were published posthumously in 1918.[107] The book discussed Hindu law using modern jurisprudential categories. It was thus a hybrid entity combining Western and Hindu law. It was Western because Priyanath accepted the English definition of what jurisprudence was ("to analyse and systematise these essential elements underlying the infinite variety of legal rules without special reference to the institutions of any particular country") and the Austinian division between general and particular jurisprudence.[108] Priyanath also accepted the notion that there are stages in the evolution of all legal systems, and that all legal systems pass through similar stages.[109] He argued that his discussion of the general principles of Hindu law could serve to promote a more general understanding of the nature of law (in the same way that the study of Sanskrit contributed to the "science of philology").[110] He was convinced that positive law was secular, and thought that the "secular" parts of Hindu law could be disentangled (with some difficulty) from the religious and moral parts. He thus focused on those parts that were seen by Western jurists as the most essential to law (property, family law, contract law, torts and criminal law, and procedural and evidentiary law). Also in his book, he rejected the traditional classifications of Hindu law in favor of a new "scientific" classification scheme derived from the Roman tripartite division of law into things, persons, and actions, augmented by a special chapter on contractual obligations and another one on tort and crime.[111]

On the other hand, Priyanath showed how the English concept of law was problematic. Law, he said, was not the command of a sovereign accompanied by the threat of an earthly sanction. In Hindu jurisprudence, the king was subject to the law like all other human beings.

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107. PRIYANATH SEN, THE GENERAL PRINCIPLES OF HINDU LAW (1918) [hereinafter SEN, GENERAL PRINCIPLES]. Priyanath first studied Sanskrit with his father, who was a teacher and Sanskrit scholar. He was later trained as a Sanskrit scholar at the University of Calcutta. *See Dr. Priya Nath Sen*, 10 CALCUTTA L.J. 37n (1909). *See also* PRIYA NATH SEN, PHILOSOPHY OF THE VEDANTA (n.d.). It is interesting to note that the lecture series delivered a year before, by Sripati Roy, was also more theoretical in comparison with previous years. *See* SRIPATI ROY, CUSTOMS AND CUSTOMARY LAW IN BRITISH INDIA (1911).

108. SEN, GENERAL PRINCIPLES, *supra* note 107, at 2–3.

109. *Id.* at 1–4.

110. *Id.* at 5.

111. *Id.* at 6–7, 36. On the problematic distinction between "religious" and "secular" law, see COHN, *supra* note 99, at 71; Robert A. Yelle, *The Hindu Moses: Christian Polemics Against Jewish Ritual and the Secularization of Hindu Law Under Colonialism*, 49 HIST. RELIGIONS 141 (2011).

The king did not legislate, except in minor and temporary matters, and his special role was merely that of an enforcer of the law. Sanctions were not earthly punishments. Instead, disobedience led to misery, either in this life or in the life to come. Thus, unlike the "modern or Austinian view" of law, which argued that law was "commands issuing from the King," the Hindu view was that law "issues from a source superior to the King, and the duty of enforcing [the law] is cast upon [the King] from above."[112] Priyanath also criticized the Western view that "Oriental Empires" lacked an interest in the rule of law, being merely concerned with raising taxes and armies, arguing that—at least as far as India was concerned—the main duty of kings was to protect their subjects by enforcing the law.[113]

Nor did Priyanath accept the disparaging English approach to Hindu law found in Henry Maine's 1861 book, *Ancient Law*, where Maine described Hindu law as containing an "immense apparatus of cruel absurdities," and referred to a "feeble and perverted" Hindu civilization.[114] However, unlike later commentators (such as Ayyar, in his 1941 article, which will be discussed later), Priyanath was relatively restrained in his praise of Hindu law, saying only that those who followed his discussion of Hindu law would be convinced that "the hostile aspersion" cast against it by "able but ill-informed critics" was the result of "ignorance and prejudice." Those critics, Priyanath continued, "go into raptures at the bare mention of the Twelve Tables, but shake their heads at the mention of the name of Manu, and talk about 'feeble civilization' and 'cruel absurdities' without feeling the absurdity of criticising upon a subject which they had no opportunity to study." Hindu law was not perfect, Priyanath argued, but it compared favorably with Roman law—and this comparison was objective, not a result of his own "undue partiality towards [his] national system."[115]

Priyanath directed these comments at Maine, although he did not mention Maine explicitly by name here. However, in another part of his book, when discussing the specific topic of the acquisition of property by conquest, Priyanath noted that the Hindu laws of war limited the rights of conquering kings more than Roman Law did, and that "we may be justly proud that Hindu law was less indulgent of the ferocity and cupidity of combatants [than Roman law] and Sir Henry Maine, when he talked glibly of the 'feeble civilization' of the Hindus might well have taken notice of this."[116]

There are a number of other places in the lectures where Priyanath sought (somewhat apologetically) to defend Hindu law relative to Western legal systems. For example, in his discussion of marital relationships, he

112. SEN, GENERAL PRINCIPLES, *supra* note 107, at 26–31. On sanctions in Hindu law, see also 1 JOGENDRA CHUNDER GHOSE, THE PRINCIPLES OF HINDU LAW 7 (3d ed. 1917).
113. SEN, GENERAL PRINCIPLES, *supra* note 107, at 30.
114. MAINE, *supra* note 65, at 19–20.
115. SEN, GENERAL PRINCIPLES, *supra* note 107, at 37–38, 374.
116. *Id.* at 61.

defended the rules prohibiting widows from remarrying, while allowing polygamy, noting that these rules "were due to social causes which I cannot here stop to discuss," and adding that, anyway, nowadays "monogamy is almost the rule and polygamy an exception."[117] The discussion of the Hindu law of slavery was opened by a remark on the existence of slavery in Roman law, and a statement that in ancient times all legal systems recognized slavery.[118] When discussing the Hindu law of contractual obligations, Priyanath noted that in Hindu law there was no "distinct treatment of contracts in general," but he added that, while this might seem to be a shortcoming, the history of English law revealed this to be the case in England too, and that, therefore, Hindu contract law was "as developed as most other systems of ancient law."[119]

Priyanath ended his lectures by stating again that Hindu law "would not compare unfavourably with even the most developed system of Ancient jurisprudence, the Roman," noting four "points of excellence" that characterized Hindu law: its comprehensiveness, loftiness of ideal, logical consistency, and reasonableness.[120] Hindus should feel proud of their forefathers, he said, for their contribution to fields such as medicine, but also their contribution to jurisprudence. Like other Indian intellectuals who sought to show the glorious and progressive nature of Indian civilization, Priyanath, too, argued that India had a brilliant past.[121] This past, he said, included a system of jurisprudence that was as wise and old as that of the Romans. "The Sun," he concluded, "arose in the east and traveled towards the west, and it is the same light which illumines the whole world." He considered Kipling's words—"east is east and west is west and never the twain shall meet"—to be "supercilious," since "the same universal reason . . . permeates the universe, and its touch makes the whole world kin."[122] Here, it seems, Priyanath was echoing a major theme in Indian liberal and nationalist discourse: the idea that ancient Hindu civilization was on a par with, or even surpassed, that of Greece and Rome, and that India had special, spiritual, universal lessons to teach the world.[123]

The second jurist I will discuss is Surendra Nath Sen, the author of a short book entitled *An Essay on Hindu Jurisprudence*.[124] The book

117. *Id.* at 284.
118. *Id.* at 293.
119. *Id.* at 302–03.
120. *Id.* at 374–77.
121. BAYLY, *supra* note 9, at 69.
122. SEN, GENERAL PRINCIPLES, *supra* note 107, at 376–78.
123. BAYLY, *supra* note 9, at 156, 163.
124. SURENDRA NATH SEN, AN ESSAY ON HINDU JURISPRUDENCE (1911). The British Library Catalogue identified the author of this work as the University of Calcutta historian, Surendra Nath Sen, who was born in 1890 and died in 1962. However, it is not clear if this indeed was the case. The title page of the book, published in Allahabad, states that the author is "a vakil, high court, nwp [north western provinces]." In any event, Surendra read Sanskrit, and based his book on original Sanskrit sources. *See id.* at 116–17. It should also be noted that he was probably associated with the Tagore Lecture Series as the person responsible for revising the 1906 Tagore Law Lectures. *See* SATISH CHANDRA BANERJI, THE LAW OF SPECIFIC RELIEF IN BRITISH INDIA (Surendra Nath Sen rev., 2d ed. 1917).

repeated many of the arguments about the nature of Hindu law found in the works of scholars such as Henry Maine, but sometimes sought to undermine them by qualifying them in various ways. For example, Hindu law was portrayed in this book, following Maine, as inflexible and nondynamic, unlike Roman and English law, because it was "religious." However, Surendra argued that this inflexibility was not "an unmixed evil," because it prevented the "adulteration" of the law, such as that witnessed in the case of Roman law after the Barbarian invasions. This inflexibility also ensured "uniformity, simplicity and certainty."[125] Later in his book, Surendra also discussed a large number of means by which the Brahmanical sages were able to repeal old laws, thus challenging the image of Hindu law as static.[126]

Surendra showed how the Hindu concept of law did not accord with the Austinian conception, because the former was not imposed by a sovereign human authority (the Hindu king being merely the enforcer of laws, not their creator), it was not necessarily a command, it included rules of conduct that Austin would not have considered law, and it was not related to the use of force (the sanctions being religious, not earthly).[127] Surendra's description of the Western portrayal of the specific details of Hindu law was also often critical. For example, discussing ownership, Surendra mentioned Henry Maine's view that Indian village communities owned property collectively, and rejected this view (drawing on Baden Powell's and Lyall's works). He argued instead that ownership was individualist (or at least, that families in the village had separate holdings, rather than property being owned by the whole village).[128]

The third jurist I would like to mention is Nares Chandra Sen Gupta, a Bengali legal scholar, writer, and political activist, who obtained a doctorate in law from the University of Calcutta in 1914, and was later a professor of law and Dean of the Faculty of Law of the University of Dacca, established in 1921. The curriculum at the University of Dacca emphasized both Islamic and Sanskritic studies, and thus resonated with an interest in Hindu law.[129] Here I will discuss two books by Sen Gupta that deal with Hindu law.

The first book was based on his doctoral dissertation, *Sources of Law and Society in Ancient India*, published in Calcutta in 1914, when he was thirty-two years old. It relied not only on the existing English

125. *Id.* at 7–8.
126. *Id.* at 38–41.
127. *Id.* at 22–31.
128. *Id.* at 67 (referring to B.H. BADEN-POWELL, A SHORT ACCOUNT OF THE LAND REVENUE AND ITS ADMINISTRATION IN BRITISH INDIA: WITH A SKETCH OF THE LAND TENURE (1907), and to A.C. Lyall, *The Land Systems of British India*, 9 LAW Q. REV. 23 (1893)). For a discussion of Maine's theory on the development of property, see, e.g., MANTENA, *supra* note 104, at 119–47.
129. For a brief biography see Samaresh Devnath, *Sengupta, Naresh Chandra*, *in* 9 BANGLAPEDIA: NATIONAL ENCYCLOPEDIA OF BANGLADESH 168 (2003). On the University of Dacca, see ASHBY & ANDERSON, *supra* note 27, at 109–10, 134.

jurisprudential literature but also on leading works of Continental jurisprudence, such as Luigi Miraglia's *Comparative Legal Philosophy* or Nikolai M. Korkunov's *General Theory of Law*, and showed an interest in "the sociological school of modern philosophical jurists."[130]

In the introduction to this book, Sen Gupta claimed that his work contained "some advance on the existing knowledge" on ancient Hindu law and society—advances that, he said, "may possibly have a bearing" not only on the study of Hindu legal history, but also "on general questions of jurisprudence."[131] One of these contributions was the argument that village communities were not the most basic units of ancient Indian society, but that each village was an aggregate of several small trans-village "ante-political" societies. A second significant point was the idea that, in Aryan societies, law was based on agreement, and that this was one of the traits that distinguished these societies from those of the Semites, "with their autocratic judges, prophets and kings."[132] A further point was that kingship was not the most primitive form of political organization, but instead only emerged gradually. Maine, said Sen Gupta, argued that kings were present at the dawn of society and were responsible for the administration of justice and the creation of law (and this view was indeed supported by examples from the Bible and Homer). Sen Gupta, however, contended that Maine had ignored the fact that this was not necessarily the case in other civilizations. In Aryan societies, unlike Semitic or Mongolian societies, kings were not the primary source of law and order. Instead of kings deciding disputes between members of society, arbitration was used, "before judicial authority was centralized in the King."[133] This idea also appeared in Rome and among the Germanic tribes, and survives in the more modern idea of a trial by one's peers.[134] Thus, instead of the common "oriental despotism" notion of India and its laws, Sen Gupta's book suggested democratic notions of the "constitution of ancient Indian society," a term related to the widespread discourse by Indian intellectuals on the Indian "ancient constitution."[135]

The search for the ancient origins of democracy was a common topic among nineteenth- and early-twentieth-century scholars of Germanic law, as well as students of other legal systems, such as mid-twentieth-century scholars of Jewish law.[136] Here we have an Indian

130. NARES CHANDRA SEN GUPTA, SOURCES OF LAW AND SOCIETY IN ANCIENT INDIA, at tit. p., v–vii, 27 (1914). The dissertation was based on Sanskrit sources which Sen Gupta read in the original, but he also relied on European translations. *See id.* at iii.

131. *Id.* at i–ii.

132. *Id.* at i, ii, 8–20, 44.

133. *Id.* at 22–23, 78.

134. *Id.* at 22–23.

135. *Id.* at 8. On the Indian "ancient constitution" and on ancient Indian democracy, see BAYLY, *supra* note 9, at 20, 164.

136. *See* RABBAN, *supra* note 65, at 90, 180 (on notions of Teutonic democracy in Anglo-American historical works). *See also* Arye Edrei, *Menachem Elon veha-Mishpat ha-'Ivri: Tsiyuney Derekh*, *in* HALAKHAH U-MISHPAT: SEFER HA-ZIKARON LE-MENACHEM ELON 13, 17–18 (2018) (on the mid-twentieth-century scholarly interest in rulemaking by "the people" in medieval and early modern Jewish communities).

example, based on an idea prevalent in liberal Indian thought since the middle of the nineteenth century, that precolonial Indian government was based on the assent of the people and was not despotic.[137]

This was not the only place in his book in which Sen Gupta attempted to revise the Mainian narrative. Later, when discussing "the King as a source of law," he repeated the argument, stating that "the King as legislator is not an idea congenial to the Aryan mind." Quoting Miraglia, he argued that Aryans, unlike "Egypt[ians], Babylon[ians] . . . Mussalmans [*sic*] and the Tartar tribes," never embraced "that all-controlling despotism which blots out man," and that, in ancient India, the idea that the King had legislative powers did not take root.[138] Maine was not the only English jurist whose work was attacked. Sen Gupta also discussed James Henry Nelson's argument in *Prospectus of a Scientific Study of Hindu Law* that "Hindu law" never existed, and rejected it using arguments made by earlier scholars.[139]

In 1925, by which time Sen Gupta was Dean of the Faculty of Law of Dacca University, he published a second book, *The Evolution of Law*.[140] This book summarized the arguments of the English historical jurisprudence school, and was mainly based on works by Maine and Vinogradoff. However, Sen Gupta was not content with merely summarizing English works, sometimes opting to criticize them. In the preface, he stated that "a long study of the history of ancient Indian law has revealed to me hitherto unrecognized truths," and therefore "I have found myself unable to agree to many of the accepted notions on the history and character of [the] ancient legal institutions of India." The book, he continued, was meant to serve students, introducing them to "[h]istorico-comparative jurisprudence," but it was impossible to write it without "a certain measure of theorising . . . and thinking on my own account, and diverging from favorite theories of the day."[141]

Sometimes, Sen Gupta's critique of Maine was based on earlier European theorists. One can see this, for example, in his remarks on the difference between Western and oriental codes. Maine argued that oriental codes were problematic because of their association with religion. Sen Gupta contended that Maine was mistaken, because *all* ancient laws were religious: "before the lawyer's law there always existed the law of the priest."[142] However, in arguing for the religious nature of ancient law, he based his argument on the work of Fustel de

137. BAYLY, supra note 9, at 10. There were similar attempts by Indian Muslim thinkers such as Judge Syed Mahmood to describe early Islamic law as "republican" rather than despotic. *See* Guenther, *supra* note 29, at 173–76.

138. SEN GUPTA, *supra* note 130, at 80–81. The quote is taken from LUIGI MIRAGLIA, COMPARATIVE LEGAL PHILOSOPHY: APPLIED TO LEGAL INSTITUTIONS 120 (John Lisle trans., Macmillan 1921).

139. SEN GUPTA, *supra* note 130, at 5–6, 28–32, 50–51, 99–100.

140. NARES CHANDRA SEN GUPTA, THE EVOLUTION OF LAW (1925).

141. *Id.* at v–vi.

142. *Id.* at 21.

Coulanges, not on Indian law.[143] Another example of this type of critique can be found in Sen Gupta's discussion of Maine's argument that adjudication preceded law. Sen Gupta rejected this argument, based on the work of the German jurist B.W. Leist.[144]

However, in Sen Gupta's discussion of another stage in Maine's scheme of the evolution of law—the transition from an individual judgment of a king (*themis*) to rules found in customs administered by an aristocracy—he relied on Indian law to critique Maine. He asserted:

> Maine's theories about transition . . . to custom must also be corrected by the same qualification that it is not a universal law of evolution. Whatever may be said about the course of evolution in Greece or Rome it is perfectly clear that in India and, possibly, amongst the original Indo-Germanic race, there never was that absolute autocratic stage which would make the stage of Themis . . . possible.[145]

Instead of kings, Sen Gupta observed, ancient societies were governed by "a group of men . . . devoted . . . to the knowledge of superhuman things," such as the Magi of Persia, the Brahmins of India or the Druids of Celtic lands.[146]

Another instance of the use of Indian examples to critique Western theories can be found in the chapter on "Family and Kindred." Here, Sen Gupta discussed debates about the nature of "the primitive family" (that is, whether ancient families were patriarchal or matriarchal). He mentioned both those thinkers who argued that the matriarchal family was the earlier type (McLennan, Morgan, Fustel de Coulanges, Kohler) and those (Maine) who argued that the earlier type was patriarchal. He declared the debate to be misconceived, because:

> [T]he form of social organisation everywhere is to some extent moulded by social and economic environments. The relative number of the two sexes, the physical and social surroundings of the community, the pressure of external enemies and such other circumstances make a particular form of social organisation the most suitable for the community.[147]

Thus, a paucity of females leads to the adoption of polyandry. As an example to prove this point, he mentioned the Nambudiri Brahmins of Malabar and their matrilineal *Sambandham* system of marriage.[148]

Similarly, when discussing forms of marriage, Sen Gupta argued that it was impossible to place various forms of marriage along

143. *Id.* at 18–19.
144. *Id.* at 19–20.
145. *Id.* at 22.
146. *Id.* at 22. *See also id.* at 95–96 (additional places in the book in which Maine was criticized).
147. *Id.* at 36.
148. *Id.* at 34–37.

a single linear line of evolution, because there were "societies which have lapsed from a more advanced form of marriage to a more primitive one" due to changed environmental conditions.[149] As an example, he mentioned both Hindu marriage rules and those of the Romans. In India, he said, the most ancient form of marriage was based on consent between the bridegroom and the father of the bride, leading to a marriage based on "spiritual union" between husband and wife. Only in a later epoch did additional types of marriage start to form, based on the force of arms, on purchase, on theft or fraud, or the bride's own consent. A similar process, he argued, occurred in Rome, the earliest form being confarreation (a Roman form of marriage ceremony, limited to patricians), which was later replaced by purchase and also by marriage upon consent of the bride alone. In both cases, the Indian and the Roman, the change was due to changes in the environment.[150] Sen Gupta also warned against assuming a "single universal course of evolution" when discussing the history of legal remedies and of the administration of justice.[151]

I will now move on to two other discussions of Hindu law in which Western jurisprudential notions were critiqued, both taken from articles published in India in the 1940s. The first article was written by A.S. Panchapakesa Ayyar, an Indian jurist who studied law at Oxford and later served as a justice of the Madras High Court.[152] Ayyar was a prolific writer, and his collected works include religious texts, plays, and novels. Many of these works deal with nationalist themes, including the article he wrote in 1941 for the *Madras Law Journal*, entitled "The Contribution of Hindu Law to World Jurisprudence."[153]

Ayyar began his article with the argument that the Hindu contribution to jurisprudence has been obscured by the fact that "Hindu legal theories" have been "attack[ed]" and changed over time by "foreign ideas."[154] Modern Hindu law, he continued, is not really Hindu law, but an Anglo-Muslim creation, because "centuries of Muslim and British rule," have "radically" altered Hindu law. Specifically, said Ayyar, these radical changes in Hindu law were the result of the fact that non-Hindu judges, "unacquainted with the basic Hindu ideals," have been applying it.[155] This explicit critique of both British and Muslim rule in India, which did not characterize the earlier works,

149. *Id.* at 55.

150. *Id.* at 56. It is not clear that he was depicting the development of Roman law correctly. *See* Blewett Lee, *A Sketch of Woman's Rights in Ancient Rome*, 2 NW. L. REV. 67, 69 (1894).

151. SEN GUPTA, *supra* note 140, at 68.

152. Mohamed Elias, *A.S. Panchapakesa Ayyar*, *in* 1 ENCYCLOPEDIA OF POST-COLONIAL LITERATURES IN ENGLISH 91, 91–92 (Eugene Benson & L.W. Conolly eds., 2d ed. 2005).

153. A.S. Panchapakesa Ayyar, *The Contribution of Hindu Law to World Jurisprudence*, *in* MADRAS L.J. GOLDEN JUBILEE NO. 1941, at 1 (1941) (a copy of this article can be found in the British Library).

154. *Id.* at 1.

155. *Id.*

may have been a result of the fact that Ayyar was (perhaps) influenced by Hindu nationalist attitudes to the period of Muslim rule in India.[156]

The main argument of this article was that, just as the Hindus had made major contributions to global science and culture (for example, the notion of zero in mathematics), they had also contributed to jurisprudence.[157] The article then went on to list some of these contributions. Ayyar argued that they were to be found both in the realm of unique answers to question such as "What is law?," but also in specific norms and institutions of public law (constitutional law, criminal law, or evidence law, as well as international law), and private law (property, tort, contract, and family law). For example, according to Ayyar, unlike Western legal systems, whose purpose was merely to ensure order, peace, and prosperity, the Hindus believed that the ultimate aim of the law was to realize righteousness and ensure the welfare of the universe and of every living thing. This meant, for example, that the Hindu kings were subject to the law just like their subjects, and were seen as servants of the people, not *above* the law like English kings.[158]

A particular characteristic of Hindu law, according to Ayyar, was its dynamic nature. Laws changed according to the times, but also according to status: "[E]ach caste, asrama [stage in life], family, guild, and tract" had its own customs. This recognition of customary law, he argued, "saved India from stark oppression and drab uniformity, and enabled the roses, jasmines, champaks, lotuses and sunflowers to grow and develop in their own ways, with their peculiar colourings and perfumes."[159] Ayyar also claimed that Hindu law was one of the earliest legal systems to create both public and private international law.[160]

Some seemingly "primitive" characteristics of Hindu law, such as the idea of collective rather than individual responsibility for crimes, were justified by Ayyar as desirable. He contended that they were "social and humane" in the sense of leading to a diminution in crime, unlike modern legal systems in which individual responsibility led to apathy regarding crimes committed by others. Another related argument was that Hindu law did not merely use sanctions to prevent crime but also used rewards for good conduct.[161] The article ended with the argument that "the unique beauty" of Hindu law was that it was developed by "Sages, Kings and caste heads, each group with unique gifts and capacities," rather than by a parliament, which Ayyar characterized as "an assembly elected on a haphazard system, and

156. On the history of early-twentieth-century Hindu nationalist ideology (Hindutva), see generally JAFFRELOT, *supra* note 86.
157. Ayyar, *supra* note 153, at 1.
158. *Id.* at 2–3, 5–6.
159. *Id.* at 3.
160. *Id.* at 8.
161. *Id.* at 8–10.

giving no sure guarantee of either wisdom or deliberation or even of public weal."[162]

A similar nationalist spirit inspired an article by Thakur Prasad Dubey, a law graduate and provincial civil service judge in Uttar Pradesh. In 1944, Dubey published a piece on "the beauties and comparative greatness" of Hindu law. In it, he argued that, just as Roman law had influenced the laws of the West, Hindu law had influenced the laws of the East, of countries such as China and Japan. In fact, he contended, Hindu law also influenced the West (the Greeks, he claimed, borrowed their law of hypothecation from the Hindus).[163] The definitions provided by Hindu jurists to the basic abstract terms of jurisprudence (ownership, right, possession), said Dubey, were markedly superior to those provided by modern jurists such as Austin or Holland. The superiority of Hindu law, he continued, was also evident from the fact that the beneficiaries of its rules were "not only the human race," since "it aims at the protection and perpetuation of the whole sentient universe," including birds and beasts.[164] The discussion of some specific topics in the article (gift, adverse possession, and the duties of judges) were all meant to prove the comparative greatness of Hindu law.[165]

The article concluded by noting the "thrill of pleasure to find that our forefathers had a brilliant record in the domain of law," before the "pioneer nations of the west," such as Rome and Egypt, were formed. While these Western civilizations are now dead, noted Dubey, "ours that started long before their birth yet exists." The West, he claimed, argued that Indian culture was "absurd . . . puerile . . . uninspired . . . grotesque . . . [and] barbarous," but then discovered that its judgment was erroneous. It was therefore a great irony, concluded Dubey, that some Indians, because of their general and legal education, still accepted this obsolete view of Hindu law, which, as a result, they had come to despise.[166]

By the 1940s, one can conclude, Hindu law had come to serve some Indian jurists not only as a source of examples to critique some of the specific details of English jurisprudential theories. Hindu law was also used to create a sense of pride in Indian culture, and to justify the claim that Indian culture was in fact superior to Western culture. Indeed, while some of the earlier writers of the 1910s and 1920s seem to have accepted the shrinkage of the scope of "living" Hindu law to the realm of personal law, arguing that the study of traditional Hindu law was justified only for the comparative jurisprudential insights it

162. *Id.* at 16.

163. Thakur Prasad Dubey, *Hindu Jurisprudence: Its Beauties and Comparative Greatness*, 42 ALLAHABAD L.J. 11 (1944).

164. *Id.* at 13.

165. *Id.*

166. *Id.* at 16–17. For similar sentiments, see S. VARADACHARIAR, THE HINDU JUDICIAL SYSTEM, at v (1946).

could yield, the 1940s authors, by extoling the "excellence" of Hindu law in areas such as criminal, evidence law, or constitutional law, were implicitly critical of the fact that most of Hindu law was no longer applicable to contemporary India.[167]

C. *Works on Jurisprudence and Islamic Law*

Another major non-Western legal system that existed in colonial South Asia was Islamic law.[168] During the British period, Islamic law was gradually transformed by the British rulers of India into a personal law system, applicable only to the Muslims of colonial India, and only in family matters—this law was often called Anglo-Muhammadan law.[169] In the late nineteenth and early twentieth century, several comprehensive books on Anglo-Muhammadan law appeared in India.[170] These works relied on earlier translations and compilations

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167. For the earlier approach, see SEN, GENERAL PRINCIPLES, *supra* note 107, at 5 (only parts of Hindu law were now applicable in the courts of British India, because "owing to altered conditions of the Hindu community, a considerable portion of [Hindu law] does not at all attract the attention of a practicing lawyer," and that it has therefore "ceased . . . to be living law."); SEN, *supra* note 124, at 117 ("[T]he subject of Hindu Jurisprudence . . . has hitherto been a virgin field . . . [and] failed to attract more capable workers, presumably because the bulk of the Shastric laws . . . [are] no longer the laws in force in British India, [and therefore] could not be expected to rouse a deep practical interest."). *But see* SEN GUPTA, *supra* note 130, at 6 (mentioning Nelson's argument that Hindu law never existed, and arguing that the fact that the similarity of "non-jural" customs of Hindu India today to ancient Hindu law prove that it did exist, and still exists and was not "affected by the political changes of history . . . in spite of all aberrations and all subsequent influences").

168. A third legal system, that will not be discussed here, was Buddhist law. In colonial Burma, the British created a body of Anglo-Buddhist personal law. The first non-English author who is mentioned in this Article, Chan-Toon, published in 1894 a book summarizing the "principles" of this law. Like most of the books on Islamic law that I will discuss in the following paragraphs, this was a book whose main audience was practitioners, not a theoretical book on jurisprudence. *See* CHAN-TOON, THE PRINCIPLES OF BUDDHIST LAW: ALSO CONTAINING A TRANSLATION OF IMPORTANT PORTIONS OF THE MANU THARA SHWE MYIN, WITH NOTES (Rangoon, Myles Standish 1894). A similar work was SISIR CHANDRA LAHIRI, PRINCIPLES OF MODERN BURMESE BUDDHIST LAW (1925). There were also historical works published in British India which dealt with the history of Buddhist law, written from a historical or a philological perspective, rather than attempting to critically engage with nineteenth- and early-twentieth-century Western jurisprudence. *See* DURGA N. BHAGVAT, EARLY BUDDHIST JURISPRUDENCE (1939). On Buddhist law in colonial Burma, see also Andrew Huxley, *Positivists and Buddhists: The Rise and Fall of Anglo-Burmese Ecclesiastical Law*, 26 LAW & SOC. INQUIRY 113 (2001); SHARAFI, *supra* note 16, at 131–32.

169. On the process, see generally JULIA STEPHENS, GOVERNING ISLAM: LAW, EMPIRE, AND SECULARISM IN SOUTH ASIA (2018). On the terminological problems of designating this system, see *id.* at 8 n.19; Guenther, *supra* note 29, at 11–13.

170. Michael Anderson mentioned nine such books that appeared in the late nineteenth and early twentieth century. *See* Michael R. Anderson, *Islamic Law and the Colonial Encounter in British India*, *in* INSTITUTIONS AND IDEOLOGIES: A SOAS SOUTH ASIAN READER 165, 175–76 (David Arnold & Peter Robb eds., 1993). *See also* Guenther, *supra* note 29, at 28–30, 172–73 (another general discussion of works on Anglo-Muhammadan law in the late nineteenth and early twentieth century); GREGORY C. KOZLOWSKI, MUSLIM ENDOWMENTS AND SOCIETY IN BRITISH INDIA 130–31 (1985) (on the influence of English legal classification structures on texts on Islamic law published in

on the topic, such as the *Hidaya*, a medieval commentary of Islamic law (first translated into English by Charles Hamilton in 1791), or William MacNaghten's 1825 compilation *Principles and Precedents of Moohummudan Law*.[171] Even when their titles proclaimed that they dealt with the more general aspects of Islamic law, they were in fact mostly surveys of contemporary law (and case law) on topics of personal law, and were thus mostly relevant to practicing lawyers rather than to legal scholars interested in the jurisprudential notions, or in the legal history, of Islamic law.[172]

For example, Ameer Ali's *Student's Handbook of Mahommedan Law* (first published in 1891), was devoted to brief discussions of specific topics such as succession, marriage, dower, divorce, gifts, etc.[173] This was also true of Ali's more comprehensive and influential books, his 1880 book *The Personal Law of the Mahommedans* and his 1885 book *The Law Relating to Gifts, Trusts and Testamentary Dispositions Among the Mahommedans* (based on his 1884 Tagore Lectures).[174] Ali's approach to Islamic law was more sophisticated than that of the English writers on the topic. He was more familiar with the original sources of Islamic law, and with the nineteenth-century European philological and ethnographic literature on this legal system. In addition, he often sought to place the rules that he was describing within their historical context (in order to show their relatively progressive nature).[175] However, unlike the works on Hindu law discussed in the

India); John Strawson, *Revisiting Islamic Law: Marginal Notes from Colonial History*, 12 GRIFFITH L. REV. 362, 369–70 (2003) [hereinafter Strawson, *Revisiting Islamic Law*]; John Strawson, *Islamic Law and English Texts*, 6 LAW & CRITIQUE 21 (1995); Scott Alan Kugle, *Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia*, 35 MOD. ASIAN STUD. 257 (2001); Elisa Giunchi, *The Reinvention of Shari'a Under the British Raj: In Search of Authenticity and Certainty*, 69 J. ASIAN STUD. 1119 (2010).

171. *See, e.g.*, Kugle, *supra* note 170; Strawson, *Revisiting Islamic Law*, *supra* note 170, at 375–76; Sohaira Siddiqui, *Navigating Colonial Power: Challenging Precedents and the Limitation of Local Elites*, 26 ISLAMIC L. & SOC'Y 272, 274–79 (2019).

172. In this subsection, I discuss books on Islamic law and jurisprudence. The interaction between English legal and jurisprudential ideas and Islamic law was not confined to such texts. There were other, less direct, arenas of interaction, for example in the decisions of Muslim judges in British India such as Syed Mahmood, who offered in his judgments a complex depiction of the nature of Islamic law, that was similar in many ways to the ideas about Hindu law found in the books on Hindu jurisprudence that I described in the previous subsection (e.g., about democracy and early Islamic law). *See* Guenther, *supra* note 29, at 54–55, 172–99. *See also* Siddiqui, *supra* note 171.

173. *See* AMEER ALI, A HANDBOOK OF MAHOMMEDAN LAW (4th ed. 1903).

174. AMEER ALI, THE PERSONAL LAW OF THE MAHOMMEDANS (London, W.H. Allen 1880); AMEER ALI, THE LAW RELATING TO GIFTS, TRUSTS AND TESTAMENTARY DISPOSITIONS AMONG THE MAHOMMEDANS (Calcutta, Thacker Spink & Co. 1885).

175. *See* Nandini Chatterjee, *Law, Culture and History: Amir Ali's Interpretation of Islamic Tradition*, *in* LEGAL HISTORIES OF THE BRITISH EMPIRE: LAWS, ENGAGEMENTS AND LEGACIES 45, 49–54 (Shaunnagh Dorsett & John McLaren eds., 2014). *See also* Cheema, *supra* note 32, at 5–6. On Ali's knowledge of Arabic and of Islamic law, see Chatterjee, *supra*, at 48–49 (on traditional Islamic education in Ali's family); 1 MUSLIMS IN INDIA: A BIOGRAPHICAL DICTIONARY 85 (Naresh Kumar Jain ed., 1979); MEMOIRS AND OTHER WRITINGS OF SYED AMEER ALI 19 (Syed Razi Wasti ed., 1968) (on Ali's study of Arabic in the United Kingdom).

previous subsection, the main goal of Ali's books was to provide a more accurate picture of the specific fields of Islamic law that he dealt with, and not to provide a general and theoretical overview of Islamic law as a way to contribute to the literature on general jurisprudence.

Other works published in the early twentieth century showed similar tendencies. Dinshah Fardunji Mulla's *Principles of Mahomedan Law*, first published in 1905, was a book which was "mainly designed for the use of students, as a guide to their study of Mahomedan law."[176] This book was basically a digest of Anglo-Muhammadan personal law, containing a series of sections each containing a simple proposition. It began with a few introductory pages describing Islamic legal history, and the sources of Islamic law, moving swiftly to an overview of the main topics of Anglo-Muhammadan personal law (such as succession, marriage, and divorce).[177]

Faiz Badruddin Tyabji's *Principles of Muhammadan Law* sought, in a similar way, to "state, in the form of a code, the principles of Muhammadan law, relating to subjects on which it is enforced in India."[178] Accordingly, the book included a short (thirty-four-page-long) descriptive historical outline of the sources and schools of Islamic law, followed by approximately one thousand pages devoted to a doctrinal survey of Anglo-Muhammadan law dealing, again, with topics such as the scope of application of Islamic law in India, marriage, dower, divorce, inheritance, etc.[179]

The only book comparable to the Hindu jurisprudence books discussed in the previous subsection was a 1911 book, *The Principles of Muhammadan Jurisprudence,* by Abdur Rahim, a Madras judge, a book which was based on the his 1907 Tagore Lectures.[180] Books

176. DINSHAH FARDUNJI MULLA, PRINCIPLES OF MAHOMEDAN LAW, at iii (1905).

177. *Id.* For a critical assessment of Mulla's approach to Islamic law, see Shahbaz Ahmad Cheema, *Mulla's Principles of Mahomedan Law in Pakistani Courts: Undoing / Unraveling the Colonial Enterprise?*, 4 LUMS L.J. 56, 61–67 (2017). *See also* Shahbaz Ahmad Cheema & Samee Ozair Khan, Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan 7–8 (Dec. 31, 2013) (unpublished manuscript), https://ssrn.com/abstract=2390688. Mulla was a Parsi, and therefore a religious "outsider" to Islamic law. A detailed discussion of his life is found in SHARAFI, *supra* note 16, at 113–15. On the role of native "outsiders" as mediators between local legal systems and the British, see Sharafi, *supra* note 16, at 1072–79.

178. FAIZ BADRUDDIN TYABJI, PRINCIPLES OF MUHAMMADAN LAW: AN ESSAY AT A COMPLETE STATEMENT OF THE PERSONAL LAW APPLICABLE TO MUSLIMS IN BRITISH INDIA, at i (2d ed. 1919).

179. *Id.* Tyabji, the son of the first Muslim president of the Indian National Congress, studied at a modern Muslim school in Bombay, Anjuman-I-Islam School (founded by his father), and he relied on the principal of this school to translate the Arabic texts used in his book. *See id.* at v–vi.

180. ABDUR RAHIM, THE PRINCIPLES OF MUHAMMADAN JURISPRUDENCE: ACCORDING TO THE HANAFI, MALIKI, SHAFI'I AND HANBALI SCHOOLS (1911). The first chapter of the book, providing a historical overview of the legal history of Islam, was published in three instalments in the *Columbia Law Review*. *See* Abdur Rahim, *Historical Sketch of Mohammedan Jurisprudence*, 7 COLUM. L. REV. 101, 186, 255 (1907). It is interesting to note that while C.H. Alexandrowicz did mention a couple of works on Hindu jurisprudence in his 1958 bibliography of Indian law, he failed to mention Abdur Rahim's book; and the only work on Islamic jurisprudence that he mentioned was a book by Columbia University Professor Joseph Schacht. *See* Alexandrowicz, *supra* note 34, at 4, 6. *But see* Roscoe Pound, Book Review, 29 HARV. L. REV. 348 (1916) (noting the contribution

on Islamic law published before Abdur Rahim's book were focused on Muslim personal laws, and if they discussed jurisprudential topics and Islamic law at all, their treatment of these topics was "introductory or insufficient."[181] This was also true for later works published in India.[182] Abdur Rahim's book was a theoretical book on Islamic law. Its audience was students rather than legal practitioners. Its goal was to discuss "the general legal ideas and relations which form the proper province of jurisprudence," and to present Islamic law "as a scientific system instead of treating it, as is the habit . . . of many lawyers in India, as an arbitrary collection of rules and dicta based on no intelligible data."[183] Indeed, Abdur Rahim declared in the preface to the book that such a study of Islamic law may be relevant to "those who are interested in the science of jurisprudence" generally, because of the fact that Islamic law was an example of a system where law and religion were mixed—and therefore jurists were attempting to create a legal system which where law was "an integral part of religion."[184]

The desire to describe Islamic law in a way that would be beneficial to students of jurisprudence generally was manifested in the structure of the book. Unlike previous works, Abdur Rahim's book's structure was not based on the conventional divisions of Anglo-Muhammadan personal law. Instead, the structure of the book partly echoed the structure of Salmond's book on jurisprudence.[185] Thus, the book began with a chapter on the history of Islamic law, followed by chapters on the "sciences of law and classifications of law," on the sources of law, on acts, rights, and obligations, on legal capacity, on ownership and possession, on the acquisition of ownership, on torts, on crimes, on procedure and evidence, on constitutional and administrative law, and on international law. Family law was relegated to a single chapter in the middle of the book. In addition to structuring the book in a way that resonated with the structure of English jurisprudence textbooks of the period, Abdur Rahim also mentioned in one place in the book the resemblance between Islamic and Roman law, noting that such a resemblance might interest "students of comparative jurisprudence."[186] There were also many places in the book in

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of this book to "science of law"). Abdur Rahim read Arabic, but the extent of his formal training in Islamic law is unclear (he studied in the government high school in the city of Midnapore in Bengal). Biographical information on him is found in 1 MUSLIMS IN INDIA: A BIOGRAPHICAL DICTIONARY, *supra* note 175, at 32–33; EMINENT MUSSALMANS 465, 467–69 (G.A. Natesan & Co. n.d.); HISTORICAL DICTIONARY OF BANGLADESH 2 (Syedur Rahman ed., 4th ed. 2010).

181. *See* Cheema, *supra* note 32, at 7.

182. *See* C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE, at xi (1988) (where Mohammad Hidayatullah, the Chief Justice (and later Vice President) of India, noted that "Abdur Rahim's book *Muslim Jurisprudence* has been for a long time the only book [on the topic] suitable for scholars").

183. RAHIM, *supra* note 180, at vi.

184. *Id.* at vi–vii.

185. *See* Cheema, *supra* note 32, at 8.

186. RAHIM, *supra* note 180, at 23.

which specific characteristics or rules of Islamic law were compared to those English law.[187]

However, unlike the books on Hindu jurisprudence analyzed in the previous subsection, Abdur Rahim's book did not explicitly engage with, or criticize, Western jurisprudential theories, even when he could easily have done so. For example, when discussing the definition of law and the role of sanctions in Islamic law, Abdur Rahim noted that the term law was "not limited in the Muhammadan system to mandatory commands, far less to commands enforceable by the courts." Instead, it encompassed "all expressions of the lawgiver's will and wisdom, whether laying down what a man must do or must not do, what he may do, and what he ought to do or ought not to do, or merely making a declaration."[188] He then gave an example: the commandment "do not tell a lie, but tell the truth" is viewed in Islam as a law despite the fact that there is no penalty for lying. In addition, sanctions in Islamic law were also defined more broadly than they are defined in English law. Thus, obedience to the law is secured not just by the threat of penalty, but also by the offer of reward, and the penalty (and also the reward) may be awardable in the next world rather than this world.[189] This definition of law and of sanction contradicted, of course, the Austinian view of what "law" and "sanction," were, but Abdur Rahim did not explicitly mention (or criticize) the Austin's definition of the term "law" in his discussion.[190]

Conclusion

Can India be considered a colonial laboratory producing innovative jurisprudential ideas? Some of the thinkers that I have examined here did produce works that were more than mere copies of English ones. As we have seen, their uniqueness lay in the fact that the texts produced in India were more receptive to Continental legal theories, and they were also sometimes more critical than conventional English ones. Furthermore, some of the texts produced in India were also unique because they were hybrid works that employed Western theories to describe non-Western legal systems. The uniqueness of the Indian works derived from the need to teach non-English law students in an environment where religious law, custom, and codes were dominant. Some Indian works were also unique because of the influence of

187. *Id.* at 35, 40, 55, 65, 97, 266, 271–72, 282, 305–07, 309, 382.
188. *Id.* at 57.
189. *Id.* at 57–59.
190. The relative conservatism of the works on jurisprudence and Islamic law can be contrasted with the creative and critical engagement of Muslim scholars with Western liberal economic theory. *See* Stephens, *supra* note 169, at 155–67. On a somewhat similar interaction of Islamic thought (and law) and socialism in interwar Egypt, see, e.g., Amr Shalakani, *Sanhuri, and the Historical Origins of Comparative Law in the Arab World*, *in* Rethinking the Masters of Comparative Law 152, 177 (Annelise Riles ed., 2001).

Indian nationalist ideology. Nationalism led some writers to espouse a broad range of jurisprudential theories in addition to English ones, to criticize Western jurisprudential notions (especially ones that seemed to place non-Western law on a lower evolutionary rung), and to create works that celebrated their own, non-Western, legal systems.

In two senses, one could therefore conclude that the India was indeed a "colonial laboratory" in jurisprudential matters. First, like science laboratories in which theories are tested and then sometimes rejected if they do not accord with reality, India also acted as a laboratory in which jurisprudential theories imported from England were rejected because they did not fit the reality that scholars of jurisprudence encountered "on the ground." Second, laboratories (at least chemistry ones) are places in which chemical substances are mixed. In a similar way, English and Indian writers mixed together legal theories taken from England and the European continent. They also produced entirely new compounds: new descriptions of non-Western law that grafted Western jurisprudential notions onto a religious legal system—Hindu law (and, to a lesser extent, also onto Islamic law).

The jurisprudential works produced by the writers examined in this Article were not, however, influential in the sense of having had an impact on Western scholars.[191] The limited impact of Indian jurisprudence may have been the result of the fact that even the most learned and cutting-edge works produced in the Empire (such as Rattigan's book) were apologetic about their own uniqueness, and thus were perceived as inferior by European scholars, if they were at all aware of them. Perhaps this lack of impact should be lamented, given the interesting insights about the nature of law and its history that non-Western legal systems can teach us. Perhaps this lack of impact should not be lamented, at least with regards to those works I discussed here influenced by Indian (and perhaps also Hindu) nationalism, given the problematic connection that may exist between law and nationalism (whether Western or non-Western). Whatever one's normative attitude to this question, I believe that from a descriptive point of view the appearance of the body of colonial works discussed in this Article is a fascinating and unexplored aspect of the history of modern legal thought—a history that, until now, has mostly focused only on the Western world.

Uncovering this forgotten episode in the history of modern jurisprudence thus provides an interesting case study of the transplantation

191. The assessment of intellectual impact or "influence" is a tricky business. Citation practices are one possible way to do so. However, influence can be exerted indirectly through channels that are often less invisible, for example through one's students. A classical discussion of the methodological pitfalls involved in the historical study of intellectual influence is Quentin Skinner, *The Limits of Historical Explanation*, 41 PHILOSOPHY 203 (1966). A more recent discussion is Gary Browning, *Agency and Influence in the History of Political Thought: The Agency of Influence and the Influence of Agency*, 31 HIST. POL. THOUGHT 345 (2010).

of Western jurisprudential ideas to the non-Western world, and also of their interaction with anticolonial nationalism. This case study may encourage attempts to find similar phenomena in the history of legal thought in other places and times. Let me mention two promising directions for future research.

First, one can expand the spatial framework used in this Article, and explore other places ruled (directly or indirectly) by the British. Specifically, there were two British territories in the Middle East—Mandatory Palestine and Egypt—where processes similar to the ones described in this Article occurred.[192] Both Palestine and Egypt, like India, had a relatively developed system of formal legal education in the early twentieth century, and therefore also a market for books on jurisprudence for students.[193] In both territories one could find jurisprudence textbooks, which, like Basu's books, combined surveys of English jurisprudence with discussions of late-nineteenth- and early-twentieth-century Continental legal thinkers (French, German, and East European).[194] The publication of local textbooks on jurisprudence containing discussions of advanced Continental theories was not the only similarity between India and British-ruled territories in the Middle East. Just as Indian law scholars turned to Hindu law

192. Mandatory (or Mandate) Palestine was occupied by Britain during the First World War, and was later administered by Britain under a League of Nations mandate. Egypt was an informal (and later a formal) British protectorate in the late nineteenth and early twentieth century.

193. There were very few law schools in the non-white territories of the British Empire, even in the middle of the twentieth century. In the territories administered by the British Colonial Office, which by 1945 had a population of over sixty million people, there were only four universities in 1945: the Royal University of Malta, Ceylon University College, the University of Hong Kong, and the Hebrew University of Jerusalem. Of these four universities, only the University of Malta had a law school. In Ceylon and Palestine, independent law schools established by the British (the Colombo Law College and the Jerusalem Law Classes) provided formal legal education. Thus, by the end of Second World War, only three British law schools existed in all the territories administered by the Colonial Office. *See* The National Archives of the United Kingdom (TNA): Public Record Office (PRO), CO 958/1, Minutes of the First Meeting of the Commission on Higher Education in the Colonies, Sept. 21, 1943, at 1; TNA: PRO, CO 958/1, Serial No. 25, Draft Letter to the Autonomous Universities; TNA: PRO, CO 958/3, Report of the Commission on Higher Education in the Colonies, June 1945, at 78. The history of legal education and legal research in British-ruled Palestine is discussed in LIKHOVSKI, *supra* note 16; Likhovski, *supra* note 37. On legal education and legal research in late-nineteenth- and early-twentieth-century Egypt, see LEONARD WOOD, ISLAMIC LEGAL REVIVAL: RECEPTION OF EUROPEAN LAW AND TRANSFORMATIONS IN ISLAMIC LEGAL THOUGHT IN EGYPT, 1875–1952 (2016).

194. *See* FREDERIC M. GOADBY, INTRODUCTION TO THE STUDY OF LAW: A HANDBOOK FOR THE USE OF EGYPTIAN LAW STUDENTS (1910); FREDERIC M. GOADBY, INTRODUCTION TO THE STUDY OF LAW: A HANDBOOK FOR THE USE OF LAW STUDENTS IN EGYPT AND PALESTINE (3d ed. 1921) (mainly citing French thinkers). On Goadby (and on this book), see John Strawson, *Orientalism and Legal Education in the Middle East: Reading Frederic Goadby's Introduction to the Study of Law*, 21 LEGAL STUD. 663 (2001); B. GANKIN, TORAT HA-MISHPAT: HELEK ALEF: MAVO LA-MUSAGIM HA-MISHPATIYIM HA-YESODIYIM (P. Dikshtein ed., 1949) (the preface was dated September 1948, the title page 1949); B. GANKIN, TORAT HA-MISHPAT: HELEK BET: MIKTSO'OT HA-MISHPAT (P. Dikshtein ed., 1950) (mentioning Russian thinkers).

and began studying it using Western jurisprudential frameworks—and, in the process, criticized Western law—so one can detect a similar process regarding both scholars of Jewish and Islamic law working in Palestine and Egypt, and in both cases nationalist ideology was one motivating factor.[195]

Thus, in different parts of the British Empire (India, Palestine, Egypt), in the first decades of the twentieth century, one can identify parallel movements by nationalist legal scholars to study their own non-Western legal systems (Hindu, Islamic, and Jewish law), using Western jurisprudential notions. The scholars studying these legal systems sought to use them to expand, and critique, Western legal theories. This phenomenon has not been detected before in the literature. A comparative analysis of the history of these movements is beyond the scope of this Article, but they certainly merit further research, either within the British Empire, or indeed by using a trans-imperial framework looking at other Western Empires (such as the French, German, or Italian Empires), or indeed non-Western Empires that were not occupied by Western powers, such as the Ottoman Empire, Japan, or China in the nineteenth and early twentieth centuries.

Second, another possible avenue for further research would be to expand the temporal framework used in the Article, and include the period after Indian Independence in 1947. In works written after 1947, one can sometimes find attempts to identify a uniquely Indian approach to jurisprudence. Some works saw the possible Indian contribution to jurisprudence in the Indian ability to synthesize conflicting jurisprudential approaches.[196] Some works talked about the spiritual nature of Indian jurisprudence.[197] There were also works that talked

195. *See* LIKHOVSKI, *supra* note 16; WOOD, *supra* note 193.

196. The term "synthetic jurisprudence" was already used in Basu's work to designate the amalgamation of various jurisprudential approaches (analytical, historical, comparative, sociological, functional, and teleological). In the post-Independence period, the leading exponent of what was termed the "synthetic" approach was Minocher Jehangirji Sethna, the self-proclaimed "Founder and President of the Indian School of Synthetic Jurisprudence." *See* M.J. SETHNA, JURISPRUDENCE, at i (rev. & enlarged 2d ed. 1959), which, unfortunately turned out to be more of a slogan than a fully developed jurisprudential school (*see* Rajeev Dhavan, *Means, Motives and Opportunities: Reflecting on Legal Research in India*, 50 MOD. L. REV. 725, 742 n.73 (1987) (citing Paton's disparaging comment on Sethna's work)).

197. *See* B.A. MASODKAR, NATIONAL JURISPRUDENCE: NEED AND APPROACH 27, 28, 100 (1974) (arguing that "India's gift" to the world was the mission of "the spiritualisation of the human race," giving the world "spiritual knowledge," which is "silent," like "the dew that falls unseen and unheard, yet brings into bloom masses of roses," and in more practical terms translated into values such as the emphasis on social and communal norms and distributive justice); S.K. PUROHIT, ANCIENT INDIAN LEGAL PHILOSOPHY: ITS RELEVANCE TO CONTEMPORARY JURISPRUDENTIAL THOUGHT 240–41, 245 (1994) (containing a chapter entitled "A Plea for Spiritual Jurisprudence," in which the author suggests that legal theory should be rescued from the "octopus of western influence," and "spiritualised," a process that, he argues, will lead to "integration, harmonisation and synthesis"). It would also be interesting to compare these works to post-Independence Indian (or Pakistani) works on Islamic law, such as ASAF A.A. FYZEE, OUTLINES OF MUHAMMADAN LAW (1949).

about the "third world" or socialist nature of Indian jurisprudence.[198] Studying how post-Independence India, or indeed other postcolonial states, viewed the jurisprudential inheritance they received from the West is, it seems to me, another promising avenue of future research, along the lines of similar studies of the particular national traditions of other supposedly universal legal disciplines such as international law.[199]

The story of jurisprudence textbooks in British India told in this Article may thus serve to encourage efforts in the future to create a truly global history of modern jurisprudence, one that pays more attention not just to Western thinkers and their ideas, but also to the way in which these ideas spread around the globe, and the ways in which local, non-Western thinkers, absorbed, opposed, and synthesized these ideas with their own non-Western legal traditions.

198. *See* PAL, *supra* note 99, at 394–98; MASODKAR, *supra* note 197, at 110 (calling a jurisprudence based on "social secular spiritualism," and inspired by the "shining pilgrimage of the souls" from Manu, through Marx, to Gandhi); PUROHIT, *supra* note 197, at xi (noting that "our country . . . is wedded to achiev[ing] a Socialistic Pattern of Society but little do we realise that in Ancient India, the Dharmashastra had for its objective the everlasting welfare of mankind . . . "); V.R. KRISHNA IYER, *Towards a Third World Jurisprudence*, *in* LAW VERSUS JUSTICE: PROBLEMS AND SOLUTIONS 132 (1981); S.N. DHYANI, JURISPRUDENCE: A STUDY OF INDIAN LEGAL THEORY 19–21 (1985) (mentioning "home-spun jurisprudence harmonising, reconciling and furthering the needs of the people," and making "law for little Indians"). It should be noted that the term "jurisprudence" sometimes referred in these works to case law rather than legal theory, specifically designating the constitutional decisions of the Indian Supreme Court.

199. *See* ROBERTS, *supra* note 17.