HINDU LAW AND USAGE

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CHAPTER I

ON THE NATURE AND ORIGIN OF HINDU LAW

§ 1. UNTIL very lately, writers upon Hindu Law have assumed, not only that it was recorded exclusively in the Sanskrit texts of the early sages, and the commentaries upon them, but that those sages were the actual originators and founders of that law. The earliest work which attracted European attention was that which is known as the Institutes of Manu. People talk of this as the legislation of Manu; as if it was something which came into force on a particular day, like the Indian Penal Code, and which derived all its authority from being promulgated by him. Even those who are aware that it never had any legislative authority, and that it only described what its author believed to be, or wished to be the law, seem to imagine that those rules which govern civil rights among Hindus; and which we roughly speak of as Hindu law, are solely of Brahmanical origin. They admit that conflicting customs exist, and must be respected. But these are looked on as local violations of a law which is of general obligation, and which ought to be universally observed; as something to be checked and put down, if possible, and to be apologised for, if the existence of the usage is proved beyond dispute.

§ 2. On the other hand, those who derived their knowledge of law not from books, but from acquaintance with Hindus in their own homes, did not admit that the Brahmanical law had any such universal sway. Mr. Ellis, speaking of Southern India, says: "The law of the Smritis, unless under various modifications, has never been the law of the Tamil and cognate nations." The same opinion is stated in equally strong terms by Dr. Burnell and by Mr. Nelson in recent works. And Sir H. S. Maine, writing with special reference to the North-West of India, says: "The conclusion arrived at by the persons who seem to me of highest authority is, first, that the codified law - Manu and his glossators - embraced originally a much smaller body of usage than had been imagined, and, next, that the customary rules, reduced to writing, have been very greatly altered by Brahmanical expositors, constantly in spirit, sometimes in tenor. Indian law may be in fact affirmed to consist of a very great number of local bodies of usage, and of one set of customs reduced to writing, pretending to a diviner authority than the rest, exercising consequently a great influence over them, and tending, if not checked, to absorb them. You must not understand that these bodies of custom are fundamentally distinct. They are all marked by the same general features, but there are considerable

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1 2 Stra. H. L. 163. See the futwah of the Pundits, 13 M. I. A. 149
2 Introduction to Daya-Vibhaga, 13; Varadaraja, 7; Nelson’s View of Hindu Law, Preface and Chap. 1.
§ 3. I believe that even those who hold to their full extent the opinions stated by Mr. Ellis and Mr. Nelson, would admit that the earliest Sanskrit writings evidence a state of law which, allowing for the lapse of time, is the natural antecedent of that which now exists. Also that the later commentators describe a state of things, which, in its general features, though not in all its details, corresponds fairly enough with the broad facts of Hindu life; for instance, in reference to the condition of the undivided family, the order of inheritance, the practice of adoption, and the like. The proof of the latter assertion seems to me to be ample. As regards Western India, we have a body of customs, which cover the whole surface of domestic law, laboriously ascertained by local inquiry and recorded by Mr. Steele, whilst many of the most important decisions in Borrodaile's Reports were also passed upon the testimony of living witnesses. As regards the North West Provinces and the Punjab, we have similar evidence of the existing usages of Hindus proper, Jains, Jats, and Sikhs, in the decisions of the Courts of those provinces. As regards other parts of India the evidence is much more scanty. But it is a matter of every day experience, that where there exists a local usage opposed to the recognised law-books, it is unhesitatingly set up, and readily accepted. As for instance, the exclusion of women from inheritance in Sholapur, and the practice of divorce and second marriages of females among the Maravers in Southern India. No attempt has ever been made to administer the law of the Mitakshara to the castes which follow the Maroomakatayem law in Malabar, and the Alya Santana law in Canara, because it was perfectly well known that their usages were distinct. Elsewhere that law is administered by native Judges, with the assistance of native pleaders, to native suitors, who seek for and accept it. If this law was not substantially in accordance with popular feeling, it seems inconceivable that those who are most interested in disclosing the fact, should unite in a conspiracy to conceal it. That there is such an accordance appears to me to be borne out by the remarkable similarity of this law to the usages of the Tamil inhabitants of the north of Ceylon, as stated in the Thesawaleme. But the question remains, whether these usages are of Brahmanical or of local origin. Whether the flavour of Brahmanism which pervades them is a matter of substance or of accident. Where usage and Brahmanism differ, which is the more ancient of the two.

§ 4. It is evident that this question is one of the greatest practical importance and is one which a Judge must frequently, though perhaps unconsciously, answer, before he can decide a case. For instance, it is quite certain that religious efficacy is the test of succession according to Brahmanical principles. If, then, one of two rival claimants appears to be preferable in every respect except that of religious efficacy, the judge will have to determine, whether the system which he is administering is based on

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3 Village Communities, 52.
4 See as to this work, post, § 42
Brahmanical principles at all. So as regards adoption. A Brahman tests its necessity and its validity, solely by religious motives. If an adoption is made with an utter absence of religious necessity or motive, a judge would have to decide whether religion was an essential element in the transaction or not.

§ 5. My view is, that Hindu law is based upon immemorial customs, which existed prior to and independent of Brahmanism. That when the Aryans penetrated into India they found there a number of usages either the same as, or not wholly unlike, their own. That they accepted these, with or without modifications, rejecting only those which were incapable of being assimilated, such as polyandry, incestuous marriages, and the like. That the latter lived on a merely local life, while the former became incorporated among the customs of the ruling race. That when Brahmanism arose, and the Brahman writers turned their attention to law, they at first simply stated the facts as they found them, without attaching to them any religious significance. That the religious element subsequently grew up, and entwined itself with legal conceptions, and then distorted them in three ways. First, by attributing a pious purpose to acts of a purely secular nature. Secondly, by clogging those acts with rules and restrictions, suitable to the assumed pious purpose. And, thirdly, by gradually altering the customs themselves, so as to further the special objects of religion or policy favoured by Brahmanism.

§ 6. I think it is impossible to imagine that any body of usage could have obtained general acceptance throughout India, merely because it was inculcated by Brahman writers, or even because it was held by the Aryan tribes. In Southern India, at all events, it seems clear that neither Aryans nor Brahmans ever settled in sufficient numbers to produce any such result. We know the tenacity with which Eastern races cling to their customs, unaffected by the example of those who live near them. We have no reason to suppose that the Aryans in India ever attempted to force their usages upon the conquered races, or that they could have succeeded in doing so, if they had tried. The Brahman treatises themselves negative any such idea. There is not an atom of dogmatism or controversy among the old Sutra writers. They appear to be simply recording the usages they observed, and occasionally stop to remark that the practices of some districts or the opinions of other persons are different. The greater part of Manu is exclusively

(addressed to Brahmans, but he takes pains to point out that the laws and customs of districts, classes, and even of families ought to be observed. Example and influence, coupled with the general progress of society, have largely modified ancient usages; but a wholesale substitution of one set of usages for another appears to me to be equally opposed to philosophy and to facts.

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5 See Hunter’s Orissa, i. 241-265; Nelson’s View, chaps. I & ii; Madura Manual, Pt. IJ., p. 11, Pt. III., ch.ii
6 See Apast. ii. 14, § 6-9; Gaut. xxviii. § 23, 38.
7 See post, § 40; see M. Muller, A.S.L. 50.
§ 7. The most distinctive features of the Hindu law are the undivided family system, the order of succession, and the practice of adoption. The two latter are at present thoroughly saturated with Brahmanism. Its influence upon the family has only been exerted for the purpose of breaking it up. But in all cases, I think it will be satisfactorily shown, that Brahmanism has had nothing whatever to do with the early history of those branches of the law; that they existed independently of it, or even of Aryanism; and that where the religious element has entered into, and remodelled them, the change in this direction has been absolutely modern. This view will be developed at length in the course of the present work. It will be sufficient here briefly to indicate the nature of the argument.

§ 8. The Joint Family is only one phase of that tendency to hold property in community, which, it is now proved, was once the ordinary mode of tenure. The attention of scholars was first drawn to this point by the Sclovonian Village Communities. But it is now placed beyond doubt that joint ownership of a similar character is not limited to Sclovonian or even to Aryan races, but is to be found in every part of the world where men have once settled down to an agricultural life. In India such a corporate system is universally found, either in the shape of Village Communities, or of the simple Joint Family. So far from the system owing its origin to Brahmanism, or even to Aryanism, its most striking instances are found precisely in those provinces where the Brahman and Aryan influence was weakest. As regards the Village Communities, the Punjab and the adjoining districts are the region in which alone they flourish in their primitive vigour. This is the tract which the Aryans must have first traversed on entering India. Yet it seems to

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have been there that Brahmanism most completely failed to take root. Dr. Muir cites "Various passages from the Mahabharata which establish this. The inhabitants "who dwell between the five rivers which are associated with the Sindhu (Indus) as the sixth," are described as "those impure Bahikas, who are outcasts from righteousness." "Let no Arya dwell there even for two days. There dwell degraded Brahmans, contemporary with Prajapati. They have no Veda, no Vedic ceremony, nor any sacrifice." "There a Bahika, born a Brahman, becomes afterwards a Kshatriya, a Vaisiya, or a Sudra, and eventually a barber. And again the barber becomes a Brahman. And once again the Brahman there is born a slave. One Brahman alone is born in a family. The other brothers act as they will without restraint." And they retain this character to the present day, as we shall see that with them the religious element has never entered into their secular law. Next to the Punjab the strongest traces of the Village Community are found among the Dravidian races of the South. Similarly as regards the Joint Family. It still flourishes in its purest form, not only undivided but indivisible, among the polyandrous castes of Malabar and Canara, over whom Brahmanism has never attempted to cast even the hem of its garment. Next to them, probably, the strictest survival of the undivided family is to be found in Northern Ceylon, among the Tamil

8 See Laveleye, Propriete, and Sir H. S. Maine's Works, passion
9 Muir, S. T., ii. 482.
emigrants from the South of India. It is only when the family system begins to break up that we can trace the influence of Brahmanism, and then the break up proceeds in the direct ratio of that influence\textsuperscript{10}.

§ 9. The case of inheritance is even more strongly in favour of the same view. The principle that "the right of inheritance, according to Hindu law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor," has been laid down on the highest judicial authority as an article of the legal creed, which is universally true, and which it would be heresy to doubt. It is strictly and absolutely true in Bengal. It is not so elsewhere\textsuperscript{11}. Among the Hindus of the

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Punjab, custom and not spiritual considerations determine the order of succession\textsuperscript{12}. Throughout the Presidency of Bombay, numerous relations, and especially females, inherit, to whom no ingenuity can ascribe the slightest religious merit. According to the Mitakshara, consanguinity in the male line is the test of heirship, not religious merit. All those who follow its authority accept agnate & to the fourteenth degree, whose religious efficacy is infinitesimal, in preference to cognates, such as a sister's son, whose capacity for offering sacrifices ranks very high. The doctrine that heirs are to be placed in the direct order of their spiritual merit, was announced for the first time by Jimuta Vahana, and has been expanded by his successors. But it rendered necessary a complete remodelling of the order of succession. Cognates are now shuffled in among the agnates, instead of coming after them; and the very definition of cognates is altered, so as to exclude those who are actually named as such by the Mitakshara. The result is a system, whose essence is Brahmanism, and whose logic is faultless, but which is no more the system of early India, or of the rest of India, than the English Statute of Distributions\textsuperscript{13}. In Bengal the inheritance follows the duty of offering sacrifices. Elsewhere the duty follows the inheritance.

§ 10. The law of adoption has been even more successfully appropriated by the Brahmans, and in this instance they have almost succeeded in blotting out all trace of a usage existing previous to their own. There can be no doubt that among those Aryan races who have practised ancestor-worship, the existence of a son to offer up the religious rites has always been a matter of primary importance. Where no natural-born son exists, a substituted son takes his place. This naturally leads to the practice of adoption. But apart from all religious considerations, the advantages of having a son to assist a father in his life, to protect him in his old age, and to step into his property after death, would be equally felt, and are equally felt by other races. We know that the Sudras practised adoption, for even the Brahmanical writers provide special rules for their case.

\textsuperscript{10} See post, chap. Vii, § 234
\textsuperscript{11} This was long since pointed out by Professor Wilson. See his Works, v.
\textsuperscript{12} Punjab Customs 11.
\textsuperscript{13} As to the hole of this see chap. Xvi, § 432, et seq.
The inhabitants of the Punjab and N.W. Provinces, whether Hindus proper, Jains, Jats, Sikhs, or even Muhammedans, practise adoption, without religious rites, or the slightest reference to religious purposes. The same may be said of the Tamils in Ceylon. Even the Brahmanical works admit that the celebration of the name, and the perpetuation of the lineage, were sufficient reasons for affiliation, without reference to the rescue of the adopter's soul from Hell. In fact some of the very earliest instances mentioned are of the adoption of daughters. This latter practice is followed to the present day by the Bheels, certainly from no motives of piety, and by the Tamils of Ceylon. There can, I think, be no doubt that if the Aryans brought the habit of adoption with them into India, they also found it there already; and that the non-Aryan races, at all events, derive it from their own immemorial usage, and not from Brahmanical invention. There seems, also, every reason to believe, that even among the Aryan Hindus the importance now ascribed to adoption is comparatively recent. Little is to be found on the subject in the works of any but the most modern writers, and the majority of the ancient authors rank the adopted son very low among the subsidiary sons. The series of elaborate rules, which now limit the choice of a boy, are all the offspring of a metaphor; that he must be the reflection of a son. These rules may be appropriate enough to a system which requires the fiction of actual sonship for the proper performance of religious rites; but they have no bearing whatever upon affiliation, which has not this object in view, and, as we shall find, they are disregarded in many parts of India where the practice of adoption is strongly rooted. Yet the Brahmans have created the belief, that every adoption is intended to rescue the soul of a progenitor from Put, and that it must be judged of solely by its tendency to do so. And our tribunals gravely weigh the amount of religious conviction present to the minds of persons, not one of whom probably connects the idea of religion with the act of adoption, more than with that of procreation.  

§ 11. If I am right in the above views, it would follow that races who are Hindu by name, or even Hindu by religion, are not necessarily governed by any of the written treatises on law, which are founded upon and developed from the Smritis. Their usages may be very similar, but may be based on principles so different as to make the developments wholly inapplicable. Possibly all Brahmans, however doubtful their pedigree, may be precluded, by a sort of estoppel, from denying the authority of the Brahmanical writings which are current in their district. But there can be no pretence for any such estoppel with regard to persons who are not only not Brahmans, but not Aryans. In one instance, a very learned judge, after discussing a question of inheritance

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14) Manu gives a preference to the eldest son, on the ground that he alone has been begotten from a sense of duty, ix. § 106, 107. See this subject discussed at length, post, ch. v. § 90-93.

15) Many of the Dravidian races, who are called Hindus, are worshippers of snakes and devils, and are as indifferent to Vishnu and Siva as the inhabitants of Whitechapel.

16) See the remarks of Holloway, J., 7 Mad. H.C. 255.
among Tamil litigants, on the most technical principles of Sanskrit law, wound up his judgement by saying, "I must be allowed to add that I feel the grotesque absurdity of applying to these Maravers the doctrine of Hindu Law. It would be just as reasonable to give them the benefit of the Feudal Law of real property. At this late day it is however impossible to act upon one's consciousness of the absurdity." I must own I cannot see the impossibility. In Northern and Western India the Courts have never considered themselves bound to apply these principles to sects who did not profess submission to the Smritis. In the case of the Jains, for instance, research has established that their usages, while closely resembling those of orthodox Hinduism, diverge exactly where they might be expected to do, from being based on secular and not on religious principles. The Bengal Court, as might be anticipated, is less tolerant of heresy. But it is certainly rather startling to find it assumed as a matter of course that the natives of Assam, the rudest of our provinces, are governed by the Hindu law as modified by Jimuta Vahana. It would be curious to enquire whether there was any reason whatever for this belief, except the fact that appeals lay to the High Court of Bengal. It is a singular and suggestive circumstance that the Ooriya chieftains of Orissa and Ganjam, who are identical in origin, language and religion, are supposed to follow different systems of law; the system ascribed to each being precisely that which is most familiar to the Courts to which they are judicially subject.

§ 12. On the other hand, while I think that Brahmanical law has been principally founded on non-Brahmanical customs, so I have little doubt that those customs have been largely modified and supplemented by that law. Where two sets of usage, not wholly reconcilable, are found side by side, that which claims a divine origin has a great advantage in the struggle for existence over the other. Further, a more highly developed system of law has always a tendency to supplant one which is less developed. A very little law satisfies the wants of a rude community. As they advance in civilization, and new causes of dispute arise, they feel the necessity for new rules. If they have none of their own, they naturally borrow from their neighbours. Where evidence of custom is being given, it is not uncommon to find a native saying, "We observe our own rules. In a case where there is no rule we ask the pundits." Of course the pundit, with much complacency, produces from his Shasters an answer which solves the difficulty. This is first adopted on his authority, and then becomes an accretion to the body of village usage. This process would of course be aided by the influence which the Brahmins always carry with them, by means of their intellectual superiority. It must

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17 Holloway, J., 6 Mad. H. C. 341.
18 Post, § 44.
19 Deepo Debia. v. Gobindo Deb, 16 W. R. 42.
20 See as to Orissa, note to Bishenpiria v. Soogunda, I. S. D. 37 (49, 51). But in a case reported by Mr. MacNaghten from Orissa, in 1813, the futwah was certainly given according to Mitakshara law. 2 W. MacN. 306. Aa to Ganjam, Sri Raghunandha v. Sri Brozo Kishore, 3 I. A. 154.
21 See Maine’s Vill. Com. 52.
have gone on with great rapidity during the last century, when so many disputes were referred to the decision of our Courts, and settled in those Courts solely in accordance with the opinions of the pundits.\textsuperscript{22}

§ 13. The practical result of this discussion, so far as it may turn out to be well founded, seems to be--First, that we should be very careful before we apply all the so-called Hindu law to all the so-called Hindus. Secondly, that in considering the applicability of that law, we should not be too strongly influenced by an undoubted similarity of usage. Thirdly, that we should be prepared to find that rules, such as rules of inheritance, adoption, and the like, may have been accepted from the Brahmans by classes of persons who never accepted the principles or motives from which these rules originally sprung; and therefore, lastly, that we should not rashly infer that a usage which leads to necessary developments, when practised by Brahmans, will lead to the same developments when practised by alien races. It will not do so, unless they have adopted the principle as well as the practice. Without both, the usage is merely a branch severed from the trunk. The sap is wanting, which can produce growth.

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\textsuperscript{22} See post, § 38.
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