

# LEGAL ASPECTS OF SOCIAL REFORM

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WITH A LECTURE ON HINDU LAW REFORM BY  
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## LECTURE

*Delivered by Sir P. S. Sivaswami Aiyar, K.C.S.I., at the Sir T. Sadasiva Aiyar Memorial Meeting, held in the Gokhale Hall, Madras, on 24th November 1928. Reprinted by kind permission of the speaker.*

THERE is some propriety in referring on this occasion, to one of the many lines of activity of the late Sir Sadasiva Aiyar, and making some general observations on the subject in which he was deeply interested. Sir Sadasiva Aiyar, a devout Hindu, and essentially religious, was fully alive to the defects of the Hindu social and legal systems. He was not one of those who considered it a sacrilege to lay hands on the fabric of the Hindu Law or Hindu social institutions, and he did not believe it was for the good of society to preserve corruptions or defects that had crept into their institutions and social life.

I do not propose on this occasion to make any observations upon the subject of social reform. Though it is intimately connected with the subject of reform of Hindu Law, it is quite possible and practicable to draw a distinction between social institutions which have no legal force, and legal institutions which have an obligatory operation upon the members of the community. Nor do I propose to go, on this occasion, into the details of any of the various measures for the reform of Hindu Law which are now before the public, and are engaging the attention of both the authorities and the public. I think it more appropriate and practicable, within the limits of time allowed to me, to make a few general remarks upon the methods by which the reform of Hindu legal institutions may be carried out, and to find out if there are any general principles which we should bear in mind.

The subject of Hindu Law does not cover all the various relations between human beings in our society. It governs only certain limited relations. The three main subjects in regard to which we are governed by the Hindu Law are marriage, inheritance and the joint family system. In regard to all of these

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The subject of Hindu Law does not cover all the various relations between human beings in our society. It governs only certain limited relations. The three main subjects in regard to which we are governed by the Hindu Law are marriage, inheritance and the joint family system. In regard to all of these

it is well known that our Hindu system is not free from defects. How are we to bring about reforms in these matters?

One method of reform is by means of judicial interpretation, or indirect legislation. I have heard it said that my friend Sir T. Sadasiva Aiyar was rather prone to rely upon this method of reforming Hindu Law. I have no particular objection to this method of indirect legislation. Where the process of reform is slow, and attended with difficulty, I am not one of those who would reject any available agency for bringing about a desirable reform. If it is possible to accomplish the desired object by means of judicial interpretation or indirect legislation, let us avail ourselves of it. But this method is not always applicable. Where the sources of law are texts, and are open to the charge of obscurity or ambiguity, the judge is within his province in seeking to reconcile or interpret the texts, and evolving some rule or decision, which would probably be in accordance with the exigencies of the times. But it is not always that you find that there is a discordance between the texts, or that they are open to the charge of ambiguity or obscurity. In those circumstances, where the evil is clear, but the door for interference is not open, it is not possible to rely upon the method of judicial interpretation, unless one is prepared to go to the full length of distorting the texts, wrenching them from out of their proper context and meaning, and putting them to a forced construction, or a forced way of application. But that process of distortion of our texts cannot altogether commend itself to a delicate conscience, and I, for one, am not disposed to approve of a too ready resort to this indirect method of legislation, where the matter is free from doubt and can only be remedied, if at all, by more straightforward and direct methods.

There is another method, which has found favour with those who seek reform in our institutions and that is to explore and investigate the old texts. They seek to explain the present defects in the law, by pointing out that they are departures from the wisdom of the ancients. They seek to show that if you only go back to the pristine purity of the old authorities of the Vedic texts, you will be restoring the law not merely to a purer form, but also to

one more in accord with the needs of the present. That method proceeds upon the assumption that the ancient texts foresaw all the needs of the future, and that they contained every possible provision for the requirements of future ages. This process requires very often a considerable exercise of imagination, and is also open to criticism on that account. But a more serious objection to this process is that those who place reliance upon it have too great a faith in the reasonableness of the people. They think that it has only to be shown to the people that their present practices and usages are not in accordance with the old Vedic texts or with the Smritis, and that they would at once revert to the ancient usages and abandon the present. I think it betrays a want of knowledge of the popular mind and its working. The cake of custom has grown so thick, that it is not possible to break through it merely by resorting to the process of interpretation of the old texts, and by successful criticism and research. Something more direct, some more open attack upon the present usages is required. When I am speaking of attack, I do not mean an attempt to carry anything against the wishes of the people, or against public opinion. What I am thinking of is rather propaganda for the purpose of educating the public, and converting them to your views, by making them see the injustice and the anomaly, and the defects of the existing institutions. That is the process which I should recommend.

Another method, which of course is the most direct and straightforward, is the method of direct legislation, and since the reform of our Legislative Councils, there has been a plentiful crop of bills introduced in the various legislatures, for the purpose of dealing with the defects in the Hindu Law, and in the Hindu social system. Whatever may be the motive which inspires those various bills, I welcome them all as evidence of an awakening to our defects, and of a desire to remedy them as far as may be possible.

Is it possible to suggest any general principle in this regard, as to the attitude which we should observe towards bills or legislative measures for the reform of Hindu institutions? There is one point which I may perhaps refer to at the very outset. There are some who advocate a wholesale codification



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of the Hindu Law, codification not merely of the rules of Hindu Law as they are at present, but codification in the sense of amendment and modification. There are others who consider that the system of Hindu Law is one entire structure, and that it ought not to be impiously touched here and there, but that the whole structure should be thoroughly examined, and every part of it tested, and that we should produce a perfect Hindu system. I am afraid that attempts of this sort are fore-doomed to failure. In the first place, it is an exceedingly ambitious attempt. It will take an enormous length of time. It will rouse very considerable agitation and opposition. There is no system of personal law in this world which can be said to be perfect in all its parts and details. To my mind, the surest and the most practicable way of dealing with these defects in our system is to make alterations, as the necessity becomes felt, and to alter a room here, to repair a room there, and to go on carrying out alterations, while we continue to occupy the house. The proper method is not to quit the house or leave it vacant, or pull down the whole structure and seek to rebuild it, either with reference to *a priori* principles, or with reference to principles to be found in foreign systems of law. 'Sufficient unto the day is the evil thereof' is a maxim of very considerable worldly wisdom, and I would follow that maxim in dealing with the demands for the remedy of the defects in our system of Hindu Law.

Passing on from this question of the desirability of a wholesale recasting of the Hindu Law or a piecemeal adjustment of the law, let us turn to another question. Supposing any measure is brought for the reform of some particular feature of the Hindu Law, and we, because we feel convinced of the desirability of a change, seek to carry it out in the face of popular opposition. Is it right, and is it possible to carry any measure in the face of popular opposition or popular sentiment? The second question whether it is possible can hardly arise, if the legislature becomes fully responsible to the people, and if there is a strong and active public opinion. It will be unthinkable in any country, where a system of responsible Government prevails, to attempt to carry any measure against public opinion, however wise the measure may be, however senseless the objections to it,

and however rational the proposal. We have only to look at the history of English social legislation. How many years did it take to pass the Deceased Wife's Sister's Bill? Suppose some legislature wants to pass a bill for the cremation of corpses—what an amount of opposition would be aroused in spite of the fact that it is the most hygienic method of disposal, and in spite of the fact that it prevails so largely in other countries? We can easily conceive the amount of opposition that will be roused to any such measure, and no Government would be able to last for a day, which dared to defy public opinion in a matter of this kind. I therefore believe that when the Indian legislature becomes fully responsible, the question whether it is possible or practicable to carry anything in the face of popular sentiment or opposition would hardly be entertained.

The other question whether it is right, may be considered. There are many things which are not practicable, but which nevertheless are perfectly right. The question is, even assuming that a certain measure of reform is opposed by the people, would it be right for you to use your power to carry it through? There are certain conditions under which it may be possible and has happened in India. For instance, the Government has passed acts for the abolition of *Sati*, legislation for widow marriages and for the abolition of the disabilities of converts; and they have introduced other measures like the Special Marriage (Amendment) Act in the interests of individual freedom, for the purpose of protecting individuals and minorities from the oppression of the majority. There have been cases of this sort and for my part I think it was perfectly right on the part of Government to have passed those acts, for legalising all widow marriages, or for any of those purposes which make for individual freedom, or which seek to protect the individual or the minority against the oppression of the majority. Cases of this kind can easily be imagined in the future also. With regard to all these cases, while I should very much like legislation in accordance with rational ideas of individual liberty and social progress, it would be impossible to carry out our ideas in opposition to popular sentiment. What then is the remedy available in cases of that sort? The only remedy which is

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open is to educate public opinion, to persuade the public to come round to your views, and then go to the legislature with the support of popular opinion behind you. That is the only method which will be feasible hereafter.

I might give point to my remark by giving illustrations from recent legislative proposals, but I do not wish to enter into any discussion of the details of this measure or that, because to explain and justify a particular position with reference to any bill, I may take much greater time than would be justified. I would ask you not to go away with the impression that I am opposed to the reform of legal or social institutions or that I wish to shelve them to an indefinite future. I am merely pointing out what appears to me to be the right course of action. If however, during the transition stage, which perhaps may last for a considerable time, it is possible for us to carry anything in accordance with advanced and liberal ideas, even though they may differ from the views of the people at large, I should not hesitate to have recourse to legislation. But the question which a practical legislature has to consider is this: Is it likely to cause such a measure of discontent in the country, as would make it dangerous or unsafe for a Government to embark upon it? The balance of advantage requires considerable discrimination and tact to judge, and it is not easy to lay down off-hand that the legislature ought to have done this or that, regardless of popular opposition.

I may here refer to, Sir V. Bhashyam Iyengar's Bill in regard to the gains of learning, and the effort to legislate that the wealth acquired by education, even if imparted at the cost of a joint family, should not be liable to partition, and point out how in deference to popular opinion the measure was vetoed. The measure was an eminently sound one, and the result of its rejection was that educated men who acquire wealth by learning seek methods of circumventing the claims of their co-parceners as, for instance, by early partition. This is an illustration of the duty of the authorities to judge on which side the balance of advantage lies. It is a difficult process but one which could not be helped. I see no necessity for shrinking from carrying through under certain

conditions a measure endorsed by enlightened public opinion, any more than a skilful doctor would be justified in shrinking from a surgical operation because his patient objects to it.

What I wish to lay stress upon, in conclusion, is that as conditions change, as the constitution approaches more and more to the responsible type, and the legislature becomes more and more sensitive to public opinion, it would not be possible to carry things with a highhand and in defiance of public opinion. But let us also remember this—that because the opinion of certain sections of the public or even of the majority of the public may differ from your convictions, it does not follow that you are absolved from the duty of speaking out your convictions, and of trying to convert others to your views. Everyman has a duty to his fellow-men, and if his sense of citizenship is sufficiently keen and active, he should also participate in propaganda to convert others to the view which he considers right. But the vast majority of us take things too easily and we are inclined to let things drift. If it is possible for us to carry things without opposition we like to do it, but if we meet with opposition we do often succumb and quickly accept our defect. The right course for a citizen is not to be afraid of the opposition, but to press his own views and seek to persuade others to adopt that course which he thinks best for the removal of those defects in our legal system which seem to require amendment.

## GENERAL INTRODUCTION

KUMBAKARNA, the brother of Ravana, King of Lanka, was a redoubtable giant of olden days endowed with fabulous strength by the gods. There was no limit to his prowess or achievements, as he was able to defeat both Devas and Dhanavas in single combat. The breath of his nostrils was enough to work havoc on ordinary mortals. His one great weakness, however, was sleep. Once in the arms of Morpheus, it needed super-human effort to awake him. Conches had to be blown, and stones and javelins hurled at him, before he could be aroused and made to take part in the famous battle that his brother Ravana waged with Rama.

May this not be an allegory of the story of this ancient land? Centuries ago it fell into a profound slumber. The tramp of armed legions across its prostrate form, famines, floods, changing dynasties, and similar vicissitudes to which nations are subject, were not enough to rouse it from the torpor and lethargy of ages. Now, at last, owing to the impact of a number of coincident forces issuing from various directions, it is beginning to rouse itself like a strong man from his sleep. Signs of awakening are visible in every direction, new currents of life are pulsing through its arteries, knotted joints are cracking; the giant is at last awake. The awakening, however, appears more in the outward and visible frame than in the mind, and more in the faculties of the intellect, than in the feelings of the heart that beats one with humanity. The ancient spiritual soul of India cannot yet be said to have shown itself with its pristine vigour.

Among the forces which have helped to arouse it may be mentioned the introduction of western political forms, the engrafting of English Law, the impact of modern civilization, reaction to western education, the contacts of commerce, and the stimulus of missionary enterprise.

The introduction of political ideas and institutions from Europe, and the familiarity acquired by working them in the central, provincial and local bodies have certainly lent new life to the nation, though foreigners may profess to be sceptic about the people having the qualities necessary to use them in their proper spirit, and be inclined to assert that they can only play with them. Power has passed from the fighting and ruling castes and the priests to the literary classes which have taken to western education. The mercantile population which is interested only in a stable government is ready to throw in its lot with any regime having authority. A centralised or over-centralised administration sympathises with villages depleted of their vitality, but the machinery devised only for purposes of control is not enough to infuse remote areas with life and vigour.

Anyone who observes modern Indian conditions will be ready to admit that English rules of evidence, the Common Law, and the numerous adaptations of it that have been grafted upon India by legislation, and more particularly the penalties and procedure of Criminal Law have touched Indian life at many points, and introduced new standards of judgment and behaviour. But to this I shall return later.

Western civilization, with its well-known characteristics of alertness and openness of mind, cultivation of material comforts at the expense possibly of spiritual progress, and its virile, highly physical and wholly cosmopolitan outlook, cannot be said to be akin in spirit to the genius of the race, with the result that, while the outward frame of life has been touched, the inward features remain pretty much the same. One often sees an Indian gentleman dressed in up-to-date western garb, with topi and boots complete, living in a house furnished as nearly as possible like an English home, but when he throws off the acquired conventions of modern life, and the jargon that goes along with it, the westerner is often surprised to find beneath the outward costume a tired, cynical soul disillusioned with life, and restive under the burden innumerable restrictions laid upon him by remote

ancestors, but not venturesome enough to throw them off and make a bid for freedom.

It was a great day for India, when pandits from the West took the place of the ancient pandits of this land, and undertook to impart the special learning which they had acquired in a different atmosphere, amidst totally different climatic conditions. The anxious, exultant youth of the country drank of the new wine with avidity at first, and became intoxicated with it. Now the inevitable reaction has come. He firmly believes that there is nothing new which he can learn from the West, and that he must return to the lore of his ancestors, if he is to live in peace, and realize himself. Here and there, people have begun to emancipate themselves from the ancient conventions of their own land, and the modern but extremely foreign conventions of an alien race, but the amount of initiative, of original literary or scientific output, and of creative energy, as distinguished from mere receptivity, put forth is surprisingly limited. A Bose, a Ray or a Raman may show that they possess the key which opens a new world, but most people are content to learn a few tit-bits from the West while at college, and forget them in after-life, or ignore them in all their practical bearings.

India has always enjoyed, and been benefitted by, mutual exchange of wares between it and the nations of the Near East, the Arabs serving as the principal medium of communication. The facilities introduced by modern shipping and railways have however transformed the industrial and commercial outlook of the country. Domestic fabrics for which India was famous in ancient times have degenerated, or have ceased to exist, while great factories started in imitation of similar institutions in Europe and America have introduced new industries. Villages are getting fewer, while towns and large cities have grown at the expense of the agricultural life which formed the staple of the country, furnishing new and complicated problems to the economist, the doctor and the patriot. Ancient habits of hoarding wealth and lavishing them on unproductive ceremonies of a wasteful character, restrict

tions in the way of foreign travel imposed upon the higher classes, and other similar causes have prevented the country from reaping the advantage, which might otherwise have been hers, as the result of the introduction of modern industries.

Buddhism has left its permanent mark upon the country in the shape of greater tolerance, ahimsa, and a higher standard of behaviour and courtesy. Muhammadans have been influenced by their environment, more perhaps than they have changed the life of the country, but they too have made abiding contributions in the departments of commerce and architecture, while social and economic life have on the whole retrograded under their influence. The latest arrival, viz., Christianity, has this much to its credit, that it has laboured for the uplift of the depressed classes, and built up many patterns or models for philanthropic enterprise in a country which is now awakening in all directions. Though it has not directly won over the higher classes, it has transformed their life by popularising higher standards of behaviour, publishing literature permeated with Christian ideas, and distributing broadcast a form of education which is democratic, and makes for openness of mind and yearning after truth.

Though diverse influences of a stimulating character have thus been playing upon the country, and the outward frame of its life has been, profoundly or at least recognizably altered thereby, it cannot yet be affirmed that the real India or the heart of India has changed. This must be due to the circumstance that most of the influences referred to above have come from abroad, wearing a foreign garb, and are at variance with the accepted ideals and institutions of this country. They may also be due to the fact that though Englishmen have altered the outward face of the country and improved its material resources wherever they have been allowed a free hand, they have not, owing to the stringency of caste rules, been admitted into the intimacies of private or social life, and their training and traditions have not been allowed a fair chance there. The result is that the body is changed while the mind or soul remains the same: outwardly the



country looks more or less modern, but social arrangements and the details of family or private life remain unaffected or at least affected to a very slight extent.

A fissiparous tendency which cuts the people up into sections, and groups them in castes seems to run in the Indian blood. Though three democratically constituted forms of faiths like Buddhism, Muhammadanism and Christianity have successively been in the country, and Western ideals and institutions based on equality and fraternity have likewise been in vogue for nearly a century, the hoary organization of caste stands firm and has affected Christians, Muhammadans and Buddhists, instead of itself being affected by them. No doubt the law recognizes no distinction between man and man, and distributes punishments and rewards irrespective of caste, creed, or nationality, and this recognition has enabled the lower classes to look upon themselves as men, and given them freedom and opportunities which they never enjoyed before. It is also true that owing to free and unrestricted intercourse in offices, places of business, and railway trains and other vehicles, there is much greater latitude shown to the lower classes than was ever the case in former days. Caste, however, instead of being fluid or mobile, as it was in the time when the ancient Rishis first formulated it, is becoming more rigid and exclusive every day. As castes are not now concerned with their duties or dharma, but more interested in enforcing rights and securing privileges for themselves, there is much more communal jealousy and tension than was ever the case previously. Owing to the accumulation of unprecedented wealth in the *nouveau riches* who have taken to literary education, the gulf between the higher and lower classes has become wider than ever. In the meanwhile, the discipline or control which caste members exercised upon one another, and the higher castes used to enforce on the lower for the benefit of the entire community, has become so relaxed that each man is now a law unto himself.

When one turns from social or public life to the private or family life of individuals, one is confronted with more serious problems. It has become a common

place that when a public man goes abroad he wears the garb and talks the phrase of a citizen of the twentieth century A.D., but when he retires to the privacy of his home, he lives the primitive life and keeps up the archaic traditions of the twentieth century B.C. It is enough that a custom is ancient ; it is likely to be kept up, though it may be totally unsuited to modern conditions of living or an enemy to progress. Non-eugenic retrograde practices which educated public opinion condemns, for instance, child marriage and the purdah, still remain intact, and the conservative influences of the grand-mother in the home are so strong that reformers are able to make little headway against them. Many of the practices which are of questionable value or positively injurious to society are able to maintain a footing on account of the shelter they receive from orthodoxy. The citadel of family life in India has always been held by women, and so long as they are uneducated or unprogressive, it seems out of the question to expect much change.

There is, however, another hindrance which bars the road to progress or reform, and it is the purpose of this book to examine how far this cause is operative, and to what extent it admits of legislative interference. Ultimately the existing arrangements of Hindu society are founded on Hindu Law, and obtain their sanction from the Courts which enforce it. The law was drawn up in olden times to suit the requirements of those days. Though it was liberal and progressive enough when it was first formulated, and was probably much in advance of contemporary law in Europe or Africa and in other parts of Asia, like Mesopotamia or China, it has had the unusual merit or demerit of having remained substantially the same through thirty centuries. If it has changed at all, it has changed for the worse, owing to the glosses and subtleties, the corruptions and restrictions introduced by Schoolmen. If a body of Hindu legists of the present day were constituted, much as the legal advisers of Justinian were commanded, to draw up a code of law for their countrymen, they would certainly not pro-

mulgate a system of law anything like that now in force. He would be a bold man who would claim that Hindu Law as it exists now is either orderly, progressive, or even just. Those who study and administer it are only too conscious of its anomalies, and of the flood of litigation which it encourages, but every time a much needed change is advocated, reformers come up against a rock foundation of archaic law, and their ardour breaks itself in vain against hoary but un-progressive rules.

Left to themselves, educated Hindus might possibly have effected improvements, and altered the law so as to meet modern requirements. But a foreign regime is naturally hesitant where an indigenous ruler could have modified the law with boldness and public acceptance. In the early days of British rule, humanitarian considerations constantly induced the legislature to interfere with objectionable practices. The custom of the immolation of widows was put an end to by Lord William Bentinck. Ishwar Chandar Vidyasagar was able to persuade the Government of his day to pass, in the teeth of opposition from orthodoxy, an enabling Act permitting widows to remarry. Thuggism and female infanticide were put down by statute in the areas in which they prevailed. The Freedom of Religion Act, which relieves persons from the disabilities to which they would have been subject if they embraced a foreign religion, was an exceedingly valuable piece of legislation, though its importance was not recognized at the time. But the Indian Mutiny, however, put an untimely end to this chapter of legislative activity. The British Government received such a rude shock then that they have been nervous ever since of fostering any legislation that might promote feelings of fanaticism or might be used for the purpose of stirring up the forces of disorder and arousing opposition against the British regime. An individual Englishman may be firmly convinced that a particular practice is unmixed evil, but when the question is brought up before the legislature, he would abstain from recording his vote against it, unless he felt assured that there is no opposition whatever to it, or that the whole body of

opinion, educated and uneducated, was in favour of it. The British official is thus often an unwilling or unconscious ally of the die-hard variety of reactionaries.

The second difficulty is due to the fact that the Hindu Law which the Courts are called upon to administer is not the impressive code promulgated by the ancient rishis, which was liberal and sensible enough for their day and generation, but the said law with all the subtleties, corruptions and narrow-minded interpretations imposed upon it by successive commentators of twenty centuries. The question came up for decision in the leading case of *Collector of Madura v. Muttoo Ramalinga*, 12 M.I.A., 297 as to whether the Indian Courts should administer the Hindu Law as promulgated in the original Shastras, or as interpreted by present day pandits, and it was held that the law actually in vogue should be administered, however defective it may be, and however far it may have departed from the spirit or letter of the ancient law. This decision was perhaps inevitable, as the British Government was pledged to retain the law that they found in the country, and clear proof of usage always outweighed the written text of the law. It was nevertheless an unfortunate decision, as in nearly every instance, the changes effected by the glossators were for the worse, and not for the better. Incidentally it introduced minute diversities between the law obtaining in different portions of India, instead of making for harmony or uniformity.

The Romans commenced with a system of ancient law when they started their separate existence as a race. In the course of ages, it went on maturing and developing and throwing up every kind of anomaly and excrescence, till it soon became wanting in clearness and consistency. But, fortunately, at a certain stage in the development of the law, a principle was discovered, which proved to be a fruitful source of order and development. Under the influence of doctors of the Stoic fur, the Law of Nature or the Law of Nations was declared to be the basis of all law. Whenever any rule was found to have come into existence which was not in consonance with right reason or

'equity, justice and good conscience,' the individual rule was made to give way, and first principles were applied. Under the beneficent operation of this far-reaching formula, the excrescences and inequalities of the old law were gradually removed, till the whole system became a consistent and harmonious whole which, even at the present day, claims universal admiration as a masterpiece of human reason. Unfortunately no such general principle has been discovered or applied to check the vagaries of Hindu glossators. Whenever decisions are wanting and there is doubt about the law to be applied to a given case, the Courts resort to a study and interpretation of the Sanskrit texts, and of the commentators who are authorities in different provinces, and try and make sense and order out of the conflicting opinions maintained in their lucubrations. Confusion becomes worse confounded.

A further difficulty lies in the fact that the Hindu Law, as found in the Shastras was never meant to be applicable to two hundred million Hindus living over the length and breadth of this ancient land. They were probably drawn up only for the use of Aryan Brahmins in the Northern provinces, possibly also for a few castes which observed the same rules as Brahmins. Those who have paid attention to the subject hold that Manu wrote his treatise for a tribe called the Manavas. Gautama compiled his law for the benefit of Chandojas or followers of the Sama Veda, and Yajnavalkya for Vajasanyei priests following the white Yajurveda. The rest of the communities in the country were formerly governed by the customs of their respective castes, corresponding to the Thesavalamai still prevalent in Ceylon. By a sweeping generalisation, for which there is no warrant or parallel anywhere, all kinds of communities which were never meant to be governed by the conflicting dicta of ancient legists are bound hand and foot by the restrictions intended for small groups in an archaic age. Neither the status nor the requirements of modern communities are taken into account. The needs of progress, or even of peace and justice, are often ignored and the population

groans under a huge incubus. Its squeals and miseries go unheeded. Entire communities are giving up healthy customs by which they were previously governed, and imitate the narrow traditions and copy the noxious practices of certain classes.

Yet another difficulty arises from the fact that Hindu Law is becoming set and crystallised under existing arrangements, instead of being fluid and adaptable as it was for centuries. Custom was always a recognized source of law. According to Maine and Mandlik, great Smritis like those of Manu and Yajnavalkya, Apastamba and Narada were merely records of customs observed by particular communities to which they belonged. In the course of ages, custom constantly varied the written text of the law. Under the guise of custom or *Thesavalamai* each community introduced and practised such variations or adaptations, as were suited to its own requirements or the needs of changing times. Courts and Panchayats were only too glad to enforce them, as they well knew that the old *Shastras* could not be enforced with public acceptance. Now all this has been changed. The people are confined within the limits of a Procrustean bed, which admits of no modification in line with the spirit of modern times. The bed is getting harder every day. As rules of Hindu Law can only be altered by the Imperial Legislature, a particular reform, however minute or beneficial it may be, can only be obtained after the whole of the country is ready for it, after years of note-writing in the Provincial and Imperial Secretariats, and floods of oratory and agitation outside.

It is perhaps too late to confine the application of the Hindu Law to the persons for whom they were originally intended. It will be certainly difficult at this time of day to make all Hindus subscribe to a general Law of Nature or Law of Nations, in the light of which their archaic code can be regulated and improved. But now that the country has obtained self-governing institutions, it is open to it to propose and carry out instalments of reform, which an alien government might well have hesitated to initiate. What are the lines along which such reforms

are most needed? What changes in the existing law are likely to be most feasible and useful at the present day? What modifications have become imperative in the light of modern requirements? These are the main questions with which I shall be concerned in this book.

There can be no doubt that legislatures can interfere effectively for the purpose of removing the excrescences and filling up the gaps in the existing law. All the ancient rules of evidence which depended on ordeals of fire and water and the caste of the witness or of an accused have been thrown over-board, and a set of sensible rules introduced, which have become part and parcel of the intellectual inheritance of modern India. The archaic Criminal Law of the Hindus, with its crude punishments varied according to the caste of the offender, and the equally unscientific Criminal Law of the Muhammadans with its primitive procedure, have been supplanted by a simple and orderly Penal Code, which has been found to be so admirable and useful, that it has been copied in all the Native States and in such distant places as Hongkong and Zanzibar. Great chunks out of the English Common Law (e.g., the Law of Contract and the Law of Torts) and the principles of English Equity have been transferred wholesale to India in substitution for the corresponding portions of the original Hindu Law, and received a welcome from those who have to administer justice. Wills were unknown to Hindu Law; the power of making testaments, though in conflict with the Hindu principles of inheritance and tends to loosen the ties of the agnatic family, has been accepted by educated public opinion without cavil or demur. The English laws of negotiable securities, and of limited companies have given an impetus to commerce by opening new avenues for capital and enterprise, and introducing western instruments of exchange. The Probate and Administration Acts, though profoundly alien in spirit to the original Hindu Law, have been silently introduced modifying the practices of large communities. The Limitation and Registration Acts have likewise influenced the people and made them vigilant and assertive. Even in the domain of private or

family law, there have been signal instances of legislative activity which have been accepted with acquiescence if not with alacrity. Various anomalies which were in vogue in Malabar have been effectively checked by the Malabar Marriage Act. The Widow Re-marriage Act has made an improvement in the lot of widows possible, though it does not appear that any considerable section of them have taken advantage of the option given to them under the Act.

The principal difficulty in the way of all reformers is the fact that the women of the country, though capable of the same degree of education and advancement as men, are under existing arrangements kept in such an ignorant and backward condition, that instead of fostering or encouraging reform in needful directions, they are among the reactionary forces against it. They, therefore, occupy a strategic situation with reference to reform, and unless the citadel which is in their hands is taken, there is no hope or chance of real progress. It is for this reason that the status of women and the disabilities and disqualifications to which they are subject have been made the first subject of investigation.

The next serious hindrance in the way of the reformer is that hoary system which puts out its tentacles everywhere like an octopus, the organization known as caste. Mere legislation, though heartily subscribed to by the entire community, will scarcely serve to alter or amend an institution which is so deeply ingrained in the life of the country. All that could be attempted is to suggest the directions in which the existing system works unjustly or injuriously and a few lines along which improvements could be effected without doing violence to the feelings of the people.

The root of the difficulty lies undoubtedly in the law relating to the Hindu joint family. It is that system which gives predominant advantage to males and works with peculiar hardship on women, which makes an immense, it might be said unreasonable, distinction between agnates and cognates, which connects together the father and the son in a nexus which is irritating and



painful to both, and puts the wife, the widow and the daughter in an unenviable position as regards legal status and rights. While elsewhere I have proceeded cautiously I have not hesitated to suggest remedies of a radical and fundamental character in respect of the joint family, but I have as far as possible followed the precedents set by Jimuta Vahana in Bengal and by the British legislature in other statutes applicable to Indians. The Indian Succession Act was in the first instance drawn up for the benefit of all the inhabitants of this country. It was entrusted, before the Mutiny, to a body of distinguished lawyers of whom Sir Samuel Romily was the chief, and would probably have been welcomed or accepted by the country in the then state of public opinion if it had at once been passed into law. After that great event, it was considered unwise to seek to apply it to all persons, and so an exemption clause was introduced by which the vast majority of people for whom it was intended are now released from its scope. It is on the whole such a fair and reasonable piece of legislation that it appears to me that an option should be given to individual castes or communities to say whether they would elect for it in preference to Hindu Law. I do not see why the principle originally recognized by the Privy Council in *Abraham v. Abraham*, [1863] 9 M.I.A., 195, that a given family which migrates from one place to another or changes its religion should be allowed the right to say what is the form or school of law by which it elects to be governed, should not now be made applicable to all classes of people; and the heads of families and leaders of communities be asked to say whether they would like to follow a piece of territorial legislation meant to apply to the whole of India. Permissive legislation enabling individuals and communities to do this would be a move in the right direction. Speaking generally, a number of enabling and permissive statutes should precede laws armed with penal sanctions.

This book is sent out in the hope and with the earnest prayer that it might strengthen the hands of those who have the progress of the country at heart, and stimulate others to think about areas of life which are

apt to go unheeded in the hurry and bustle of the twentieth century. It has been written chiefly at the instance of a Society whose main object is the welfare and enlightenment of our country. The only excuse which the writer can put forward for making his bow before the public is that he has an intimate practical acquaintance with the evils which stand in need of mitigation and has undertaken the task, in the intervals of an all too busy life, solely with a view to do his best in trying to leave things a little better than he found them. If unwillingly he has said anything which hurts the feelings of any one, he prays that his delinquencies may be forgiven, as it is impossible to write for the general good without touching vested interests and pre-conceived prejudices somewhere. If long standing sores or painful wounds have been exposed to the light of day, it is only in order that the appropriate remedies may be applied by true patriots and health restored. May the book be blessed for the good of the country.

BOOK I  
**Status of Women**

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