

# LEGAL ASPECTS OF SOCIAL REFORM

BY

PAUL APPASAMY, M.A., LL.B.  
*City Civil Judge, Madras*

WITH A LECTURE ON HINDU LAW REFORM BY  
SIR P. S. SIVASWAMI AIYAR, K.C.S.I.  
*Sometime Member of the Executive Council, Madras*

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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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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 Vajasanyeyi 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**

## CHAPTER I

### Introduction

IT is not possible within a short compass to unfold all the depth of meaning involved in that famous sentence of George Meredith 'Woman is the last thing civilized by man.' It means, among other things, that as woman rises in the scale of culture, she pulls up the entire family along with her, including her husband; but man is usually so concerned about retaining his authority or superiority over woman, that the very last thing that he dreams of doing is to provide woman with the same opportunities that he would give himself. As women are welcomed into society and admitted to its intimacies and privileges, the tone of conversation is purified, manners take an upward trend, and character has a chance of becoming both sober and refined. On the other hand, man, especially in early stages of society, is so conscious of his physical and intellectual pre-eminence over woman, and so anxious to retain his influence or control over her and keep her in subjection, that he constantly devises laws, draws up rules of behaviour and invents veils or purdahs which are meant to keep her in perpetual tutelage and make her pliant to his authority. Entire communities may, like the Greek, the Roman, the Chinese, the Arab and the Indian, rise to a high average of culture, but the last step they are inclined to take is to concede generously to women the same rights as they themselves enjoy. When men in their selfishness thus look at women from their own point of view, there is bound to be a reaction from which they themselves eventually suffer. The women who are kept at a lower level drag the men down to the depths in which they are consigned to live, and infect them with narrowness of mind and a tendency to superstition. The race as a whole degenerates and suffers defeats at the hands of



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its enemies, before it eventually comes to learn that it really pays to recognize that woman has her rights and privileges as well as man, and that to treat her justly or generously and to concede her equal opportunities is to improve society as a whole and make for strength and stamina. No nation can afford to waste its valuable human material. Ignoring or debasing of womanhood has always to be paid for in hard coin sooner or later.

It has been said that Americans idealize their wives as goddesses, Frenchmen treat them as mistresses, Germans look upon them as household drudges, Indians and Chinamen regard them as the mothers of their children, while Muhammadans fancy them as playthings for their hours of ease. Few however are willing to recognize their real position and treat them as the mates and companions they are meant to be. Men generally are apt to look at them from their own point of view, and regard them as mere adjuncts to the male. Their duties to the stronger sex are emphasized and magnified; their rights go by without reference. Qualities like obedience and self-effacement, and patience and self-denial, which make them pliant and willing instruments in the hands of the male, are dwelt upon in song and legend as the special virtues of the sex. Service and sacrifice are the *dharma* ordained for them. Their rights are apt to be taken away one by one, and they are liable to be relegated by law or custom to an inferior place along with children and slaves. It does not matter if they are allowed to live stunted lives, kept in ignorance, and hardened by a life of drudgery or suffering. Such injustice however usually reacts on the selfish male and works its own Nemesis.

If any part of the human body is diseased or atrophied, the whole system becomes affected by the ailment, and participates in the suffering caused thereby. Similarly in the body politic. 'We are members one of another'; if any member degenerates or becomes stunted or diseased, the whole of society suffers from the evil effects of such a malady. For instance, if one section of society and that the most important, namely the

whole body of mothers present and future, is separated from the rest and subjected to harder and more inequitable treatment than others, society as a whole is certain to be injured thereby. If women are confined to the back parts of houses and deprived of the benefits of air, light and good society that men enjoy, if, moreover, they are denied the privileges of education and of liberty of thought or action, if they are sedulously taught from childhood that their only vocation is to beget children, and that no account will be taken of them in any other capacity, if they are warned that they cannot take part in religious service or sacrifice, or entertain any hope of Heaven except as domestic drudges of their husbands, it must necessarily follow, in course of time, that they themselves will come to entertain the notion that they are inferior to their brothers and husbands, and submit timidly to a fate which is not theirs by birth. It has been well said that no country in the world suffers so much from self-inflicted and therefore avoidable evils as India. Half the limitations and defects from which our people suffer are directly or indirectly traceable to the persistent ill-treatment that has been awarded to women.

It was not always so in Hindu society. In Vedic times the treatment of women was a great deal better than it is at the present day. In fact, so far as the evidence goes, they seem to have been regarded as equal to men. There was no such institution as infant marriage. On the other hand, the Vedic rites and the *Mantras* recited in connection with weddings make it clear that only grown-up women entered into the status of matrimony. They also prove that women had equal part or right with men in the home, and in the performance of domestic ceremonies. If they were thus given in marriage when they were comparatively advanced in life, it is likely that they entered into the relationship of their own accord, and it was not merely arranged for them, over their heads, by their parents or other relations. The ancient and well-known custom of *Swayamvara* shows that a girl of good family was allowed,

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like Portia, to select her husband from among a number of suitors who applied for her hand, neither parent nor brother interfering with her choice. There is likewise reason to believe that women were not denied the privileges of learning, sacred or secular, in ancient times. Some of the hymns in the *Rig Veda* (which women are not now allowed even to study) were actually composed by members of that sex. Visvavara, a lady of great learning, composed the hymn in the 4th Ashtaka, 5th Mandala, 18th Sukta of the *Rig Veda*, which contains twenty-eight very beautiful stanzas. Vak, the daughter of Rishi Ambirana, sang the 125th hymn in the 10th chapter of the *Rig Veda*, which sets out the highest conception of God then known, and subsequently formed the basis of the Vedanta, as some commentators have held. Lopamudra, a princess, the daughter of the king of Vidarba, and the wife of the great Rishi Agastya, was similarly responsible for a beautiful hymn.

*Rig Veda* 10. 85 refers to the famous marriage of Soma to Surya, which is the symbol of all marriages for the Hindu. Some of the verses are repeated by the bride and bride-groom to this day at the solemnization of a marriage ceremony. Verse 36 :

By thy right hand, for happiness, I take thee, that thou mayest reach old age with me, thy husband. Aryaman, Bhaga, Savitar, Paramodi gave thee to me, to rule our house together.

On arrival at her husband's, the bride is welcomed thus :

Here may delight be thine, through wealth and progeny. Give this house thy watchful care, with thy husband, and in old age mayest thou still rule thy husband.

In verse 45, we find :

O Bounteous Indra, make this bride blest in her sons and fortunate. Vouchsafe to her ten sons, and make her husband the eleventh man. Over thy husband's father and thy husband's mother bear full sway. Over the sisters of thy lord, over his brothers rule supreme.

The sacredness of marriage is evident from passages such as these.

She, the wife, in sooth, is one half of his own self, hence, as long as he does not obtain her, so long is he not regenerated, for so long is he incomplete . . . .

Complete I want to go to that Supreme good.

(*Sat. Brah.* 5. 2. 10.)

In the *Upanishads* we find,

Lo, verily, not for love of the wife is a wife dear, but for love of the soul a wife is dear.

(*Brihad. Up.* 2. 4. 5.)

Maitryei, wife of the sage Yajna-Valkya, carried on philosophic disputations with her husband. One of the leading *Upanishads* commences with a question or series of questions propounded by Gargi, the daughter of Vachakru. There is a text in Yama, one of the Law-givers, which shows that maidens used to tie the sacred cord, and underwent the initiation necessary for study of the Vedas. They also recited *Savitri*, the most sacred of prayers. Harita, one of the earliest sages, says that all the four orders of life, including studentship, were open to women, and both sexes had the right to recite *Mantras* or sacred texts. In religion, women were allowed equal privileges along with men, at least in the performance of domestic rites. It is true that they were not allowed to perform such rites by themselves, but neither could a husband, who had a wife, go through the ceremonies in the absence of his wife. Women were honoured members of society, and there are precepts in the ancient books which may well put us to shame. *Manu* says :

The mouth of a woman is constantly pure, to be held in the same esteem as running water, or a beam of sunlight.

'Strike not', says another ancient sage, 'with a blossom a woman guilty of a hundred faults.' These are sentiments so delicate that they can stand comparison with the refinements of the most romantic chivalry, modern or mediaeval.

A change of view seems to have come in with the advent of the Law-givers about the seventh century before Christ. In course of time, women probably became

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confined to the home, and engrossed in the performance of domestic duties, like cooking food, cleansing utensils and looking after the children. They had neither the time nor the inclination to devote themselves to the more serious pursuits of life. Learning was then a long and laborious discipline. The shortest period of study prescribed in the *Smritis* was nine years, the longest period being thirty-six years. It was naturally impossible for a woman to give up such a large slice of her life to the acquisition of knowledge. The rule enforced on students made such heavy demands, and imposed such extensive self-sacrifice, that most women would have succumbed under the strain. (Vide *Manu Samhita*, Book II.) Women therefore ceased to perform the initiation ceremony usually taken before entering upon study, and to learn or recite the sacred scriptures. It was then argued by acute lawyers that persons who could not study the Vedas should not be allowed to perform sacrifices, or take part in public rites. It followed, as a further corollary, that women, who could not spend their wealth in the performance of the rites and ceremonies prescribed by the Vedas, had no claim upon the wealth, and no right to inherit the family property, which could be used for such purposes. The main argument employed by the subtlety of our ancient lawyers to denude woman of her rights was that she could not study the Vedas, and so stood outside the pale, like Shudras. Step by step therefore she lost the privileges of education and religion, and her legal rights as well, and had to take an inferior station in life. This change is indicated in Manu, (Circa 800 B.C.) one of the earliest Law-givers. He says:

Day and night women must be kept in dependence by the males of their families, and if they attach themselves to sensual enjoyments, they must be kept under one's control.

Her father protects her in childhood, her husband protects her in youth, and her sons protect her in old age; a woman is never fit for independence.

*Manu IX, 2-3.*<sup>1</sup>

<sup>1</sup> These translations from Manu are by Buhler. (Sacred Books of the East.)

Considering that the highest duty of all castes, even weak husbands must strive to guard their wives.

No man can completely guard women by force, but they can be guarded by employment of the following expedients.

Let the husband employ his wife in the collection and expenditure of his wealth, in keeping every thing clean, in the fulfilment of religious duties, in the preparation of his food, and in looking after his household utensils.

*Manu IX, 10-11.*

As a justification for keeping them in this inferior position, Manu paints a very dark picture of womanhood, laying on the colours thick, in order to heighten the effect:

It is the nature of women to seduce men in this world; for that reason the wise are never unguarded in the company of females.

For women are able to lead astray in this world not only a fool, but even a learned man, and to make him a slave of desire and anger.

*Manu II, 213-214.*

Women do not care for beauty, nor is their attention fixed on age; thinking it is enough that he is a man, they give themselves to the handsome and to the ugly.

Through their passion for men, through their mutable temper, through their natural heartlessness, they become disloyal towards their husbands, however carefully they may be guarded in this world.

Knowing their disposition, which the Lord of creatures laid on them at the creation, to be such, every man should most strenuously exert himself to guard them.

When creating them, Manu allotted to women a love of their bed, of their seat and of ornament, impure desires, wrath, dishonesty, malice and bad conduct.

For women no sacramental rite is performed with sacred texts, thus the law is settled; women who are destitute of strength and destitute of the knowledge of Vedic texts, are as impure as falsehood itself, that is a fixed rule.

*Manu IX, 14-18.*

It was Manu that laid down that a girl could be married after she was eight years of age, and that it was a sin to keep her unmarried after she was fourteen or fifteen. Though he allowed men of the higher castes to take wives for themselves, not merely from their own castes, but also from the castes which were reckoned inferior, he did not accord the same privilege to women; they must marry, if at all, in their caste or a higher one, but never in a caste lower than their own. The right of

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inheritance to a father depended upon the caste of the claimant's mother ; when the child was born of parents of equal caste, he obtained full rights of inheritance, while mixed progeny obtained inferior rights. When a woman was married, her only hope of salvation lay in discharging her conjugal and domestic duties to her husband, however hard and cruel he might be.

By a girl, by a young woman, or even by an aged one, nothing must be done independently even in her own house.

Him to whom her father may give her, or her brother with the father's permission, she shall obey as long as he lives, and when he is dead, she must not insult his memory.

Though destitute of virtue, or seeking pleasure elsewhere, or devoid of good qualities, yet a husband must be constantly worshipped as a god by a faithful wife.

No sacrifice, no vow, no fast, must be performed by women apart from their husbands. If a wife obeys her husband, she will for that reason alone, be exalted in Heaven.

A faithful wife who desires to dwell after death with her husband must never do anything that might displease him who took her hand, whether he be alive or dead.

*Manu V, 147-156.*

By violating her duty towards her husband, a wife is disgraced in this world, after death she enters the womb of a jackal, and is tormented by diseases, the punishment of her sin.

*Manu V, 164.*

She who shows disrespect to her husband, who is addicted to some evil passion, is a drunkard, or diseased, shall be deserted for three months, and be deprived of her ornaments and furniture.

*Manu IX, 78.*

Though a man may have accepted a damsel in due form, he may abandon her if she be blemished or diseased, and if she had been given with fraud.

*Manu IX, 72.*

A wife could thus in no instance cast off her husband, however cruel or licentious he may be ; but a husband could desert her for reasons like the above, and refuse to maintain her. It follows from the above description that the legal status of a wife in Manu's times was far from enviable. Her rights of inheritance were of the slenderest kind.

While Manu would thus give an inferior legal status to the women, whether daughter, wife or mother, he at

the same time issued precepts that she should be treated with respect and affection. He taught that woman, as the weaker vessel, should be treated with honour, so that the family may prosper.

Women must be honoured and adorned by their fathers, brothers, husbands and brothers-in-law, who desire (their own) welfare.

Where women are honoured, there the gods are pleased, but where they are not honoured, no sacred rite yields rewards.

Where the female relations live in grief, the family soon wholly perishes, but that family where they are not unhappy ever prospers.

The house on which female relations, not being duly honoured, pronounce a curse, perish completely, as if destroyed by magic.

Hence men who seek (their own) welfare, should always honour women on holidays and festivals with (gifts of) ornaments, clothes and (dainty) food.

*Manu III, 55-5.*

Perhaps the whole blame for bringing down the legal status of women should not be attributed to Manu. Though he declares that he received the Divine Law from God Himself, the Immutable and Universal, it seems likely that he was actually giving expression to the customs prevalent in his time, and claiming Divine inspiration only in order to add moral force and sanction to what he was laying down. It also seems probable that the points of difference which we observe in the Smritis of Manu, Apastamba (500 B.C.), Narada (400 B.C.) and others were really due to the fact that customary law was slowly changing, and they were each of them giving expression to the usages which were prevalent in his own time. Both Manu and his successors lay down that 'a well established usage will always outweigh the written text of the law.'

Immemorial custom, is transcendent law, approved in the sacred scripture and in the codes of divine legislations. Let every man therefore of the three principal classes who has due reverence for the supreme spirit within him diligently and constantly observe immemorial custom.

*Manu I, 108.*

Mandlik maintained that custom has always been the main source of Aryan Law from the earliest times. Owing



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to the fact that men recorded law and custom, and women had become their helpless dependents, the dice was loaded heavily against them, without protest or resistance on their side.

The rights conceded to women diminished gradually till a time arrived when the lawyers themselves felt that things had gone too far, and that the downward tendency must be arrested. They probably observed that society had become degenerate, and that the hard treatment meted out to woman reflected itself in the general degradation, and therefore felt that something ought to be done to retrieve matters before they became a great deal worse. Narada, for instance, is always inclined to take a more refined and liberal view where women are concerned. He argues that though women are described as dependent on men, they are dependent only in the same sense as the subjects of a king, or sons in a family, or pupils of a teacher; they could enter into contracts and own and manage property. Jaimini (A.D. 600), the author of the famous *Mimamsa Sutras*, was a powerful advocate of women's rights. He argued that, according to the Vedas, women were not slaves or chattels; and if there was anything contrary to this in the Smritis or law books, they must be disregarded. They were entitled to have an equal part in the sacrifices with their husbands; they and their husbands had equal rights in each other's wealth. Vijnaneswara, the author of the *Mithakshara* (A.D. 1100), acknowledged as a leading authority on Hindu Law all over India, was also a reformer, though his strictly logical mind was afraid of making any violent departure from existing usage. Jimuta Vahana (A.D. 1400), whose treatise known as *Dayabagha* is the authoritative text-book in Bengal, was much more modern in his views than any of his predecessors, and under colour of glossing over or commenting on earlier law books, he introduced a number of modifications which give women in Bengal a position which is much in advance of the status they enjoy elsewhere. Usana directs that the wife of a preceptor should be adored, and females generally revered with salutation and rising up.

But the ball which was set rolling downwards by the Law-givers could not be arrested or completely stopped by such hesitating half measures as those for which Vijnaneswara and Jimuta Vahana made themselves responsible. Time and again it has been found that when a social movement has been set on foot by popular leaders, it grows to dimensions and leads to consequences much larger and more disastrous than the founders of the movement ever contemplated. Even if they realized the danger in time, and determined to call back the movement initiated by them, they found, only too frequently, that it had advanced far beyond their power, and that things were bound to get a great deal worse before they could possibly become better. This is exactly what happened as regards the status of women in India. Manu probably imagined that he was giving to each sex its proper due, that he was putting power and wealth into the hands of men who alone could study the Vedas and perform religious sacrifices; while women, who confined themselves to domestic duties, could be safely left in the hands of their male relatives, who were supposed to be guided or illumined by spiritual wisdom. He did not reckon with the selfishness inherent in people who became endowed with more power than they were entitled to. It was this selfishness or thoughtlessness which gradually led to the diminution of the liberty and respect due to woman, till they came to occupy the status that they enjoy at the present day. Manu merely laid down that the earliest age at which marriage could be performed was after the girl had attained eight years of age. He would have been shocked, no less than we are, if he had known that the movement that he initiated would lead eventually to the marriage of thousands of girls under eight years of age and a great number under a year old. He would have been still more astonished if he realized that such early marriages were followed by early consummation, so that girls of eleven and twelve who were absolutely unprepared for such onerous duties had often to enter conjugal life and bear the responsibilities of motherhood.

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Among Brahmins, and various other castes like the Vaisyas who are anxious to raise themselves in the social scale by imitating them, parents become frantic about the marriage of their daughters long before they are ten years old, and spend a great deal of their time, thought and money in arranging to give away their daughters before they are of that age. The number of girls under fifteen that are married is 8,565,367 according to the *Census* of 1921, and there are 396,556 widows under that age at the present moment in India. There are 15,139 child-widows under five years of age.

Again, while *Manu* contemplated intermarriages between men of higher castes and women who occupied a lower position in the social scale, exclusive customs have become so far crystallized, that under Hindu Law at the present day, apart from statutory amendments, a marriage between a man of one caste and a girl of another caste is invalid altogether, and the progeny of such marriage are not entitled to rights of inheritance. The rule indeed became much stricter than this; it was held for a long time that even members of sub-castes under the same main castes could not enter into a valid marriage with one another. When men were not allowed to marry beneath caste they took the law into their own hands and entered into various kinds of irregular relationships, e.g., concubinage.

Perhaps the degeneration of girls or women dedicated to gods into public prostitutes is also due in part to the same set of causes. In theory these girls were not merely dedicated to the gods, but actually given in marriage to them, so that they may have the use of their services in the same way that married men had the use of the services of their wives, but in practice they passed into the control of priests and dharmakarthas, or trustees, attached to the temple, and on the same principle on which offerings dedicated to the gods become available to those about the temple, the women were also considered part of the perquisites of priests and officials.

The anxiety of parents of all castes to dispose of their daughters in marriage at as an early age as possible

has led to many ancillary evils which were not contemplated by the original Law-givers. In every community in which early marriage is a recognized custom, there have always been marriage brokers who make it a source of livelihood to find suitable husbands for the girls whose parents are anxious to dispose of them. The broker, originally meant to be a source of convenience, viz., to bring together parties or families who were unknown to one another, proved only too often that he could be a thorn in their sides. He was the cause of at least as many quarrels and disputes, and as much meaningless or injurious bargaining, as he was of any happiness that might result from the marriage.

The astrologer was another person who was out to make money from the anxiety of parents. When he received a proper fee, he was apt to declare that horoscopes were entirely favourable, though one of the parties might die within a few months, or even days, of the wedding; but where he was not paid according to the scale that he had set for himself, he was disposed to keep apart families which might well have become united by the bonds of matrimony. If the marriage broker and the astrologer were really respectable persons, interested in securing the happiness and well-being of the parties to the marriage, something might be said for their existence; but unfortunately they are often the merest charlatans—the barber of the village, or the soothsayer, or a member of the great family of the unemployed, or the witch doctor, whose wisdom is entirely governed by the number of rupees, annas and pies which he can make out of the transaction.

A further indirect consequence of the anxiety of parents to dispose of their daughters is the introduction of the spirit of bargaining into the negotiations for a marriage, and the exaction of a heavy price for the bridegroom. The bargaining goes on for days, frequently amid mutual recriminations, and belittling of each other's wares. The bridegroom's people consider it the proper occasion for exacting all the money they have spent on the education of their son, and frequently

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stipulate that the bride's parents should also pay for his future education. The bridegroom himself uses his power over his wife to exact from her family all sorts of 'presents' on every conceivable occasion or ceremony.

Legally also the position of women has become a great deal worse since the days of Manu. There are many indications that in early times the wife was not regarded merely as a chattel of her husband. She was entitled to rights of inheritance both from the father and from the husband, much in the same way as a son would be. Several Law-givers speak of a daughter being entitled to one-fourth of the property that a son would inherit from his father, an unmarried daughter being preferentially entitled to a daughter who had been given in marriage, and who had come into wealth in her husband's house. This advantageous position was however slowly taken away from the daughter. She is now legally entitled to maintenance when she is in the joint family house, to such jewels and presents as would make her a desirable party in marriage, and to the expenses connected with the marriage itself. For the rest she should look to her husband and to the members of his family. After she is once married, she has no claim on her father's house unless her brothers and mother are dead; but she may occasionally get presents on the occasion of the birth of her children, or on important ceremonies following immediately upon her wedding. When she is in her father's home she cannot claim money for her education in the same way that a son can. If her father is alive and is a man of advanced ideas, he would cheerfully spend money on the education imparted to his daughters, though even the most enlightened person would not consider it part of his duty to devote the same care and money to their education as to that of his sons. When the father is dead, the daughter can very rarely come into her own in the matter of education. In any case she is not entitled to it as a matter of right, as she cannot, like the son, ask for partition of the family property if she is deprived of the means necessary for study. It cannot be said that she does not enjoy liberty or happiness while in her father's

home. Very often the years of childhood spent with her parents is the only period when she enjoys the maximum quantity of liberty and love ever likely to fall to her lot. She is frequently petted and sometimes spoilt as the result of the excessive affection bestowed upon her before she passes into her husband's home. But even then her movements are greatly restricted and her outlook narrowed by reason of the fact that the son is the person entitled to the full benefits of the paternal home, and the daughter is only entitled to its crumbs.

From the earliest times the Law-givers have laid down the importance of begetting sons who will carry on the lineage and pay the debt due to ancestors. The 'Putra' is the person who releases his parents and his grandparents from the hell to which a sonless family would otherwise be sent. The mother that does not beget a son can be superseded. The *Aiylareya Brahmana* declared that there was no heavenly region for a sonless man. The *Rig Veda* and *Sama Veda* evidence the anxiety of our forefathers for male issue.

There is no place for a man in Heaven who is destitute of male offspring.

*Vasishtha Smriti XVII, 2.*

Through a son he conquers the worlds, through a son's son he obtains immortality, but through his son's grandson he gains the world of the sun. Because a son delivers his father from the world called 'Put' he was therefore called 'Putra' (Deliverer from Put) by the self-existent Svayambu himself.

*Manu IX, 81.*

A barren wife may be superseded in the eighth year, she whose children all die in the tenth, she who bears only daughters in the eleventh, but she who is quarrelsome without delay.

*Manu IX, 837.*

The daughter, on the other hand, is considered a drag or encumbrance on the paternal family, to be transferred at the earliest possible moment to the home of her husband. The fact that so much money has to be spent on her before she can be thus transferred makes her arrival a theme for regret and complaint, rather than of jubilation. When a son is born, the father joyfully announces to all concerned

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that an important member of the family has come into existence; but when a daughter is born, he usually says in certain cases, e.g., among the Rajputs, that 'nothing' has come into existence. There are numerous auspicious ceremonies connected with a son after he is born, and even before he is born there is one ceremony, 'Pumsavana,' which is said to make probable the arrival of a son instead of a daughter, and another which prepares the mother for the arrival of the son. In the case of the daughter, however, there are no sacraments or ceremonies except the single ceremony of marriage, which is said to take the place of all the Samaskaras prescribed for boys. The boy in the house knows that he is a much more important person than the girl, and is not slow to take advantage of his position to lecture his elder sisters and to treat them with contempt. In some castes the arrival of the girl is so much a matter of bad augury that the neighbours turn their noses in all directions to manifest their disgust and indignation, and even the mother herself begins to disregard her infantile needs and requests. If a girl is born after her brother's death, or if soon after her birth a boy in the family dies, she is often regarded by her parents as the cause of the boy's death, and the girl is often addressed thus:

Wretched girl, why didst thou not die instead of our darling boy? Why didst thou crowd him out of the house by coming to us? It would have been good for all of us if thou hadst died and thy brother lived.

Pandita Ramabai, *High Caste Hindu Women*, pp. 18-19.

Another result of the distinction made between the arrival of a boy and that of a girl in the home is that, being considered a superfluous commodity likely to be the source of expense and trouble rather than of benefit to her parents, the girl was sometimes put out of the way soon after birth, as in Persia and ancient Greece. The Census of 1870 revealed the curious circumstance that 300 children were stolen in one year by wolves from within the city of Amritsar alone, all the said children being girls. Whereas in long established states girls are usually slightly more numerous than boys, the Census

returns for 1880-81 showed that there were five million fewer women in India than men. 'A small pill of opium was usually sufficient to accomplish the cruel task; or a skilful pressure on the neck, known as "Putting the nail to the throat" also answered the purpose.' The Census of 1921 shows that out of every 1,000 persons in India 514 are males, 486 are females. The sexes are about equally represented in provinces like Madras and Behar, where there is no tradition in favour of female infanticide, while in the Punjab and North-West provinces, the disproportion is very great, there being 850 women or less for 1,000 men. From Appendix VI to the Census of 1921, we learn that female infanticide was common at one time over a large part of India. Central India, Rajputana, Gujarat and Oudh are the provinces where it is most common, especially among Sikhs, Jats, Khattris, Rajputs and Gujars, so much so that special legislation has been considered necessary to check the practice. Many ancient races seem to have practised it, but India and China are the only countries where the custom still survives.

Another result of the distinction made between the sexes is the imperfect care and treatment accorded to women who are taken ill or are going through a period of confinement. They themselves do not like to be taken to male doctors or to be treated by them. Male relations are only too apt to be careless when women display this obstinacy, and to consign them to the tender mercies of the village barber or medicine man. Race decay appears to have set in as early as the dates of the different recensions of the Smritis, which emphasize the importance of sons and make arrangements for different forms of adopted and illegitimate sons. Other archaic systems of law devote attention to such topics, but the peculiar tone of the Smritis and their increasing elaboration are significant. More cogent, because less conclusive, are the usages that require every maiden to be married and the marriage to take place as early as possible, so that the chances of begetting progeny may be enhanced. (See *Manu* IX, 4, 88-94; *Vishnu* XXIV, 40-41; *Gautama*, XVIII, 20-23; *Narada*, XII, 19-27; *Vasistha*,



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XVII, 67-71; *Yajnavalkya*, I, 64; *Parasara*, VII, 6.) Further decay can be arrested only by robuster ideas of race development, e.g., intermarriage between different castes along selected lines.

There can be no doubt that the deterioration of women all along the line has led to the degeneration of society altogether.

Woman's cause is man's; they rise or sink together, dwarfed or god-like, bond or free.

Sir Henry Maine says :

The degree in which personal immunity and the proprietary capacity of women are recognized in a particular state or community is a test of the degree of the advance of its civilization. Inasmuch as no class of similar importance and extent was in the infancy of society placed in a position of such absolute dependence as the other sex, the degree in which that dependence has voluntarily been modified and relaxed serves undoubtedly as a rough measure of tribal, social and national capacity for self-control. The assertion then that there is a relation between civilization and the legal capacity of women is only a form of the truth that everyone of those consequences, the sum of which we call civilization, is a result of curbing some one of the strongest, because primary, impulses of human nature.

If the need of reform or modification has become urgent or insistent and nothing is done to effect the needed improvement, things go from bad to worse; society rapidly degenerates and becomes an easy prey to more virile races in the struggle for existence. Seeing that the nation of the future comes into existence through women, it follows that as they become physically or morally weaker, less able to resist the onslaughts of disease, more ignorant and superstitious and therefore less capable of taking up or following a courageous or independent attitude in life, their children become weaker and more diseased; they also as a natural consequence become more effeminate and cowardly. Every successive horde of invaders that over-ran India from time to time carried off part of its wealth and destroyed the able-bodied section of the population. It is easy enough to blame the invaders. The guilt lay really at the door of those who sapped the energies of the race by subjecting one half of

the population to unnatural or unrighteous treatment and set Nemesis at work. Nor is there any hope for the race in the future unless the leaders of the nation take existing conditions into account and devise measures for improving them, and the prospective mothers of the race are enabled to face the world with the same courage and confidence with which mothers elsewhere do. Likewise the ravages of disease in this country can be effectively arrested only as and when women are allowed to grow up, live, and perform their functions in accordance with the laws of hygiene and eugenics, and their children, having a better inheritance of health and stamina, are able to resist the advance of disease. As one reflects on the existing situation, the conviction is brought home with irresistible force that the future of the Indian race depends on the future of our women, and it is only to the extent to which the stock is improved, and the general evils from which society is suffering through the neglect of its women are removed, that there can be any real change for the better in future. Women hold a strategic position in the building up of nationhood, and it is impossible to expect that a virile race will spring up and assert itself as against other nations so long as women are kept weak and ignorant, treated as mere drudges in the home and exposed to the perils of maternity when they are still growing children.

## CHAPTER II

### Infant Marriage

The practice of Infant Marriage was not introduced all of a sudden, but must have come into existence gradually in the course of centuries. It is said to be based on certain ancient dicta of Manu.

A man aged thirty years shall marry a maiden of twelve who pleases him, or a man of twenty-four a girl of eight years of age.

*Manu IX, 94.*

Reprehensible is the father who gives not his daughter in marriage at the proper time.

*Manu IX, 4.*

To a distinguished handsome suitor of equal caste, should a father give his daughter in accordance with the prescribed rule, though she has not attained the proper age.

*Manu IX, 88.*

Three years let a damsel wait though she be marriageable, but after that time, let her choose for herself a bridegroom of equal caste.

It will be noticed that the rule, as laid down by Manu, provides at least for one of the parties to the marriage being advanced in age, and able to look after the other. He would certainly have given no countenance to the existing practice under which a boy of fifteen, or even five or two years of age, who is unable to earn his living or think or act for himself or look after his wife, and who for years to come must continue to be dependent upon the senior members of his family, should undertake the responsibilities of matrimony. It will also be noticed that the youngest age recommended by him for a girl being given in marriage is eight years. Here also Manu's rule has been honoured more in its breach than in its observance, with consequences which can be noticed only too patently at the present day. The circumstance that the boy was considered an important factor in the family—a

being absolutely essential to discharge the debt due to one's ancestors—while the girl was neither useful nor beneficial to the family—was the main reason for the anxiety to get rid of the girl in marriage. If she attained puberty or came anywhere near it, it became more difficult to secure a bridegroom in the same caste and sub-caste, and so the girl had to be disposed of at the earliest possible opportunity. Perhaps the peculiar customs and practices of Muhammadans had also some influence in the matter. All risk of the girl being snatched away by violence or as the spoils of war, and made part of a zenana or harem, had to be avoided. In any case the situation is with us, and has come to stay.

According to the Census of 1921, at the present day out of every 1,000 women in India 11 are married before they are five years of age, 32 between the ages of five and ten, and 382 between the ages of ten and fifteen. (See page 153 Census Report.) There are according to the same Census, 218,463 girls married under five years of age, 2,235,150 under ten years of age and 8,565,357 under fifteen years of age. These figures do not include widows, of whom there are 15,139 under five years of age, 102,293 between five and ten and 279,124 between ten and fifteen years of age. The boys too are married equally early. Out of 1,000 males, 6 are married before they are five years of age, 32 before ten and 116 before fifteen. It is scarcely possible to believe these enormous totals, but for the fact that their accuracy is vouched by Government; if they err at all they err on the side of moderation. In Dharbanga district, out of 1,000 women, 103 girls are married when they are below five years of age and out of 1,000 men 64 boys are married. There are other districts which run Dharbanga a close second. The most deplorable feature of the situation is that while educated people are appalled by this state of affairs, and are ready or anxious to effect needed reforms but for the influence of their grandmothers, whole castes and strata are beginning to adopt these practices with a view to imitate Brahmins and raise themselves in caste. A still more curious phenomenon is that though Christians

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and Muhammadans do not believe in early marriage, the infection has passed to them also. Among Muhammadans there are 28,783 girls married under five years of age, and 264,723 between ten and fifteen. Likewise among Christians there are 992 girls married under five, 4960 between five and ten, and 27,420 between ten and fifteen years. It is believed that the girls were not married after they became Christian but before conversion, and subsequently changed their faith with other members of their families, as marriages among Christians is prohibited before the girl is 13. The Census Commissioner quotes an instance of a Hindu girl's marriage being settled before her birth, on the off chance of her being a girl and the wedding being celebrated soon after birth! Early marriage of course is most common among Hindus, and as they form the majority, they raise the total of such married women for the entire population.

The Vedas, to which orthodox Hindus appeal as the final authority for their customs, certainly do not lend countenance to such proceedings. The Vedic rites performed and the Mantras recited show beyond possibility of doubt that a wedding was a Samskara intended for grown up persons. A person can become a Grahasta or house-holder only after he had finished his course of study, and as this may take nine, eighteen or thirty-six years, according to the ability of the student and the course or courses undertaken by him, and had to be reckoned from the period of Upanayana, the age for which was seven in the case of Brahmins, ten for Kshatriyas and twelve for Vaisyas, the bridegroom would at least have to be sixteen if he is a Brahmin, possibly twenty-five, and in some cases forty-three. In other castes he would be still older. It is part of the marriage ceremony that the bridegroom professes to have known the world and become disenchanted with it, and pretends that he is about to start for the forest with a view to become a Sannyasi, when the bride's father waylays and invites him to his home and promises to make him happy by bestowing his daughter on him. The Mantras recited when the bride is being

bathed and decorated for the ceremony refer distinctly enough to the part she has to play at once in the procreation of progeny. The marital contract is said to be complete, according to Yama, after the ceremony of joining hands and walking seven steps together. 'These steps imply deliberation; the taking of the final step implies that the bride has made up her mind and deliberately chosen the bonds of matrimony.' The Mantras recited when the husband joins hands with his wife and water is poured on their joined hands contemplates immediate relationship as man and wife, and so does the ceremony of Garbadana which follows. After the seventh step the bridegroom says, addressing Soma, Gandarva and Agni: 'This girl has passed her virginity. May she have a good son by your blessing. May a male embryo enter the womb, as an arrow the quiver.' The numerous recitals on the fifth day contemplate in unmistakable language immediate conversation between bride and bridegroom. (See Thurston, *Castes and Tribes*, Art. 'Brahmin,' pages 278-295.)

The ancient Rishis, who were virile as well as saintly men, and understood the laws of health and hygiene much better than their descendants of the present day, would certainly have prescribed the severest of fasts and penances if they saw any one adopting the corrupt practices now prevalent. They realized also that though marriage was outwardly a sacrament, in ultimate analysis it was a contract. Therefore they ordained that if any one was deceived or cheated, he could get out of the relationship, and if any fraud or force was employed upon innocent people, they were entitled to be released. It is certainly hard and unfair that persons should be thrust into such a lifelong partnership when they are too young to know what they were about and what responsibilities they are undertaking. According to Hindu Law marriage is an irrevocable relationship; the persons entering into it are at least entitled to ask that their wishes should be consulted before they take such a responsibility on themselves. The Samskara has this degree of irrevocability

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about it, that if she loses her husband, the girl becomes a widow at once and remains one for the rest of her life, though she may not have lived with him even for a day. There are 15,139 child widows under five years of age, 102,000 between five and ten and 2,79,000 between ten and fifteen years of age. According to the views and practices of the present day she is not a person entitled to sympathy for her terrible misfortune; her's on the other hand was the evil star that slew her husband, as she is constantly reminded. She cannot look any one in the face; she has to go through a life of servitude and drudgery exposed to the scorn and contempt of all. Even if she is so fortunate as to live with her husband, she has to go to her husband's home soon after attaining puberty and submit to sexual relationships and the pangs of maternity long before she is completely grown up, and her mind or character have attained sufficient maturity to enable her to take care of younger lives. Marital relationship with girls as soon as they attain puberty is certainly harmful to them and against the interests of the race, and has undoubtedly been the cause of national degeneracy and physical and mental weakness. In olden days, women were much stronger in physique than they are now as they became inured to regular work in their homes, e.g., grinding and pounding, fetching water, sweeping. Gradually ladies in good houses are giving up these health-giving forms of labour, with weakened constitutions, as a result of which they are frequently unable to stand the strain of child-birth or the onslaughts of disease. The sages who laid down the law that girls should be married before puberty had probably some good ends in view, but at the present day the system has proved to be a source of untold evil. Education has become practically impossible, as girls cannot go to school after ten or twelve and in most cases stop study much earlier. The Rishis probably thought that girls married young would make it easy for men to mould them after any fashion they desired; but the system certainly favours slave mentality and weakness of character which repeats itself in aggravated forms in children. Incidentally

early marriage brings in its train evils to which reference has already been made, the brokerage system, the payment of heavy bride and bridegroom price and presents, the system of bargaining, and the anxiety to get rid of girls when they and their parents are entirely in the dark as to the sort of husbands they are going to have. The dharma of women, about which so much has been said, has not been to be companions to their husbands or educators of their children, but to love, to serve, to suffer, perhaps to die, with hope of reward only in other worlds.

Fortunately public opinion, at least among those people who have enjoyed the benefits of a liberal education, and have the moral courage to give public expression to their views, is now willing to admit that Infant Marriage has produced numerous evils, not the least of which is the existence of such a large number of widows who have to be used as drudges, and who in order to escape that fate sometimes run away and take to a life of pleasure. The evil however has not yet been attacked at the root.

The first step should be to provide for the registration of marriages. A simple and inexpensive process like that in use in Scotland or France may well be employed. Both the Parsee Marriage Act and the Indian Christian Marriage Act contain provisions for the preservation of Marriage Registers, which can easily be followed as precedents.

The persons about to be married or their guardians if the parties to be married or either of them are minors, and two witnesses should be asked to proceed to the nearest public official, a Village Munsiff or Magistrate, and enter the transaction in a book kept for the purpose. This alone should operate as an effectual check upon the practice. If the age limit for marriage is fixed at fourteen for girls and eighteen for boys as I suggest later, the parties bringing about the marriage would not be anxious to furnish evidence against themselves by public registration. It should be ordained at the same time, that no wife can claim rights of maintenance and consortium



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from her husband, and no husband claim conjugal rights against his wife, and no issue of the marriage should be deemed to be legitimate, unless the marriage is properly entered in the Public Register. The system would incidentally have the additional advantage of securing permanent and valuable evidence of the marriage which can be made use of in a Court of Law. It is an anomaly that there is usually no record anywhere of a Hindu marriage. The entries in a Kazi's register of a Muslim wedding are of such a flimsy character that a great deal of public time is often wasted on deciding as to their genuineness.

The legislature has hitherto aimed rather at raising the 'age of consent' for consummating a marriage than at dealing with the proper age for marriage itself. The Bills which have been brought forward in the Imperial Legislature from time to time have proceeded on the footing that a marriage can take place at any time, but the parties should not live together as man and wife till they are twelve or thirteen or fourteen. The Age of Consent Act, which was passed into law in 1924, now provides, after a good deal of discussion and protest from various quarters, that the age for sexual intercourse should be fixed at fourteen in the case of girls but the husband should not be punished if he has connexion after thirteen. This reform, though a step in advance of previously existing conditions, does not go far enough. Marriages can still be celebrated when the parties are one or two years of age; if the husband happens to die soon after the marriage, the wife is left a child-widow with no prospects of another marriage, and with the curse and contempt of every member of the family upon her for being the unconscious cause of her husband's death. Further, consummation being a private act, it seems of little use for the legislature to address itself to that act rather than to the public ceremony of marriage, which is the occasion the legislature ought to have in mind. It is impossible to expect the bridegroom to take out a license from a District Magistrate before he first enters into conjugal relationship with his wife. The only other

alternative is for the police to keep a sharp look out to see if any connexion takes place before thirteen. They will have to enter the age of the girl in a register, test the information if they suspect its accuracy, and resort to medical examination of the girl if they find the information untrue. This will be revolting to the girl herself and to every member of the family; the girl will probably be abandoned, whether her husband is convicted or not, and her further life ruined. Baroda has already caught the bull by the horns and introduced legislation prohibiting marriage before the age of sixteen for boys and twelve for girls. The vigorous steps—there are about 4,000 prosecutions in a year—taken to enforce the Act have served to educate the people who appear to be now in favour of it. Mysore has fixed the lower limit for marriage at eight, and for consummation at twelve, and this act too appears to be working smoothly. No serious consequence is likely to result if the lower limit for marriage is fixed at fourteen in British India as a preliminary measure. There ought also to be some legislation prohibiting, as in Mysore, the marriage of a man over fifty years of age with a girl under twelve, as otherwise when the old man dies, the girl is left to bear the horrors of widowhood for a long term of years. If that is not possible, the old man who is anxious to provide himself with a young wife should be compelled to settle upon her for life his own share of the joint family property. Among Muhammadans there is a sensible rule that if a girl is given in marriage when she is a child she has the option of repudiating it when she attains puberty. The Common Law of England had a similar rule. Even under the old Hindu Law if a girl is merely betrothed, the parties can get out of it, if the arrangement is totally unsuitable, as it often proves to be, on careful enquiry. It ought be possible to make a similar rule as regards girls already married when they were children. The husband usually deserts the girl without much compunction when she is totally unsuited to his purpose; but at present there is no similar liberty given to the girl wife. The notion that the girl is a kind of chattel (as Manu calls her)

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to be given away by her father or other paternal relative, needs revision in the light of facts which are of everyday occurrence. Legislation prohibiting marriage below a certain age is likely to remain a dead letter unless penalties are inflicted upon persons who bring about or solemnize such marriages. The Indian Christian Marriage Act imposes a maximum punishment of ten years upon the person who solemnizes marriages prohibited by that Act, e.g., weddings between Christians and followers of other faiths, bigamous marriages, and ceremonies between persons who are below eighteen and thirteen if they are Indians. The Parsee Marriage Act has similar penal provisions. The Purohits who now hasten to celebrate marriages between infants will have a wholesome fear of the law, if they have to pay a heavy fine or face a period of imprisonment. Penalties similar to those provided in the Parsee Marriage Act may be added for punishing cases in which false entries are made, or registers are tampered with or in which there is failure to attest or register the marriage.

## CHAPTER III

### Widow Re-Marriage

One of the problems that call for careful thinking and an early solution is that relating to widows in India. The waste of valuable human material that goes on under our very eyes is incalculable. If the childless widow could be trained and educated to take up an independent position in life as teacher, nurse or doctor or as singer or artist, as she would be elsewhere, what a tremendous advantage there would be to society, but at present an entire community instead of being a help is treated as an intolerable burden.

In every age, according to the Census of 1921, the number of widows is more than twice as numerous as widowers. One in every 1000 women is a widow under five years of age, five out of 1000 women are widows between five and ten years of age, and seventeen out of 1000 are widows between ten and fifteen.

There are 15,139 child-widows under five ears of age, 102,293 child widows between five and ten years, 279,124 widows between ten and fifteen years of ege. The large number of Indian widows, twenty-six millions, according to the Census of 1921, is due, partly to the universality of marriage and the early age at which it is contracted, partly to the disparity in the ages of the husbands and wives, but chiefly to the prejudice against the re-marriage of widows. (See Census Report, page 155.) The communities which marry late, it has been noted, have very much fewer widows, e.g., Animists, Buddhists and Christians.

The lot of the widow who is also a mother of sons is not altogether bad. She is the recognized queen of the son's household. Her sons look after her, and she is entitled to veneration as having brought into existence sons who occupy such a valuable place in the economy of Indian society. The old widow who has lived a life

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of self-sacrifice and virtue, and escaped the perils and temptations incident to her lot, is also a respected member of society. The widow who has given birth to daughters alone, who have not been given in marriage during the father's lifetime, comes in for a great deal of unmerited privation and suffering. The greatest sufferer of all is the child-widow who is held responsible for the death of her husband, and is therefore treated with the hatred and contempt which such a position deserves. Here is an authoritative account of her condition given by a Hindu :

The widow who has no parents has to pass her whole life under the roof of her father-in-law, and then she knows no comfort whatever. She has to meet from her late husband's relations only unkind looks and unjust reproaches. She has to work like a slave, and for the reward of all her drudgery she only receives hatred and abhorrence from her mother-in-law and sisters-in-law. If there is any disorder in the domestic arrangements of the family the widow is blamed and cursed for it. Among Hindus, women cannot inherit any paternal property, and if a widow is left any property by her husband she cannot call it her own. All her wealth belongs to her son, if she has any, and if she has nobody to inherit it she is made to adopt an heir, and give him all her property directly he comes of age, and herself live on a bare allowance granted by him. Even death cannot save a widow from indignities. For when a wife dies she is burnt in the clothes she had on, but a widow's corpse is covered with a coarse white cloth, and there is little ceremony at her funeral.

The English have abolished Sati (Suttee), but alas! neither the English nor the angels know what goes on in our houses, and the Hindus not only do not care, but think it good. Such were the words of a widow; and well might she exclaim that 'Neither the English nor the angels know, and that the Hindus not only don't care, but think it good;' for Hindu as I am, I can vouch for her statement that very few Hindus have a fair knowledge of the actual sufferings of the widows among them, and fewer still care to know the evils and horrors of the barbarous custom which victimizes their own sisters and daughters in so ruthless a manner; nay, on the contrary, the majority of the orthodox Hindus consider the practice to be good and salutary. Only the Hindu widows know their own sufferings; it is perfectly impossible for any other mortal, or even 'the angels' (as the widow says), to realize them. One can easily imagine how hard the widow's lot must be. . . . when to the continuous course of fastings, self-inflictions and humiliations is added the galling ill-treatment which she receives from her own relations and friends. To a Hindu widow death is a thousand times more welcome than her miserable existence. It is no doubt this feeling that drove in former times many widows to immolate themselves on the funeral pyres of their dead husbands.

DEVENDRA N. DAS, *The Nineteenth Century*, September 1886.

Bhagat Ram, Secretary, Jiv Daya Sabha, Punjab writes :

The widows' lot is a very hard one. To see the bright ornaments and garments suddenly removed and sometimes the head also shaved is a terrible shock. The very presence of a widow in a Hindu family is often looked upon with disfavour and for any misfortune that may betake the family the blame is usually laid upon her. What is still more pitiful is that many a time the entire personal property of the widow is illegally taken away from her by her husband's relations under some pretext or other.

Pandita Ramabai, who devoted her life to the service of the neglected widow, draws an even more gruesome picture, too long to quote.

The natural cure for all this misery would have been to allow the child-widow to marry again. In any other country, and even in India among Christians, Muhammadans and Buddhists, that would be the solution adopted, but the Hindu religion is supposed to be unfavourable to the re-marriage of Hindu widows. When we look into the texts, however, we find that this is not the case. No doubt Manu says that even when her husband dies, the duty of the faithful wife is not at an end. 'Let her rather emaciate her body by living upon pure flowers, roots and fruits, but let her not, when the husband is dead, even pronounce the name of another man; longing for the unparalleled virtue of those who remain steadfast to one husband, let her lead a life of austerity, observing strictly the rules of continence and foregoing all sensual pleasures until she dies.' He also says elsewhere, 'A second husband of a good woman is nowhere prescribed.'

It is clear that when Manu sang these slokas he was not thinking of child-widows at all or of widows who were left helpless on the death of their husbands. A woman who had lived for a reasonable time with her husband and begotten children of her own would even now willingly and cheerfully carry out the precepts of Manu. A great wrong has been inflicted on Indian womanhood by subtle lawyers applying a rule made for mature or middle-aged women who had lost their husbands, to infants who were lisping or at play when they became widows. It may at

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the same time be noted that Manu would give very different treatment to the widower. 'Having thus at the funeral given the sacred fires to his wife who dies before him, he may marry again, and again kindle the nuptial fires.' 'Having taken a second wife he must dwell in his own house during the second period of his life.'

Even in Manu and other Law-givers there are indications that he meant widows to re-marry or have offspring without re-marriage, while other Law-givers expressly ordained re-marriage for widows. Parasara, an ancient Rishi, has a text to this effect (IV. 27): 'Another husband is ordained for women in five calamities, viz., if the husband be unheard of, or be dead, or adopt the order of an ascetic, or be impotent, or become an out-caste.' It may be urged that Parasara was a very early Rishi, but we find the same text reiterated without alteration in Narada (XII. 97), a sage who was always inclined to adopt a commendably modern and reformed way of thinking. Pandits of the die-hard variety try to get over these texts by suggesting that Parasara and Narada were referring to girls who were betrothed rather than to girls who have been properly married. There is nothing however in the texts to suggest such a gloss. They also advance the special pleading that the advice of these two Law-givers was not meant for the Kaliyuga. Unfortunately for them, Parasara at least expressly professes to lay down the law for the Kali age, and his pronouncements should therefore be regarded as of special authority for the present day. They would also contend that, Manu being the first among Law-givers, these texts should be deemed to have been over-ridden by his text that the re-marriage of a widow has never been prescribed, but they forget that Manu himself speaks of re-marriage in several places.

He says: 'When a woman being forsaken of her husband or becoming a widow voluntarily marries again and gives birth to a son, that son is called "Punarbhava" or the son of a re-marriage' (*Manu* IX.) Such a son is deemed to be on the same footing as other sons, both for the purpose of making funeral offerings and also for the purpose of inheritance.

Manu would go further and say that 'When a woman takes a second husband when her first marriage was not consummated or really returns to the first husband after having gone over to another, then with him the marital ceremonies may be again solemnized'. (*Manu IX.*) This text appears to contemplate three marriages, a marriage with her first husband, a second marriage with another if the first was not consummated, and the third with her own first husband if she was disposed to return to him.

A still stronger argument in favour of re-marriage could be drawn from the practice of Niyoga, or appointment, which prevailed extensively in ancient India and continued to do so for centuries. As among the Jews so among the Hindus, a wife who had not borne children to her own husband when he was alive may after her husband's death be asked to submit herself to her husband's brother or other agnatic relation in order to bear progeny who will offer sacrifice to her deceased husband. Manu prescribed the exact manner in which such an appointment should be made, and gives special rights of inheritance to the son who may be born as the result of such a union. 'On failure of issue by her husband, a woman who has been authorized may obtain, in the proper manner prescribed, the desired offspring, by co-habitation with a brother-in-law or some other sapinda of her husband.' The succeeding slokas discuss in detail the question whether a person may thus be appointed to beget one or more sons, and it is after these that the text occurs that the re-marriage of widows is nowhere prescribed. Other ancient sages like Parasara, Harita, Gautama also describe elaborately the practice as it existed in their day centuries later. Even Vijnaneswara and Jimuta Vahana discuss the rules relating to Niyoga at great length, but it is thought that the practice had fallen into disfavour by their time. The fact is that it is of little use for die-hards of the present day to rely on ancient texts, which merely describe the customs and practices as they existed in Manu's time. The ancient Law-givers were so deeply interested in the generation of male progeny who would pay the debt due



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to their ancestors that they recognized as valid not merely wedding ceremonies which would now be deemed to be binding, but several forms like the Rakshasa, the Paisaca, etc., which in the strict sense of the term are not marriages at all, but merely forms of rape or seduction, as Mayne calls them, though they may have been regularized later by performance of ceremonies.

There were eight forms of marriage in ancient India—Brahma, where the father-in-law gives his daughter as a gift to a learned Brahmin ; Daiva, where a similar gift is given to the priest who officiates at a sacrifice ; Arsha, where the father-in-law receives in exchange for the bride two pairs of kine for sacred uses ; Prajapatya, where the bride's father gives his daughter to a suitor who asks for her hand, so that they may perform together ceremonies and religious duties ; Asura, where the bridegroom gives as much wealth as he can to the bride and her relatives and takes her voluntarily ; Gandarva, contracted for amorous embraces, proceeding from sensual inclinations ; Rakshasa, or seizure of a maiden by force from her house when she weeps and calls for assistance ; Paisaca, where the lover secretly embraces the damsel either while sleeping or when flushed with liquor or disordered in mind.

Likewise the ancient Law-givers recognized twelve orders of sons, all of whom would be entitled to offer oblations and inherit property, but several of whom were not sons in any sense in which we use the term at the present day.

Manu also speaks of twelve kinds of sons :

1. Son by married wife of same caste, or Aurasa.
2. Son by married wife of next lower castes, or Parasava.
3. Son by married wife two or three degrees lower.
4. Son by twice born men who have not assumed the thread.
5. Son by a wife who conceived and delivered before marriage, or Kanina.
6. Son purchased, or Kritaka.
7. Son of an appointed daughter, or Kshatraja.
8. Son of a woman who conceives to another with her husband's permission, he being impotent, or Kshatria.
9. Son of a woman pregnant at marriage with or without bridegroom's knowledge, or Sabodha.
10. Adopted son, or Datrika.
11. Deserted son, received as such by a putative father, or Apavidha.
12. Son of a re-married woman, or Punarbhava.

Though Manu describes the customs and practices of the day as he found them, he occasionally pronounces, strongly enough, his own opinions on them. Likewise we of the present day have to exercise our judgment or discretion in sanctioning those usages which are likely to be useful or helpful, and condemning those with which savour of vice or crime.

The Hindu Widow Re-marriage Act was enacted in 1856 as the result of the sustained agitation carried on

by Iswar Chandar Vidyasagar and other reformers who sided with him, but to a large extent it still remains a dead letter. Very few people venture to marry widows or give their widowed daughters in marriage because of the social opprobrium that they have to face. Though the ancient Law-givers did not prohibit re-marriage, but on the other hand may be said to have favoured it, still the ignorant public blindly believes that the Sastras are against it and pillory with contempt the people who re-marry. Late Smriti-writers who, under pretext of commenting on the recognized lawyers, introduced endless subtleties and corruptions which miss the spirit behind the old texts, must bear the blame for the evils we see around us. Many cases may be cited in which people who have re-married have had to live secluded lives and have been cut off from all social intercourse with fellow members of the same caste. One case has come to my notice where a man who married a young widow was treated so badly that he preferred to commit suicide to living in a state which involved so much oppression from his neighbours. In *Venkatachala v. Subbaroyadu*, 13 Madras, 293, the *prima facie* right of a Brahmin to enter and worship in temples was denied to plaintiff, as he had become a pathitha or out-caste by marrying a widow and forfeited his status in the eyes of the community.

The Hindu Widow Re-marriage Act XV of 1856 is an enabling Act which provides that any widow may marry again with the usual ceremonies; the marriage will be treated as valid in law and the offspring of such a marriage will be regarded as legitimate. It lays down, however, that from the moment of her second marriage she ceases to have any interest in the family or property of her first husband. The same applies to the children of her second marriage. Though such children should have no claim on her first husband's estate, it would have been fairer to the widow to give her some fraction of it, as its absence acts as an effective bar against the right of second marriage.

One or two interesting questions are also left open,

and there has been a great deal of controversy regarding them.

One is whether this rule that a widow who remarries has no claim on her first husband's property applies to castes like the Marava and the Keli, in which remarriage has always been allowed. Three of the High Courts, viz., Madras, Bombay and Calcutta, have decided that when a widow belonging to such a caste marries, she forfeits all her rights in the family of her first husband, while Allahabad takes a different view. (*Murugayi v. Viramakali*, 1 Madras, 226. *Ranchor v. Bai Vakhat*, 11 Bombay, 119. *Kashul v. Ramsuran*, 22 Calcutta, 589. *Gours Charam v. Sita Patni*, 14 O.W.N, 346. *Muha v. Pertab*, 32 All., 489.)

Another problem relates to her rights of inheritance to persons other than her husband. (*Harasaram v. Nandi*, 11 All., 330.) There can be no doubt that under the Act, a widow who marries again cannot claim any rights of maintenance or inheritance from the property of her first husband, but why should she not inherit to a son who was born of the first marriage and who was alive at the time of her second marriage? It is admitted that if he too died before her second marriage and she inherited property from him she is liable to be divested of it on her re-marriage, but if the son dies after her second marriage, why should she not inherit to him? The majority of a Bench in Calcutta held that she could. (*Okhorah Soot v. Bhoden*, 10 W.R., 35.) Bombay and Madras have followed this view. (*Chamar Haru v. Kast*, 29 Bombay, 388. *Lakshmana v. Siva*, 28 Madras, 425.) Again when the widow in question inherits as a daughter or sister and not in her capacity as a member of the first husband's family, the fact that she is a widow who has re-married ought to make no difference. Property that she might have obtained absolutely as *Stridhanam* or otherwise ought not to become lost to her by reason of her second marriage.

An interesting side issue has arisen in connexion with Dayabaga Law prevalent in Bengal. There a widowed childless daughter does not inherit to her father, as she cannot thereafter beget a son who can make the funeral

oblation to her grandfather. If now she re-married under the Act before the death of her father she becomes an heir, as she is likely to have male issue and has therefore to be put under the same footing as a widowed or other daughter who has already borne sons.

The provision now permitting the re-marriage of a widow does not however cover the whole ground. At the best the chances of a widow obtaining a second husband are everywhere more slender than a virgin's. In a country like India where widow re-marriage is still under the deadly blight of social disfavour, not many men could be found bold enough to go through the required sacrifice. Then, too, the Act made a blunder in listening to orthodox opinion and divesting the widow of her estate as soon as she remarried. It is not often that fathers give dowries to widowed daughters, and worldly considerations cannot altogether be ignored. The reluctance of widows, owing to the sway of religious and altruistic motives, and increasing asexualism due to close or endogamous marriages, has also to be kept in mind.

Provision would have to be made for the widow both from the property of her husband and of her father, so that she may be in a position to earn respect and an independent livelihood without having to serve unfriendly relatives as a drudge all her life; but to this I shall return later. Though the Hindu Widows Re-marriage Act became law in 1856, it has not been made use of to any considerable extent, as it seems to have been forced through by ardent reformers, well in advance of public opinion. I do not know whether, even at the present moment, some positive encouragement should not be held out by the State, with a view to encourage or show its appreciation of such marriages. The State, for instance, may undertake the education of the first issue of such a marriage, be it a boy or girl, in its own schools and colleges. Elderly widowers appear specially to have a fancy for young girls as their second wives, a procedure which is not good morally or physically for them, or for the girls or their issue. If widows are given the right to inherit shares

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both from their husbands and their fathers, as I suggest elsewhere, they would have a better chance of getting second husbands. In the chapter on Infant Marriage I have recommended that an elderly widower marrying a young girl should be compelled to make a marriage settlement in her favour. With a view to encouraging widowers to marry widows (whose first marriages have not been consummated) the former may be exempted from the liability to settle such property where they marry widows already provided with an inheritance.

## CHAPTER IV

### Marriage Expenses

There is a well-known saying in Tamil: 'If a man has as many as five daughters, even if he is a prince, he is sure to become a pauper.' Another saying has it that there are two difficult experiences in life; one is to build a house for oneself; the other is to get one's daughter married. Both these *mots* have reference to the expense and anxiety involved in connexion with the marriage of daughters. If there is any single custom in this country, which has reduced individuals and entire families to pauperism, it is undoubtedly the extravagant expenditure incurred in connexion with marriages.

Indian human nature apparently requires a certain amount of ostentation and display on ceremonial occasions. There is no important function, be it the welcoming of a visitor, or the speeding of a parting guest, or one of the numerous ceremonies prescribed by custom or sanctioned by religion, that does not involve a certain amount of show, and corresponding expenditure of an unproductive character. The *ne plus ultra* or extreme limit of such ostentation and expenditure is usually associated with the marriage of sons and daughters. Courts of law have gravely laid down that expenditure on a Samskara like marriage is not only justified but constitutes a legitimate burden upon the family resources. Priests and teachers of religion are apt to invoke and recommend expenditure, rather than discourage it. When however one sits down, and considers why such expenditure should be incurred, when moreover one compares conditions in India with those obtaining elsewhere, one is bound to admit (if he is a reasonable being) that three-fourths of the money usually spent on such occasions is waste of the most ridiculous and unmeaning character, leading families only too often on the downward path to ruin. No doubt a wedding should be an occasion of family

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reunion and rejoicing. The good-will and blessing of all near relations have to be bespoken in order that the newly married couple may start their joint life smoothly and happily. Perhaps also a certain amount of ritual or ceremonial is justified on such occasions. If the contract of marriage is reduced to its simplest elements, and treated as an ordinary transaction, like the purchase of a house or the commencement of a trade partnership, it is apt to descend to the level of a Gretna-Green or runaway marriage little different from an elopement. Women in all ages have been specially interested in investing the ceremony with a certain amount of dignity and solemnity, in order to assure to the bride a secure position and fair treatment in her new home of which she cannot be hastily deprived. But the requisite ceremony and blessing can be secured by simpler means than those now in vogue. Instead of the wedding being a source of joy or blessing to the parties concerned and to their near relations, it is at present the harbinger of intense anxiety for a number of days or months preceding the event, culminating in something approaching torture, during those three or seven days when the actual ceremonies are being concluded. The unfortunate parent is so anxious to discharge his dharma and to be considered generous, that he would gladly spend the savings of a life time or the salary earned during many months in order that his daughter may be married, to the complete satisfaction of his neighbours. A person getting an income of Rs 50 a month from landed property would think nothing of spending Rs 500 to Rs 1,000 on his daughter's marriage. In the meanwhile not one in a hundred couples knows or cares to know the meaning of the ritual or ceremonial which constitutes the marriage. Not one in a thousand has any chance of realizing the importance or solemnity of the relationship that is being initiated, or bestowing upon it the thought or care or prayer that ought to attend the commencement of such a life-long union. One may go further and say, without exaggeration, that not one in a ten thousand knows the meaning of the verses or mantras recited at a wedding or follows it or realizes its spirit.

It is impossible to understand why there should be so much ostentation, or such anxious preparation and unlimited expenditure far beyond the parent's means, when the result of it all is to prevent the parties most concerned, viz., the bride and bride-groom, from realizing what it is they are doing, or entering upon the partnership in the spirit of seriousness in which it ought to be begun. Many a parent will boast about the enormous sums of money that he spent upon his daughter's wedding, about the things that he purchased and presented, and the stuff and paraphernalia that passed through his hands at the time of the marriage; or if he is a sensible man bewail the waste, the worry and the anxiety, rather than sit down and take effective measures against such wild ostentation. In addition to the actual sums spent on the marriage ceremony itself, the money that changes hands as bride or bride-groom price, the commission paid to the broker who is a common institution in North and West India, the jewels and other paraphernalia that have to be given to the bride and bride-groom, and the numerous presents bestowed upon relations on such happy occasions, amount to a ruinous total. In a great many instances, the money that is lavished on a marriage is borrowed at extravagant rates of interest from moneylenders, and ancestral property mortgaged for the purpose which scarcely ever gets out of the grasp of those sharks. There are not wanting enlightened persons who regret all this waste and weariness, and resort to the nearest temple or to a quiet village in the district, in order that the ceremony may be carried out in simple solemnity instead of with extravagant ostentation. But such sensible examples are few, and unfortunately they are not copied by the masses for whom the lesson is intended.

In the first place, there ought to be, as I have already suggested elsewhere, a registration of the marriage before some competent authority, in order that there may be permanent valuable evidence of the date of the wedding, and of the names of contracting parties and witnesses.

In the second place, though Courts may continue to regard marriage as a Samskara and treat it as an occa-



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sion justifying some expenditure, some strictness should be employed in limiting that expenditure and fixing the amount which is decreed as reasonable or proper.

The system by which neither the bride, nor the bridegroom, nor their near relations understand what is being said or recited is certainly an anomaly unsuited to modern conditions. When a person enters into any other contract, important or otherwise, he tries to understand what he is doing and to negotiate with open eyes. There ought to be some simple liturgy in the vernacular of the people or some language which the bride and bridegroom understand, and they should make their invocations and mutual promises with a knowledge of their significance.

Seeing that the marriage couple are being newly started on their way through life, it seems absurd to expect them or their parents to bestow presents on relations near and far and thus greatly enhance the expenditure attending a marriage. A much more reasonable arrangement would be for neighbours to display their good-will towards the married couple by giving them either money or gifts which will help to start them on their way.

It is thought and rightly thought, that the jewels bestowed upon the girl by her parents, or her husband, or relations, at the time of a wedding are her own peculiar property or *Stridhanam*, which should be available to her at a time of distress or want. It must be admitted that jewels are certainly not the most desirable method of investing a fund meant to serve such a purpose, as they are so often kicked or kissed out of the wives, and are apt to prove a source of danger or annoyance to them when they go abroad. A permanent method of investing the money or dowry given, say in a house or land or public funds, seems more suitable for ensuring a regular source of income to the bride meant to be benefited by the gift. It is perhaps too soon to expect a radical change in this direction, but it is certainly desirable that half or three-fourths of the money now spent in useless ostentation at the time of wedding should be saved up, and bestowed upon the girl as her *Stridhanam*, so as to

form the nucleus of the property that she is going to have as her own, and constitute an insurance against a season of distress or penury.

A marriage settlement is a device adopted by English lawyers, from the most ancient times, in order to secure property given to her at the time of marriage from being taken away from her by force or fraud. The married woman herself is restrained from alienating it except for specified purposes; it is usually vested in special trustees, so as to make her an independent and self respecting personality in the eye of the law. It is time that a father who bestows property on his daughter at the time of her marriage, or a husband who similarly gives her an estate in consideration of the relationship, draws up a close settlement on English lines, making the income available to the married woman but rendering the corpus inalienable by herself or others.

It has always been a recognized principle of taxation that luxuries, or matters on which money is apt to be wasted, should be assessed for public benefit. A heavy tax is imposed in France on all theatres and music halls, and the proceeds are devoted to the maintenance of public hospitals. There is no reason why the legislature should not provide that out of the sum expended on a marriage two-thirds or three-fourths should be settled on the wife for her benefit, and the benefit of her children, and only the balance spent on wasteful ceremony. With a view to discourage waste and extravagance, ten per cent of the money spent on the actual ceremony should be made payable to the state. This is the only way in which ruinous waste can be restrained. Courts should lay down that expenditure exceeding three months' income is not justified; and that in no case should money be borrowed for marriages from Sowcars or moneylenders. Such loans should be declared irrecoverable, the same as expenditure for dissolute purposes; the person who spent the money should be personally held accountable for it.

## CHAPTER V

### Bride Price and Bride-groom Price

Fortunately it is not in all castes or through the whole of Hindu society that the spirit of bargain and sale exists. In practice it is confined to those sections or castes which practice the system of early marriage or infant marriage, and are anxious to dispose of their daughters at as an early age as possible. The *Census Report* of 1911 has, however, this passage :

As a rule marriage is by purchase. The high castes pay for the bride-groom and the low castes for the bride, but there are many exceptions. Some even high castes such as the Havic Brahmins of Bombay pay a bride-price, while the low castes such as a Bhangi sweeper caste of the United Provinces pay the bride-groom price.

In recent times, the bride-groom's price has been affected very largely by the educational qualifications of the bride-groom. A Kayasth graduate in Bengal usually fetches from Rs 500 to Rs 1,000 ; but there are said to be instances of as much as Rs 10,000 having been paid. Even where the bride is usually bought, the parents of a girl are willing to pay for an educated bride-groom (see *Census Report of India, 1911, Volume 1, page 257* for other instances of the practice).

Even in this matter, the practice recommended by the ancient Rishis is very much nobler than the habits and practices of the present day. Only four forms of marriage were considered suitable for Brahmins, viz., the Brahma, the Daiva, the Arsha and the Prajapatya ; and in all these the spirit of bargaining is conspicuous by its absence. The bride's father admires the young man who has become learned in the Sastras, or is actually engaged in performing sacrifices on his behalf, and makes a free gift (Kanyadanam) of his daughter, with or without presents. No doubt the Asura form (where the bride-groom receives a maiden after giving as much wealth as he can afford to her kinsmen) was

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prevalent in ancient times, but it was recommended as suitable for Vaisyas, rather than for the higher castes. There is an express text in Manu, that only curses would alight upon the father who makes money by selling or disposing of his daughter in marriage. In ancient days in India, as in all primitive countries, the practice of purchasing brides as well as the custom, still more primitive, of carrying them off by force, was widely prevalent. The Law-givers take things as they find them and merely describe them as contemporary practices. When it comes to giving their own personal opinion on these forms of marriage they do not mince matters, they hit out in a straightforward manner, condemning them altogether as too ignoble for spiritually minded men. How people who base their faith on the ancient Vedas could encourage present-day practices, which are in direct contravention of the noble precepts laid down by the ancient Rishis, it is impossible to understand. Any person who has had to arrange for the marriage of his daughter will be ready to confess, with shame and sorrow, all the humiliations to which he was put, and the financial loss that he sustained. Throughout his life the father lives the simplest and most austere and self-sacrificing life in order to save money, and at the end he usually finds that all his savings are not enough, and that he has to borrow and pledge his future credit for years to come in order to satisfy the greed of the bride-groom's party. Every Indian who reads this passage will be able to supply, from his own experience, instances where parents have been hurried on the road to ruin or insolvency, by the extravagant demands made in the shape of bride-groom price. (See Risley, *Peoples of India*, chapter on 'Caste and Marriage' for details.) The case of Snehalata which was reported in the papers a few years ago will be fresh in everyone's mind; this young girl was so touched by the poverty which she was bringing on her parents in their anxiety to dispose of her in marriage that she wrapped herself in clothes soaked in kerosine oil and burnt herself to death. Constantly we read in the newspapers, as well as in novels and in humorous

publications, of the extremities to which parties are willing to go in demanding a bride-groom price, and enforcing it in the mercenary spirit of a Shylock. The defence usually put up for the practice is that a bride-groom's father has incurred expenses in educating his son, and is entitled to recover the money spent by him when the opportunity allows him to do so. Do only parents of those castes who insist on a bride-groom price put themselves to expense in order to educate their sons? All parents throughout the world have sufficient interest in and affection for their children to confer the benefits of education upon them, and most parents are only too willing to go through extremes of self-sacrifice, in order that their sons may obtain a proper course of training. They do this partly for their children's sake, that they may have a better position in life when they grow up than they themselves held, and partly in order that they may be able to help or maintain themselves in their old age. Money spent on children's education is a form of prudential investment for the advancement of a son; at the same time it is an insurance against the parents' old age. The vast majority of parents living in the world do not consider that at the time that they are arranging for their sons' marriage they are entitled to recover what they have spent on the son from the bride's party. If they were going to lose their son altogether, and have nothing more to do with him, there might be something to be said in favour of the practice; but according to the law relating to the Hindu joint family, the son continues to live with his father, and to throw his earnings into the family hotchpot. Nothing but harm could result from the continuance of the practice; but though violent speeches are made from the platform, and equally violent lucubrations appear from time to time in the press, the practice appears to grow upon people rather than to diminish. To make matters worse, the bride-groom often insists on a second sum of money at the time of his nuptial marriage, and stipulates in addition for suitable presents on Deepavali day, New year's day and other auspicious occasions. There obviously can

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be no blessing on a marriage which is arranged solely or principally with a view to the money to be made therefrom, irrespective of the suitability of the bride to the bride-groom, her temper, her character and other like important considerations. It proceeds on the mercenary footing that any girl is good enough for any boy, and all unequalities can be adjusted by payment of money by the bride. While the Vedic Rishis held a noble idea of marriage, that it was a holy Samskara intended for the joint performance of sacrifice and the perpetuation of the race and its spiritual ethos, by the begetting of offspring who would keep alive the sacrificial fire and the life of austerity and prayer, their present-day descendants decide on such irrelevant and entirely worldly considerations as money, good omens, or the worldly position of the contracting parties, and their families. In these and other matters the present generation has merely to go back to the law and the prophets, and not to destroy them by soulless bargaining. To go back to the Vedas is no unworthy ideal.

The Sardars of Rajputana have formed themselves into an association to put down several of the evils connected with marriage. The ceremonies on which money may be spent have been agreed upon, and it is not permissible for any funds to be wasted on other ceremonies like betrothal and musical entertainments. The quantum of money that could be expended has also been limited by agreement binding on all Sardars. The age of the contracting parties has been defined. Risley reports that the strict enforcement of these rules by the President of the Sabha has effected a progressive improvement.

The Namasudras of Bengal have not only passed a resolution that a person marrying a son under twenty to a girl under ten should be excommunicated, but are strictly enforcing it, with the result that the marrying age is steadily going up. Likewise it has been ruled that no Namasudra parent should take more than Rs 30 for a daughter, and if he is well off should take nothing at all. The practice of disposing of brides for a price is therefore at a discount.

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There is no reason why communal associations should not be formed everywhere on lines like the above for putting down with a strong hand unhealthy or non-eugenic practices now prevalent in the caste.

## CHAPTER VI

### Marriage Brokerage

The practice of employing brokers, unconnected with the parties to a marriage and their near relations, is undoubtedly due to the anxiety of parents to get daughters off their hands as early as possible. Certain important castes have rules of exogamy, endogamy or hypergamy, which greatly limit the choice of a prospective bride or bride-groom. The stringent rules as to prohibited degrees which prevent a person from marrying another who belongs to the same Gothra or is nearly related to him, have also probably something to do with the practice, as matches have to be arranged between families which were previously unknown to one another, and which have to be brought in touch by a common intermediary, viz., the broker. In the Presidency of Bombay we learn from Steel (*Law and Custom of Hindu Castes*) that persons negotiating marriage, if successful, often receive from Rs 100 to Rs 1,000 per transaction, according to the difficulty of the bargain and the circumstances of the parties. In Bengal the Ghataks have been in existence for at least 500 years, and are said to make even larger gains by negotiating marriages.

It is a general principle of law that all marriage brokerage contracts, or contracts for the payment of money or conveyance of property or performance of any act, on condition of the procurement of a particular marriage are void on the ground that it is immoral to allow marriages to be made the subject of mercenary speculation. Even a father is not allowed at the present day to make money by selling or disposing of his daughter in marriage. A suit would not lie to recover money due under a bond executed in favour of the father of a girl in consideration of his giving his daughter in marriage to the defendant (*Kalvakunta Venkata v. Kalavakunta*



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*Lakshmi*, 32 Madras, 185). The well-known English case of *Herman v. Charlesworth* lays down that all agreements to procure marriages for reward are void. Marriages ought to proceed, if not from mutual affection, at least from the free and deliberate decision of the parties or their guardians, with an unbiassed view to the welfare of the bride and bride-groom. A contract whereby a guardian, whether natural or appointed, agrees to dispose of his ward in marriage for his own personal or pecuniary gain is not enforceable in a Court of Law (15 C.W.N., page 147). The rule rests on the broad principle that where any one is in a fiduciary position with respect to a person and is bound to exercise skill, care and judgment for the benefit of that person, he must not accept a reward from some other individual for the exercise of his powers in a particular way, whether the course taken is, in fact, beneficial or the reverse to the person whose interests he is bound to protect. Where the object of a contract is to procure, by corrupt means, the guardian's consent to a desired marriage, and is therefore a bargain and sale of the minor in marriage, such agreement is void as being opposed to public policy (112 P.R., 8892). On this principle, a Hindu mother was held not entitled to recover a sum of money definitely promised to her in consideration of her consenting to give her daughter in marriage to defendant's son. Similarly, contracts to pay money to the father for disposing of his daughter in marriage have been held to be void, and opposed to public policy. It follows that, where the match maker is a stranger, it is absolutely void. An agreement to pay a stranger a certain sum in consideration of his negotiating a marriage is void (3 M.L.J., 132). An agreement to reward a Hindu for procuring a marriage is void, as being contrary to public policy (17 Madras, page 9, 13 Bombay, page 131). Though, under the law of contracts, a promise to pay money to a broker in future is thus unenforceable, there is at present nothing to prevent a broker from claiming his money, and taking it in cash, when he has completed his business. There ought to be some remedy for this state of affairs. There can be little doubt that

the intervention of a broker produces a vast deal more of mischief than good: he very often conceals facts which each party should know, or makes serious misrepresentations, with a view to complete the contract as early as possible and earn his reward. He is the person who usually arranges for payment of money when the contracting parties are not equal in status; but for his interference, respectable parties would scarcely like to face each other with a demand for money, while arranging such a sacrament as the Samaskara of marriage. As a rule, endless quarrels and recriminations are engendered when a broker intervenes. There should be some penal or other provision which prevents third parties from interfering with marriages for personal gain or reward, in the same way as a person is now punishable for the offence of procuring a girl for improper purposes, or for procuring a house for use as a brothel. A person who for reward brings about a marriage should be penalized by law. The postponement of the age of marriage already advocated in these pages is, it is anticipated, also likely to operate as an effective check on the procurement of marriage by third parties for reward, without any thought of the suitability of the parties to one another.

## CHAPTER VII

### Monogamy

As every one knows a Hindu can marry as many wives as he likes, though, in practice, he usually limits himself to a single wife, unless he is a Raja, or the Indian equivalent of a millionaire, who could afford to divide his favours among a plurality of wives. Muhammadan Law also sanctions four wives for every individual, and as many concubines as he may fancy. A Buddhist is allowed to have more wives than one, if the first wife proves barren or quarrelsome or ineffective for one reason or other. This state of affairs has arisen in India as a result of a long history which has left traces in the constitution of present-day society. It is thought that, at one time, promiscuity was the order of the day. The story of Satyakama in the *Chandogya Upanishad*, and the loose practices as regards sexual relationship implied in Manu, clearly indicate that no cut-and-dried rule had come into existence, defining or limiting the sacrament of marriage. This may have been followed, for a short period, by a stage of polyandry, which is illustrated by the case of Draupadi, and which has left its traces among the people of Ladakh in Tibet, and among certain communities in Malabar. In some castes in India, a woman married to a brother is deemed to be the common property of all the brothers, but this system of polyandry has only continued in places where a limit had to be put to the growth of population, and the slender means of livelihood available had to be conserved for later generations as they grew up. The Nambudri practice of the eldest son of a family alone being allowed to marry in his own caste, and the rest being given liberty to roam at large among other castes, is also due to the same set of causes. It was well known to the early Rishis that polyandry is apt to be a fertile source of quarrels, and was moreover likely to lead to infertility in females. They set special store

by the propagation of the species, and especially of male progeny, and therefore they not only discouraged polyandry but encouraged polygamy, which continues to be the law up to the present day. This may be said to be one of the few departments of law in which Indians of the present day can be said to have remained loyal to the teaching of their Rishis, and to have even improved upon it, by gradually favouring monogamy in practice. There can be little doubt that the practice of polygamy greatly weakens the legal position of women, and places her at the mercy of an over-bearing husband. Any assertion, on her part, of her right to equal or favourable treatment is apt to be met by the taking of another wife, on whom more favour is bestowed than upon the superseded wife. When the law allows a plurality of wives, it is not possible to endow the wife with a definite portion of her husband's property in the event of his death, as the Indian Succession Act does. According to that law the widow gets one-third of her husband's property if she has children, and half if she has neither children nor lineal descendants.

There is need, however, for a set of rules which give equality in the eye of the law as between different wives. Muhammadans have a wise provision that each succeeding wife is entitled to the same allowances and comforts that were given to the first wife, thus preventing gross inequality being enforced among different wives, according to the favour they temporarily enjoyed in the eyes of their husbands. A provision like this, that if a man practised polygamy he should put all his wives on the same legal footing, and leave them exactly in the same position at his death, would be a valuable addition to the Statute Book, and would discourage hasty second marriages. In a case in which a man has no sons who could be depended on to take care of their mothers, there ought also to be a provision that, on the man's death, half his estate should go to his widow or widows, to be divided equally among them if there are several of them.

Successive Conferences have resolved that there should be the same standard for men and women; in

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other words, if men exercised their right of discarding their wives or superseding them, women should be endowed by law with similar rights. Such bold assertions are significant signs of the times, but it is scarcely possible to suggest that public opinion is ripe for a radical alteration of the law along these lines. The right to divorce husbands which has been similarly claimed is dead against the principles on which Hindu society rests, which regard marriage as an irrevocable sacrament. Even Hindu husbands have no legal right to divorce their wives (except among the lowest castes); among Muhammadans, wives cannot now divorce their husbands, but the latter can get rid of their wives by pronouncing Talak. They will however hesitate to do so, as the wife can at once claim that the dower fixed at the time of her marriage should be paid to her. I do not see why a Hindu wife, who is discarded without adequate reason, or superseded in favour of a younger wife, should not at once be endowed by law with a separate allowance for her maintenance and residence. If the Hindu marriage is a sacrament, of an irrevocable character, it ought to have the same effect for both parties. The wife can never discard her husband or remarry; it is only fair that the husband too should not be allowed to discard or supersede the wife, unless he is prepared to find her a separate ménage and maintenance.

The system of registering marriages, which has been advocated elsewhere in this book, and which has many points to recommend it, would, it is believed, be an influence favouring monogamy. If a man goes through a second or third marriage when his earlier wives are alive, he does it on the sly, and tries to avoid the glare of publicity. When he goes through inferior forms of marriage such as are prevalent in different parts of India, like the sigai of Bengal, the pat or natra of Bombay, the nikka and the santi grihita of Hill Tipperah, the phulbiha in Orissa, the pan-leaf marriage in Assam, or the anand among Sikhs, the bridegroom has the consciousness that he is doing what the social consciousness of his caste or community disapproves. The compulsory registration

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of such marriages will serve to bring them into line with weddings performed with full ceremonies, and give the wife a status, in which she can respect herself, and exact respect from her husband and his relations.

## CHAPTER VIII

### Concubinage

It is certainly an extraordinary anomaly that the law should declare regular marriage between different castes invalid, and at the same time sanction irregular relationships (or concubinage) between men and women irrespective of caste. Probably the two are related, in part at least, as cause and effect; the tendency to form illicit connexions has arisen as the logical result of the legal embargo put upon inter-caste marriages. As the law stands at present, while a woman of one caste who goes through a ceremony of marriage with a man of another caste is not entitled to maintenance from his family or of inheritance to him when he is dead, and her sons if any obtain only the half share allotted to the illegitimate sons of Sudras, a concubine who is never ceremonially married is placed in a better position. If she continued faithful to the man who kept her until he died, she can claim maintenance out of the joint family estate, and her son can inherit as an illegitimate heir. There is yet another piece of injustice perpetuated by Hindu Law. While an illegitimate son of a Sudra is always entitled to maintenance during the life time of his father, and to rights of inheritance to him after he is dead, the illegitimate daughter gets absolutely nothing under Hindu Law, not even a bare right of maintenance. Fortunately the Criminal Procedure Code provides a minimum maintenance, though from the parents alone, for every child whether male or female, but Hindu Law cannot claim credit for this fair and beneficent provision. There is little room for doubt that if inter-caste marriages were recognized and regulated by law, concubinage will *ipso facto* decline. Even the ancient Rishis made provision for Anuloma marriages, i.e., marriage of persons with women of inferior caste, and for inheritance to Anulomajas or issue of such marriages. Even such a wife has no legal status at the present day, unless she calls herself a concubine. It may however be noted that the

concubine is very rarely a maiden. Most often she is a widow who has probably been treated with cruelty in her father-in-law's home, and therefore resorts for protection to another person, who will give her shelter and the comfort or the kind treatment she needs so sorely. Less frequently she is a married woman, seduced by another man; owing to maltreatment by the husband or want of comfort in his home, she prefers an irregular friendship with a stranger to the tender mercies of her own lawful husband. While concubines of the first and second class, i.e., maidens and widows, are entitled to maintenance and their children to inheritance, a concubine falling in the third class is entitled to neither, as the relationship is deemed to be adulterous. Even in the case where a widow became the paramour of a man and lived faithfully with him until his death, it is often sought to send her away on her keeper's death, and if she is bold enough to claim maintenance in a Court of Law or rights of inheritance for her male children, her suit is often met with the inevitable defence that she is a prostitute, or that when she entered into an irregular relationship with her paramour, her first husband was alive (though as a fact he might have been dead for years). All these complications could not arise if the comparatively simple and elastic rules promulgated by the Sastras had been observed. They provided not merely for the maintenance of concubines, but also for the legitimacy of inter-caste marriages. Their main idea was that if a woman bore a son to her husband or keeper, however irregular the relationship might be, she was entitled to fair treatment at the hands of his family.

Except in the case of Brahmins, a king when succeeding to the estate of a heirless person should give something as maintenance to the women of the deceased.

*Mayukha.*

Heirless property or wealth which is without a heir to succeed it goes to the king, deducting however a substance for the families, i.e., excluding or setting apart sufficient for the food and raiment of the woman (apart from wives kept by the deceased).

*Mitakshara.*

It is under this rule that concubines now get maintenance.



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It might be too much to expect that concubinage would disappear altogether on the regulation of inter-caste marriages. It might be too early to ask that it should be legally prohibited, but at any rate the numerous anomalies connected with it can be removed by the legislature. At present no concubine, however long she may have been kept, has any claim or right to maintenance against her paramour during his life time, and she is always liable to be discarded by him at any moment. A concubine who is sent away just before death also loses her right to maintenance. Her maintenance again is contingent upon her continued chastity after her paramour's death. Opportunity is taken only too frequently of this rule to impute unchastity to her the moment she comes into Court claiming maintenance from her putative husband's joint family. (The female issue of an irregular relationship is now absolutely deprived of all rights of inheritance or maintenance though it might have been enjoying it throughout the time their father was alive.) It would appear to be the practice of most concubines, at least in South India, to have a Thali, or necklace, tied round their neck so as to give an appearance of regularity to their relationships. A rule under which this informal Thali tying is given legal recognition would make their position much more favourable than it is at present. Under the guise of customary law, phulbiha or exchange of garlands, Malabar sambandam or the gift of a cloth, the pat or natra marriage of the West Coast, or the nikka or sigai of Bihar, have all been recognized, so as to give full rights of legitimacy and inheritance to the issue of such relationships. There ought to be no difficulty in enforcing the simple general principle that a man should be responsible for all children, male and female, that he may bring into existence, and should make some competent provision for their maintenance and education. Also, as under Muhammadan Law and under ancient Hindu Law as promulgated by the Rishis, concubines of whatever class, if kept permanently, or for a long period, should be declared entitled to maintenance both during the life-time of the husband and after his death.

## CHAPTER IX

### Prostitution

Hindu Law-givers set the greatest possible store by chastity on the part of the women of India, and made many elaborate provisions with a view to secure or inculcate that virtue. Inheritance by a widow or daughter was made dependent on continence; in the case of a concubine or kept woman, she would forfeit her maintenance after her paramour's death if she went astray. It is thought that infant marriage was introduced as a method of securing the chastity of women. At the same time they did not ignore the classes who earned their living as courtesans, or who had merely lapsed into vice owing to neglect or bad treatment on the part of their husbands. Narada, for instance, said: 'Let a maintenance be allowed to a woman kept by a man.' The term used by him was *Yoshit*, or concubine, and not *Stri*, which is the Sanskrit equivalent to a lawfully wedded wife. Manu adds:

This rule does not apply to the wives of actors and singers nor of those who live on the intrigues of their own wives: for such men send their wives to others, or concealing themselves allow them to hold criminal intercourse.

If a prostitute does not attend, after having received her fee, she shall be fined twice what she may have taken, but if her paramour refuses to receive her, he shall only lose the money that he had advanced.

In another place the same sage says:

An unchaste married woman who is not of the Brahmin class, or a professional prostitute, or a female slave who has left the family protection, may be carnally known by a man of the same or higher class but not by a man of the lower class, but if such women be the kept mistresses of some persons the offence of approaching them would be that of approaching another man's wife.

Yajnavalkya lays down that if a man has intercourse with another's mistress, he shall be fined fifty *Panas*. The Mitakshara, noticing the above says, that prostitutes

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constitute a fifth caste outside the recognized four castes. Nilkantha cites from Narada a text to the effect that the ornaments of professional prostitutes should not be confiscated in any case. The fact is that while Hindu Law-givers condemned immorality and made the most careful provision for chastity, they recognized the existence of persons pursuing immoral practices and did not deny them the civil rights of owning property and transmitting the same to their descendants. The gods themselves according to ancient ideas loved to be surrounded by Apsaras and Gandarvies. Men could scarcely be expected to rise above that level! Temples had troops of dancing women as part of their establishment, and some of the temples had endowments out of which the dancing women could be maintained. Provision had accordingly to be made defining their legal status and rights.

If prostitution was thus recognized in ancient times, it is not surprising that it continues in full vigour down to the present day. While all Law-givers are uniformly insistent on preserving the chastity of women, they are not particular about abstinence on the part of men. If men were thus allowed to roam at large, they could only do so at the expense of women. The inferior position accorded to women by law, the stringent restrictions to which they were subjected in the homes of their husbands or their fathers-in-law, and the ill-treatment or neglect that fell to the lot of widows, probably increased the tendency to immorality which is ingrained in human nature. British India at the present day accordingly recognizes a class of women who live by selling their persons, and provides laws for inheritance and succession to them. This profession, sometimes described facetiously as the most ancient profession in the world, is continuously being recruited and strengthened by a class of women who are attached to temples for religious purposes, but who nearly always lapse from virtue.

A great deal has been written in recent times as to the origin of the institution of Naikins or Kandians (dancing girls). In most cases they appear to have been women attached to temples for the purpose of doing

service to the gods in the same way as similar women were attached in connexion with the worship of Isis in Egypt, Astarte in Chaldea, and Baal in Assyria. The court or retinue of a god was held to be incomplete unless it contained a number of 'vestal virgins' to fan him and put him to sleep, to sing and dance before him, and perform other services. In some instances at least, helpless women seem to have resorted in great numbers to temples in times of famine, and were allowed to live on the proceeds of temple endowments as an act of charity, when there was no other kind of sustenance available to them. In certain cases and in certain parts of India, it was thought not dishonourable for persons to give up their daughters to be married to the local god, and the scant estimate in which girl children have always been held probably made it easy for their parents to get rid of superfluous issue by resorting to such marriages. In any event, the institution has been in existence for centuries and has come to occupy a permanent part in the life of the country. There are however certain objectionable features of it which can be modified, if not removed, by legislative action.

There ought to be some restriction in the way of temple trustees or managers recruiting women for services to be rendered in their temples. At present the number and character of women thus recruited seem to depend almost entirely on the idiosyncracies of individual trustees. An enquiry should be instituted into the temples which are allowed by custom or precedent to take in their own recruits, and the quantum of endowments available in each case. The number of persons that could be attached to each temple and maintained out of its endowments may well be limited by some body or committee brought into existence by statute. Likewise restrictions should be put on the kind and quality of the service that could be exacted from them. So long as they are merely required to sing or dance in front of gods, during processions or in the course of festivals, very few Hindus would object to their presence. But it is not clear how either the fervour or purity of worship in temples is improved

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by the presence of women known to be living evil lives, or understood to be recruited for evil purposes. It seems unnecessary, in these modern days, to cater to the libidinous tastes of debased men who are accustomed to confound religious with sexual emotion in the worship of deities. It is only in the presidencies of Bombay and Madras that the institution of dancing girls attached to temples has been recognized by the Courts. In other parts of India they are not employed at all or engaged only for the time being, as they are on ceremonial occasions in private houses. We read in older books of history that till about the beginning of the nineteenth century it was considered an essential part of every rich man's establishment to keep a certain number of dancing girls as part of his retinue, in order to do honour to guests and visitors when they came to see him, or accompany the master in processions for social purposes. It would appear that this practice was kept up, not merely by Muhammadan Nawabs and Hindu princes, but even occasionally by Englishmen in the early days. The growing feeling of refinement and purity in public life has silently put an end to this institution, though the houses where these women were lodged still remain as silent witnesses of the practices, which continued down to dates within the recollection of many men now living. Nautch parties, again, used to form a regular feature of marriage and other ceremonial processions, but the growth of public opinion has stamped out the practice altogether, or at least confined it to backward areas and people in the mofussil. I do not see why the next step should not be taken by temple trustees being compelled to give up the bands of courtesans attached to their temples, and confine themselves just to a small number for actual dancing and singing, releasing the others from claiming any portion of the temple endowments. In the recent debates in the Legislative Assembly at Simla a question arose as to whether there should be a conclusive or rebuttable presumption introduced by law that every girl connected with a temple must be *prima facie* deemed to be a bad woman. Public opinion has at least arrived at this stage, that such a

presumption should be unnecessary. If further recruitment is hedged in with such rules and restrictions that it becomes impossible (except in stray cases) for women attached to temples to increase their emoluments by selling their persons, the institution will probably die a natural death. In Mysore, there is a beneficent enactment abolishing the institution of devadasis altogether, while conserving the rights of existing dasis who are dependent for their livelihood on temple endowments. There has been no protest against this legislation, which shuts the door effectively against all future recruitment.

A still more serious question is the question of adoption to dancing girls. Here also in the early days of social reform some learned judges set their faces stoutly against the practice. Sir M. Sausse, C. J. of Bombay, doubted 'whether any recognition ought to be extended to an essentially immoral class like Naikins.' (*Anandarao Ganpat v. Bapu*, referred to in Tara Naikin's case, 4 Bombay, 573). Justice Sir Raymond West considered that judges must decide cases relating to particular institutions 'on an appreciation of the legal consciousness of the community, but when that consciousness is unsettled and fluctuating, its nobler may properly be chosen to its baser elements as those which are to predominate. As the mind becomes enlightened its legal convictions will change, and this will constitute a change in the common law, so that law must from time to time be recognized and recorded in the Court.' (*Mathura v. Esa*, 4 Bombay, 545). If the recruiting of women was confined to temple trustees and depended on the endowments available there for, there will be no need for dancing girls themselves greatly to increase their number by the process of adoption. In ancient times, adoption of girls as well as of boys was equally recommended by scripture with the same object, viz., the production of progeny who would offer funeral sacrifices on behalf of the adoptors. The adoption of daughters which was prevalent up to the nineteenth century, and in certain castes even down to the present day, has now been given up with reference to all except dancing girls. Why Hindu Law, at this stage of

the country's development, should openly allow a body of depraved women who are living as courtesans to increase their number at their pleasure, and purchase or adopt girls who could be brought up as dancing girls and prostitutes, it is impossible to see. It is, to say the least, inconsistent to punish people who sell girls for use in brothels, and persons who enter brothels for the purpose of procuring their pleasure from girls without knowing their age, when the law still allows prostitutes to adopt them (to use the legal phrase) when they are very young, in order, at the earliest possible age, to put them up to the highest bidders and train them to earn their livelihood by a life of vice. Sir T. Muthusamy Ayyar in 11 Madras 401 disagreed with Sir Raymond West, and considered that it was not clear that public opinion was against the practice of adoption of dancing girls. 'Whatever may be the change in the sentiments of the general mass of Hindus in regard to dancing women in Bombay, I am unable to say that there is considerable change in this presidency in the opinion of the general mass of the Hindu community as contradistinguished from a comparatively small section that has come under the influence of Western culture.' He was inclined to set aside a contract or disposition which had the effect of an offence under sections 372 and 373 of the Indian Penal Code, but would not otherwise interfere with the existing practice of adoption by courtesans. (I.L.R., 11 Madras, 393 *Chulakonda v. Chalakonda*.) A similar view was taken by Justice Sir Subramania Ayyar. (*Kamakshi v. Kamasamy*, 19 Madras, 127.) These very judges, if they had lived to the present day, would probably be glad to recognize that a great deal of water has flown under the bridges since the dates on which their judgments were written, and might be inclined to lay down a more progressive policy. They held that if the adoption was proved to have been made with intent to train the child to a life of prostitution, it would come within the mischief of sections 372 and 373 I.P.C. and become a criminal act in consequence.

As the law stands at present a woman who has fallen,

and is living the life of a prostitute, is said to have cut herself off from all caste and family ties and a new law of inheritance is applied in her case. She is not allowed to inherit to her undegraded relations. (21 Calcutta, 697 ; 25 Calcutta, 254 ; 26 Madras, 509 ; 29 Allahabad, 4.) In this respect there does not seem to be any need for change, as the woman is penalised who is unable to control herself and deliberately chooses to go down the easy path of vice. But the law goes still further, and states that only girls and boys who go away and live with these fallen women could inherit to them. If a dancing girl had a daughter who followed her mother's profession she could inherit to her. Others who have kept themselves in family circles and have not degraded themselves by living in the dancing girl's home could not inherit to her. If a dancing girl had a daughter who followed her mother's profession she could inherit to her, but if she had a daughter who was married in the proper manner and was living a life of virtue as a lawful wedded woman, she is not allowed to inherit. A girl adopted by a courtesan and trained by her to follow her own life is according to the decisions entitled to inherit the mother's wealth because it is deemed to be 'the gains of science.' But if for the purpose of saving her own daughter from such a life she sent her elsewhere the daughter could not inherit. The property of dancing girls is for some purposes assimilated to *Stridhanam* property, and males as well as females are allowed to inherit it. For other purposes it is described as the 'gains of science.' If the legislature made a provision that it is an offence for a dancing girl to purchase or adopt girls for the purpose of bringing them up in the same manner of life which she is leading, and at the same time added a corollary that in no case such girls could inherit to the adoptive mother, the institution would be attacked at its root and would not flourish for many days.

There ought also to be provision for women, who might have occasionally fallen, being rescued from a position in which it is necessary for them to continue the same manner of life if they are to live at all. It is a standing



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reproach against Hindu customs that they make it easy for a woman to fall, and punish severely a female who has lapsed from virtue, but has no means of rescuing fallen girls and giving them a chance of bettering their lot. The old Law-givers were in this respect much more favourable to women than the law is at the present day. Parasara, for example, holds that an adulterous woman is purified by the flow of menses, and if a woman having committed adultery is not willing to repeat it, she may be purified by Prajapatya rite and the flow of catamenia, but a woman who has conceived by adulterous intercourse has severely to be dealt with. Yajnavalkya ordains the same rule (I. 70 to 72). The Japanese have a healthy provision in this matter. Even though a person might have lived a life of vice in early days, if she subsequently gets married to a husband and lives loyally and faithfully with him, neither law nor public opinion penalises her in any way, and she is not cut out of the family either by being deprived of her right to inherit to others or by others who are undegraded being made unable to inherit to her. Under the Yoshivara system a girl has to satisfy the Police authorities that she has to make money in order to discharge a family debt, or maintain her parents or other relatives. She is then granted a license to reside in the appointed quarters and earn till the sum she desires is made up. She then reverts to natural life, as a married woman or otherwise, without any disrepute attaching to her.

Under the auspices of the Contract Act, following the English Law, various improvements have imperceptibly been introduced as regards prostitutes. A landlord who lets lodgings knowing that they are intended to be used as a brothel or by a prostitute is held disentitled to recover rent for that lodging. Likewise a courtesan is disentitled to sue for wages or remuneration due to her daughter as a concubine. Generally speaking, if a promise was made to a woman to give her a sum of money in future, or donate property to her, or make a monthly payment in consideration of continued or future co-habitation, the same cannot be enforced in a Court of law; but if a kept

woman has already been endowed with property for having lived with a man she cannot be deprived of it because it is past consideration.

The provisions of the Penal Code have been gradually improved till they throw the net wide enough to catch most cases of barter of girls for procuration. Under Section 372 :

Whoever sells, lets to hire, or otherwise disposes of any minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

The age limit has been raised from 16 to 18 by Act V of 1924 (Section 2). The offence is committed even if no immediate prostitution is contemplated, but there is an intent or knowledge that at any age (say after 18) she is likely to be subjected to illicit intercourse. While Section 372 makes the person who sells, hires or disposes of a girl liable to conviction, Section 373 subjects the person who purchases or takes on hire a girl for continued or even a single intercourse to penalties :

Whoever buys, hires, or otherwise obtains possession of any minor under the age of sixteen years with intent that such minor shall be employed or used for the purpose of procuration for any unlawful and immoral purpose, or knowing it to be likely that such minor will be employed or used for any such purpose, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Section 375 again lays down that the offence of rape is committed when *inter alia* a man has sexual intercourse with a girl, with or without her consent, when she is under fourteen years of age. An exception is provided that sexual intercourse by a man with his own wife, the wife not being under thirteen years of age, is not rape. When the Penal Code was first enacted, the age for intercourse was fixed at ten, but so many notorious instances of abuse of this liberty were brought to the notice of the legislature that the age limit was raised to twelve by Act X of 1891, and now by Act XXIX of

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1925 to fourteen. No person therefore is allowed to have dealings with a girl not his wife if she is under fourteen, but for the husband the age is reduced to thirteen on account of the matrimonial consent which she and her parents have given. This rule cannot be said to afford any real protection to girls married when they are infants, as they are likely to be made use of before they are thirteen, and no one is likely to come forward and prosecute. Though under Section 366 A the procurement of a minor girl, and under Section 366 B the importation of a foreign girl, and under twenty-one years of age in order that she may be subjected to illicit intercourse, are made offences, the keeping or conducting of a brothel and the letting by a landlord of premises for such purposes is allowed. Landlords consider it a highly profitable investment to build or buy houses in particular streets or quarters of the city devoted to prostitution, and entire professions are said to subsist by the traffic in human flesh. There are wiseacres who say that sexual vice will anyhow exist so long as human nature is frail and passionate, and the function of the State is merely to recognize its existence and regulate it. It is argued that a system in which there are places known to be places of ill fame protects chaste married women and maids, and at least obviates the need for solicitation in streets. Though there is some truth in this last argument, still there is room for the contention that it is no more the duty of the State to organize vice or allow it to flaunt itself publicly, anywhere, than it is for a father to arrange or pay for indulgence on the part of his children. It is as necessary for the state to see that brothels are shut up as to provide that opium or gambling dens do not exist or to put an end to public solicitations in streets. Every brothel is a standing invitation like every arrack shop, and if they are closed, men know that they are not allowed to roam at large. Vice goes underground and does not flaunt itself publicly to the corruption and injury of society.

## CHAPTER X

### Women's Rights

Women have their rights and privileges as well as men, and the sooner men come to recognize this fact, and give them opportunities similar to those which they themselves enjoy, the better for society. Otherwise society as a whole suffers, sooner or later, and has to take a back seat among the nations. Certain of these elementary rights are so commonly and continuously denied, that people have become steeled against them. There are surgical operations for rectifying a blinded physical eye; there are none to get rid of moral blindness.

#### 1. The Purdah

The purdah has now become a recognized institution, at least in North India. Probably the entire blame for the introduction of this system should be laid at the doors of our Muslim friends. Throughout Muhammadan countries, a veil is the inseparable adjunct of a highborn woman, and is supposed to invest her with a halo of impressiveness and dignity. Seclusion in a harem is similarly supposed to add to her mysterious sanctity, and so secure her beauty and virtue from prying eyes. When Muhammadans invaded India in successive shoals, and kept up the system with reference to their own princesses and noble women, the epidemic was caught by the Hindus, who were previously unused to the system.

In *Rig Veda* 86. 10, we find that 'from olden times the matron goes to feast and general sacrifice.' Other verses give pictures 'of the dawn shining forth with sun-beams, like women trooping to the festal meeting'; of how 'maidens deck themselves with gay adornment to join the bridal feast' and 'of women at gathering, gently smiling and fair to look on'.

Ancient Hindu literature abounds in poetic accounts of the attractiveness of women; it is clear from them that

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women went abroad freely to rivers and tanks, and along the streets and thorough-fares, and also attended all public functions, and ceremonies of importance. The description given of them in Sanskrit and Dravidian poetry before the advent of Muhammadans makes it evident that there was nothing corresponding to the modern purdah. Buddhists, in particular, have always been enthusiastic advocates of the cause of womanhood, and have jealously guarded her rights and privileges. Even among Hindus it has always been considered honourable for women to attend festivals, and take part in public or semi-public ceremonies. Seclusion therefore is a late innovation, contemporaneous with the times when the women had to be guarded from prying eyes, and relegated to the back areas of houses. If the purdah meant merely seclusion of women in their homes, for the purpose of preserving their chastity or dignity, it might not be such a backward institution as it has actually proved to be in practice. But in fact the physical has led to a deplorable intellectual, and still more regrettable moral, purdah. Not only are women kept in the back parts, or the most interior and dingy apartments of houses, and deprived of the natural advantages of light and air, exercise and recreation, but they are imprisoned, or confined in surroundings which are a standing invitation to fever and consumption. Four times as many purdah women die of phthisis as men: and the toll paid in India at times of confinement would be enough to repopulate small countries like Belgium or Scotland once every five years. They are shut out from all the sights and sounds of the outer world, with their educative and broadening influences, and are necessarily kept in extreme ignorance. Many things which were matters of familiar knowledge to women of an older day are now treasured arcana hidden from them. Not even two per cent of Indian women have received what is known as a literate education, which means merely the ability to read and write. According to the Census of 1921, there are one hundred and fifty million women in India, who are illiterate, and live in total darkness so far as the mind is concerned. The law has so far recognized their

backwardness and ignorance that it has been made a rule of evidence that, if a man entered into a contract with a purdah woman, the burden is thrown on him of showing that he has not cheated the woman, but entered into a transaction which is fair or advantageous to both parties. In spite of this beneficent provision, cases are only too often brought before the Courts, in which men have taken advantage of their superiority to women in the matter of education to drive hard or unconscionable bargains with them, make them sign documents which they would not sign if they knew what they meant, or grant powers of attorney to persons who cheat them right and left. Then, again, besides the intellectual purdah there is the moral purdah. The very institution which is meant to preserve their chastity and improve their dignity has had the reverse effect. Women learn to despise themselves, and forego that self-respect which is an essential element in a well-constituted character. If they value themselves at all, it is according to the money or position owned by their husbands. Women in all ages have been more devout and religious than men, and more anxious to preserve the proprieties, and uphold moral standards, but as they cannot read or study their own scriptures, their religion becomes a mass of superstition with which they infect their children. Their eyes get blinded to light. Where they have not been selfishly deprived of ordinary opportunities of mixing in the world, where, in particular, they have received the elements of education or training, they manage their concerns at least as well as men do theirs, if not a great deal better. Many estates and properties would have gone to rank ruin but for the fact that the wife steps in and aids a weak husband, who is liable to give way to the distractions of the outer world; she has always an eye for the main chance, and knows how to drive a good bargain and to do so tactfully. When women come and give evidence in Courts they are usually more telling and effective witnesses for their side than their husbands.

The provision by which purdanashin women are exempted from the publicity of Courts has worked more

to their detriment than to their benefit. The slender rights with which the law invests them are infringed heartlessly by the very men who are bound most sedulously to watch over their interests. Even in Turkey, which is the headquarters of Muhammadanism and the original home of the purdah, women have dropped the veil and are freely going about in public. They drive their own motor cars, and engage in work in public offices. They receive education and take part in charitable and public movements. Marriage laws have been equalised. One of the ministers in the present Turkish Government is a woman. Egypt we are told is following closely upon the heels of Turkey. It is to be hoped that the time is not far off when Muhammadans in India will have the good sense to realize what is due to themselves and to their women, and be glad to give them the same opportunities and privileges as they themselves enjoy. Hindus, who merely copied this altogether foreign institution, and have greatly suffered thereby in national and spiritual self-respect, will then hasten soon enough to drop this nefarious institution.

## 2. Consent to marriage

There is a good deal of discussion in Hindu law books of the present day, as to who has the right to bestow a girl in marriage, and controversies frequently come before the Courts as to who is the person entitled to perform that function. The girl is only too often apt to be regarded as a chattel, liable to be disposed of at the whim and fancy of the eldest male member of the family. The bride herself and the mother may honestly be of opinion that a proposed marriage is not to the benefit of the girl, but their views are not infrequently overridden, and the man, whether father, elder brother or uncle, has his way. This is not as it ought to be. Even in Manu there was a provision that if a girl was not married within three years of her attaining puberty she was entitled to arrange for her own marriage, and 'bestow

herself upon a husband.' The same liberty was conceded by most of the Law-givers who succeeded him. They recognized that, by that period, the girl had attained sufficient intelligence and maturity of understanding to enter into the marriage contract on her own account, and might therefore be allowed to take the responsibility upon herself, even though her parents or other paternal relations were alive, and were willing to dispose of her to their advantage. The ancient practice of *Swayamvara*, to which reference has already been made more than once, obtained down to the eleventh century A.D. in India, and girls of well-to-do families both of the Brahmin and of the Kshatriya castes were allowed to make their choice among a number of suitors, and bestow themselves on the person who succeeded in impressing them. Muhammadans, who in such matters are thought to be behind the Hindus, have a rule known as the option of puberty. If the girl is given in marriage by her guardian before she attains age, she can, on attaining puberty, either adopt the contract made on her behalf by others or repudiate it, and if she rescinds, she can marry another, even though she has been formally given marriage to a first husband. In ancient times Manu laid down a similar provision. If she or her relations have been cheated into entering into a marriage contract, or if she finds that the husband is, owing to sickness, old age, infirmity or other reason, unfit to act as a husband, she can, when she comes of age, get out of the relationship and marry again. The system of registration of marriages which has already been recommended elsewhere would at least ensure that the registrar asks questions of the bride, and satisfies himself that the girl is a consenting party to the contract, and enters into it with a willing mind. Cases occasionally come before the Courts, in which a decision has to be given as to whether there was a marriage or not, and if the outward ceremony has been properly performed by a purohit or other authorized person the marriage is deemed to be complete; usually no further evidence is taken whether or not the girl was a consenting party. The *Sapthapathi* ceremony, or taking seven steps round the



marriage mound, is supposed to imply deliberation, and even though ninety-nine per cent of those married do not understand it in that sense, that is all the evidence that is required before a marriage can be deemed to be complete. Both for the purpose of getting rid of various inferior forms of conjugal relationship, which are little different from concubinage or seduction, and bringing all marriages into line, there should be a beneficent provision by which the contractual element in a marriage is emphasized and brought out, though the doctrine that it is at the same time an irrevocable *Samskara* creating a sacred relationship might also be retained, along with all the impressive ceremonial usual on such occasions. To dispose of a girl finally and irrevocably, whether she consents or not, is to treat her as a slave or chattel. She must be admitted to be an independent personality, and the least that she can ask is that, before she binds herself for life, she is entitled to be asked about it and to say 'No' if she cannot make up her mind to agree.

### 3. Earnings

In former times, it did not often happen that a woman had to earn her living. But even our ancient Law-givers have made provision for a woman earning her own livelihood, and keeping her property separate as her *Stridhanam*, the same to devolve on her own heirs, as distinguished from her husband's heirs. There are many cases of desertion or neglect, in which a woman is driven to earn her living in order to keep herself from starving. Widows are so often badly treated or neglected in the homes of their fathers-in-law that they take to some occupation of their own choice, such as nursing, or husking paddy, or selling in the bazaar. Oftener still, it happens that a married woman, who is still living with her husband, carries on her own bazaar or conducts some trade in the house, investing the profits arising therefrom for her separate benefit. In certain castes and communities, women always have their separate estate and business, selling milk or ghee or garden produce.

or weaving. In order to provide for Christian woman entering into contracts on her own account in respect of such separate business, and securing her property free from molestation by a husband or parents, there was an Act known as the Married Women's Property Act passed in 1874 of which there have been several recensions since. The need for a similar Act is not as great here as it is in England, owing to the existing provisions that a woman may earn her own property, and keep it separate. Still some legislation on the point is desirable, because under some schools of law prevalent in India, where a woman has separate property of her own, the husband is entitled to appropriate it in times of distress, and cases occur only too often, in which sons forcibly take away property which ought to have devolved upon the woman's rightful heirs. English lawyers have also recognized what are known as marriage settlements, or settlements generally for the benefit of women, which vest women's property in trustees in such a careful manner that it cannot be taken away from them by act of parties or operation of law, and even the beneficiaries are restrained from alienating or wasting it. In India property belonging to males is often purchased or settled in women's names, benami for their husbands or male relations, in order to secure them from creditors; but the reverse arrangement of protecting women's property from inroads by their male relations has yet to occur to Hindu lawyers.

So long as woman occupies the inferior position now allotted to her under Hindu Law, whether she is a daughter, widow, sister or mother, she cannot carry herself with the same self-respect as if she had independent rights of inheritance more or less on a level with those of her brothers. Though Muhammadans accord a very inferior position to their women socially, their rules relating to Mahr and inheritance give them a much more secure and independent position than that accorded to women by Hindu law at the present day. When a father dies, the daughter is entitled to a definite or ascertainable share in the father's property, and only the residue is

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divided between the sons. This is also the case with regard to the Christian and other communities coming under the Indian Succession Act. Definite suggestions regarding improvements in the law of inheritance are made later, in the chapters relating to widows and daughters.

## CHAPTER XI

### Education

If Indian women have been denuded gradually of their rights and privileges, they have to thank, not the ancient Rishis who were always inclined to deal fairly by them, but later lawyers, who purported to comment on their works. The most valuable privilege from the modern point of view of which they have been deprived is undoubtedly their right to receive education along with their brothers. The natural instinct of a father must have always been, in India as well as in other countries, to give equal treatment to his children of both sexes, and to bestow the same care and thought on the up-bringing of his daughters as of his sons. It is generally said that daughters take after their fathers. In any case a father's affection goes out in a peculiar manner to the daughter, growing up from infancy in his home. The mother also has special reasons for wishing her daughter well. While a son may be said to be the right hand of the father, the daughter is the right hand of the mother, and as she grows up she usually relieves her of a good deal of her burden and care. Left to themselves, therefore, Indian parents would never have neglected their daughters as they now do, under the aegis of the law. It is the inequality introduced by lawyers, and the restrictions placed upon them by late commentators, who took no thought about the ultimate and inevitable consequences of their acts, that have really been responsible for the denial of the benefits of education to half the total population of India. Some of the restrictions imposed on women might have been really for their advantage, as they operated perhaps as a kind of discipline ; but to legislate for all time that girls are not fit for education, and therefore should not receive it, was a piece of injustice from which the nation as a whole has grievously suffered, and

will suffer for a long time to come, unless a speedy remedy is devised.

The injustice is the more unwarranted, as those women who have enjoyed the same benefits as their brothers have brought distinction to their race and generation. Reference has already been made to Vak, Lopemudra and Vishyavasa who composed hymns included in the Vedas. Maitreyi, wife of Yagnavalkya, and Gargi, were famous in ancient times as disputants and philosophers of a high order. Vedavathi, and the great non-brahman lady mentioned in the Vana Parva of the *Mahabaratha*, were reputed as Bhavishyavadinis with their Brahmajnana. There were great Yoginis like Sandili and Swayaprabha. Davabuti, the mother of the philosopher Kapila and Vashishta, the mother of the world-famous Sankaracharya, were marvels of erudition. Yamunabhai and Lakshmi Bai were known as warriors, who played active parts in war in male costumes. The great woman artist Chitrlekha, and the lady mathematician Leelavathi who could tell, it is said, the number of leaves in a tree by mathematical calculation, have been highly spoken of for their erudition. Leelavathi was also the author of certain books in mathematics. The woman scientist Susi Lekha was well versed in chemistry. We had the great magician, Bhanumathi, the wife of Bhoja Raja and Rhana, the great astronomer and astrologer. Most of us are aware of the well-known educationist, the highly learned Bharathi, who acted as umpire in the metaphysical discussions between Mandanamisra and Sankaracharya. We have also heard about the Head Pandita, who presided over the Pandits of the Court of Vikramaditya. There have been women lawyers like Devara, and Lakshmi Devi who composed a legal treatise called *Vivada Chandra*. Ahalya Bai Holkar, and Mathusri Gangabai Ammal are well-known for their charities and devotion. In modern times there have been poetesses like Mira Bai, Toru Dutt and Mrs. Sarojini Naidu, and leaders of thought and action like Pandita Ramabai and Mrs. Ramabai Ranade. In India at least men cannot set up the boast that they have a monopoly of intelligence or spirituality.

The ancient Rishis were generous or at least just in the treatment of their daughters. It is clear from the records that they have left behind, that Indian women in olden times occupied a much higher position with reference to men than women did in Greece or Rome or Palestine. They were allowed to choose their own husbands in a great many instances. The custom of *Swayamvara* appears to have existed widely both in the Kshatriya and Brahman castes. The practice itself points to a degree of freedom and a sense of equality among the sexes, that are undreamt of in modern times. Further, as stated in the introduction to this book, maidens in early times received instruction from their parents on the same footing as their brothers and even received the right of initiation. It was the later Law-givers that laid down, that while there are ten *Samaskaras* or sacraments, which must be performed in the case of a male, only one, viz., marriage is prescribed for females. This has been done, though in the life of piety and devotion, in progress along *Bhaktimarga* and *Karmamarga*, they have always kept pace with their brethren, if not shot well ahead of them. It was by arguing in a vicious circle that women were deprived of the benefits of learning. It was first stated that a girl should not receive initiation, because she was not in a position to study the Vedas. Then it was argued that because she could not be initiated, she could not be classed as a twice born, but was equivalent to a Shudra and as a Shudra, she was not allowed to study or recite the Vedas. Women too were considered too corrupt to learn the ancient scriptures, and it became a grievous offence to impart to them the sacred learning. By another vicious argument in a circle, the lawyers came to the conclusion that they should not have property rights similar to those which were bestowed on men. Women cannot be initiated nor can they learn the Vedas nor perform sacrifices. Property was given to men in order that they may perform sacrifices and offerings to the gods. As women are incapable of performing oblations or ceremonies, there was no necessity for them to own or hold property.

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Vijnaneswara, who was favourable to women's rights, greatly extended the area of the property legally known as '*Stridhanam*'. He taught that property was not merely given by the gods for being offered as sacrifices, but also for being enjoyed by members of the family and for this reason women ought to have a share of the good things of life along with men. Jimuta Vahana likewise propounded a generous view of women's rights. He argued that a wife is the other half of the husband and as she could do whatever the husband could have done in her capacity as his other half, she should succeed to the same rights during widowhood, as her husband had in the family estate during his life-time. But these two Law-givers, however, were far in advance of their time : their notions were not acceptable to their short-sighted and selfish successors, who went on limiting or taking away women's rights and placing heavier burdens on them with the result that at the present day, a girl has no legal right to be educated at her father's expense or at the expense of the joint family, of which she is a member. The only rights that she can claim in a Court of Law are the right to be maintained till she is married and sent away to her husband's home, and also the right to be given in marriage and to have jewels and presents made for her for that purpose. Even if a girl is as clever as Leelavathi or as devout as Andal, she cannot claim as a matter of right that she should be educated. If her parents are alive, they may not be unwilling to spend a fraction of their fortune on their daughter's education ; even this is often done merely in order that she may be a vendible commodity in the marriage market. In any case, an orthodox father would hold up his hands in pious horror if he was told as Paul Bert, a famous leader in education in France, declared in public that :

If you educate a boy you educate a single individual, if you educate a girl you train up a whole family, and it is therefore worthwhile to put one self at greater expense for education for girls than it is for boys.

There is an indication in some of the early Law-givers, for example, in *Manu*, that a girl should have at

least a third or fourth of the property that goes to a boy. It may take sometime before the legislature of the present day would be inclined to introduce such a sweeping reform, but it will be simpler to have a law formulated that girls should have three rights instead of two, viz., the right to maintenance, the right to education and the right to marriage. On a girl's education, the father should be entitled to spend as much as he likes and will be bound to spend at least half of what he spends on his sons. Owing to the peculiar habits and customs of this country relating to Purdah and early marriage, it is not likely that women would take to higher education and go in for degrees in the same numbers as men who have to be wage-earners. In most cases, their education would probably have to be stopped with the period of their marriage, say, when they are sixteen or eighteen, but they should at least have all the education that they can get up to that period. Instead of being wholly illiterate, as 150 millions of women are out of a total of 153 millions, they would be at least as well off as they are in Burma and be qualified to help their men relatives in business and be companions to their husbands in the management of family affairs. It is all to the credit of Brahmos in Bengal and Nairs on the West Coast, that they have afforded their women all possible chances of education with the result that they are able to go about with their husbands easily and naturally, take part in social life and conversation, and entertain family friends on the same terms as men. It cannot be said that they have been spoiled by the advantages that have been conferred upon them. On the other hand, the instruction received by them has greatly added to their charm and courtesy and to the beauty of the family lives lived in these two strata of Hindu society. It is to Burma, however, that we have to turn for a real lead in the matter of women's education, for it is there that it is universal, and run on the best and most economic lines. Every girl proceeds as soon as she is able to do so to the nearest nunnery, where the nuns consider it their duty and privilege to impart education to all girls gratis. If



the twenty million widows in India, who according to the Rishis, should live lives of austerity and useful service could be arranged to play the same rôle for Indian girls, what a great service they would be doing to their time and generation! The Germans have made admirable provision for their old maids by providing in every important town and city, homes or stiftens where they could live in comfort and help themselves and others. We ought to take a leaf from Germany in respect of widows.

Women's education has suffered in the past by being a servile and unpractical copy of that imparted to men. The educational system that has grown up in this country in a haphazard manner, is being applied to girls with conspicuous want of imagination and insight without any sensible adaptation to their needs. The British Government introduced education in the first instance to train clerks and officials to help in the work of administration: the promulgators took little account of the fact that the vast majority of people cannot be clerks, but must pursue one or other of the practical avocations which supply the people with bread. English was necessarily made the medium of education, as the object was to help English officers in carrying on the routine of administration. Such vernacular or Sanskrit education as formerly existed in pial schools and academies became moribund, as the persons who supported and encouraged them became blind followers of the new system. Universities were then added, not after the best available models, but in imitation of utilitarian, materialistic London University, and they have served to make education cheap and to give unfair predominance to the literary classes, and crowd certain professions, while killing enterprise and initiative along lines in which they are sorely needed. The school and college courses have become an enormous grind; few of those who start with great ambition live to complete their education; health is sacrificed; character and moral training are held of no account; the needs of the agricultural, commercial and industrial development of the country are starved, as

they are either in the hands of men who still practice the methods prevalent before the Deluge, or of Occidentals, whose only thought is when they may retire with a decent competence to their native land ; all the spiritual traditions of the race are ignored ; and men judge of things solely from the point of view of money. Now this system, with its obvious anomalies and lacunae, is sought to be imposed wholesale upon women. The courses usually prove too heavy for them and sacrifice health and the finer instincts of women. The only line open to them is teaching and there are not enough opportunities for all the girls who are crowding in. Training in character and manners, in home making and the building up of society are of course completely in the back-ground. It is obvious that some careful thinking has to be done before a proper system is devised. It is clear for instance that education must be given in homes or institutions like homes and not in public institutions to which girls will not go. It must be in the vernaculars and must mainly concern itself with such things as are useful in the home, hygiene and nursing, arithmetic and a few easy lessons in natural science, cooking, gardening, weaving, sewing and interesting readings from one or more of our Indian literatures. There should be plenty of music and games ; and a first hand acquaintance with out-door nature. Training in manners and self-respect, in conversation and the art of entertaining, should not be lost light of. One would avoid written examinations and substitute *viva voce* questioning in its place.

## CHAPTER XII

### Widows' Rights

Under the Indian Succession Act XXXIX of 1925, which is applicable to Christians and others, a widow is one of the heirs of her husband and obtains a portion of his estate absolutely on his death. If he happens to have children or lineal descendants, she is entitled to one-third of the deceased husband's estate; if he has neither, she is entitled to a half. In the event of her death, the one-third share that she inherits will naturally pass again to her own heirs or children; the half share that she inherits will go to her own next of kin, like her father, mother, brothers and sisters.

Under Muhammadan Law also the widow is always entitled to claim, as a sharer in her husband's estate. If she is a single widow she takes a fourth. If there are a number of widows, they divide the fourth share between them.

The position under Hindu Law is very unfavourable to women compared to what it is under Muhammadan law or the law applicable to Christians. She is only entitled to inheritance in certain events. In others she is liable merely to be maintained by her sons or husband's relations. If her husband has left sons behind him, she has no rights of inheritance at all and becomes merely entitled to receive maintenance at their hands: this duty is usually cheerfully performed by her sons, except in the case of the very poor, who sometimes shirk their duty, driving the mother to institute suits in the courts. If her husband had no sons, and was divided from and had not become re-united with the other members of the joint family to which he belonged, she would be entitled to inherit to him, but she would only take a limited estate. If, on the other hand, he remained a member of the joint family to which he belonged, she can claim only maintenance out of the joint family property. If, however,

though still a member of the joint family, her husband had acquired property of his own, independent of the joint family estate, his widow in the absence of a son, inherits his self-acquired property but takes a limited estate as before. This limited estate known as a 'widow's estate' is not exactly the same as a life estate under English Law. Normally, she can enjoy only the income from the property but cannot touch the corpus or alienate any portion of it except for certain purposes. *E.g.* In order to provide for her own maintenance, or discharge her husband's debts or perform ceremonies for his spiritual benefit, she is allowed to sell, or mortgage a reasonable portion of the corpus.

The above is a concise statement of the position of the Hindu widow under the Mitakshara, but she enjoys a much more favourable position under Dayabaga Law prevalent in Bengal. Under that school, a widow succeeds to the estate of her deceased husband under all circumstances, that is to say, whether he was joined with his brothers or divided from them or re-united with them. Jimuta Vahana's argument is worth citing in full. He quotes Brahaspathi. In scripture, in law, by sacred ordinances and in popular usage, a wife is declared by the wise to be half the body of her husband, equally sharing the fruit of pure and impure acts. 'Of him whose wife is not deceased, half the body survives; how then should another take the property, while half the body of the owner lives? As the surviving half of the deceased husband, she inherits, but only in the absence of a son, as the latter is a renovation of the father's own soul.' In another well-known passage he says, 'The woman who is assiduous in the performance of duties, conveys her husband, though abiding in another world, and herself, to a reign of bliss.' 'Since by these and other passages it is declared that the wife rescues her husband from hell, and since a woman doing improper acts through indigence causes her husband to fall to a region of horror, for they share the fruits of virtue and vice, therefore the wealth devolving on her is for the benefit of the former owner, and the wife's succession is consequently proper.' It will

thus be seen that Hindus following the Dayabaga system of law are more generous in their attitude towards widows. A wise or substantial provision is thus made for them, which enables them to escape slavery or misery in their husband's home and live in independence and comparative comfort, devoting themselves to the performance of charitable acts, which acquire spiritual merit for their husbands in the other world. These widows or most of them, being uneducated, advantage has sometimes been taken by family priests of the fact that they are in possession of their husbands' property, to wheedle a large portion of it out of their hands and thus prevent them from performing sacred duties to the manes of their husbands or discharging charitable obligations for the increase of holiness as ordained in the Sastras ; but there are rogues everywhere willing to take advantage of ignorance and helplessness, whether on the part of women or on the part of men, and the rights of inheritance that are their due cannot be curtailed in the case of women alone because of their existence.

Perhaps it is not right to state that under Mitakshara the widow occupies the unfavourable position described above. Vijneshwara, the author of the Mitakshara, took as a matter of fact a much more liberal view and gave to the widow all the property that her husband had. The author of the Mitakshara maintained that when a man, who is separated from his co-heirs and not re-united with them dies having no male issue, his widow, if chaste, takes the estate in the first instance. He bases the right of the widow to inherit on the following well-known text of Yajnavalkya : ' The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates, a pupil and a fellow-student ; on failure on the first among these, the next in order, is indeed an heir to the estate of one, who is departed for Heaven without leaving male issue.' He then goes on to discuss and refute two objections raised to his view. The first of these objections is to the effect, that the texts of Yajnavalkya and others were intended to ordain the succession of the widow of the separated brother, provided

she had authority from her husband to raise issue by appointment. Vijneswara meets this objection by saying that the raising up of issue by the widow (*Niyoga*) is not a condition precedent to inheritance, but merely an alternative, which she might choose if she was so minded. He observes that it is fit that a chaste woman should succeed to the estate rather than one appointed to raise up issue, reprobated as this practice is, in law as well as in popular opinion. The second objection is stated by him in these terms: 'Since the wealth of the twice born man is designed for religious uses, the claim of women to such property is denied because they are not competent to the performance of religious rites.' Vijneswara refutes this subtle argument by laying down that wealth was designed not alone for religious uses, but also for enjoyment. He supports his saying by quoting texts from Yajnavalkya, Gautama and Manu. 'Wealth which was given in charity solely for the purpose of performing solemn sacrifices must be appropriated exclusively to that use, but other wealth may be enjoyed by the husband when alive or by his widow after his death.' The *Viramitrodaya* also contains an argument that there are many passages of law establishing the preferable right of the wife to succeed to the estate of a sonless husband, who was separated but not re-united and relies on the known text of Brahaspathi in the Vedas and in the Smritis. 'A wife is declared by the wise to be half the body of her husband equally sharing the fruit of pure and impure acts.'

If we extend our researches still further back and ascertain the views prevalent in the Vedic age and for a considerable period of time afterwards, we find that the position of the widow was much more favourable. It was only by ingenious and tortuous and, in some instances, unfair interpretation of those ancient texts that the widow has been gradually denuded of her rights by later commentators. The text on which the later rules of exclusion are based is one of Baudayana, the reputed founder of one of the schools of the Yajur Veda. '*Nirindriya Hyadadah Strionritam.*' This may be translated as

follows: 'Devoid of prowess and incompetent to inherit, women are useless.' There is a great deal of dispute as to the precise meaning of this text. Some commentators say that it could have no possible application to the inheritance of women and translate the text thus: 'Women are considered disqualified to drink the Soma juice and receive no portion of it at the sacrifice.' Others base the entire theory that women have to be excluded from inheritance upon this ancient and doubtful text. Sir Raymond West has in an elaborate judgment come to the conclusion, after carefully examining all the authorities, that the text itself was probably an interpolation inserted by later Law-givers intent on depriving women of their rights of inheritance. Several modern writers agree with this view. It is at any rate certain that Baudayana's text was not in existence at the time when the Mahabharata was composed; or at least was not understood in the sense which Smriti writers put upon it in later ages. According to the Mahabharata a widow can claim up to 2,000 *panas* in her husband's estate. Vyasa has a similar text. From the free and independent position occupied by women in the time of the two Epics, we may infer that their legal position was much more assured than it became later. All modern writers have to concede that the general proposition that women are incompetent to inherit, cannot be supported as, according to all schools, daughters and mothers as well as widows are heirs in certain circumstances. The ingenious shifts and straits to which they are reduced and the tortuous argument propounded by them to get over those straits are absurd.

The Mitakshara does not expressly comment on the Vedic text, but proceeds on the assumption that women are entitled to inherit, and discusses the various ways in which they may inherit to males and to females and the kind and quality of estate that they take in each case. Apararka takes the Vedic text as an explanatory sentence only (*Artha-vada*) and not as a rule (*Vithi*). He says therefore, that the text that women are feeble and incompetent to inherit, has to be applied conformably to

circumstances and in corroboration of rules otherwise established. It must, therefore, be referred only to the case where there are sons. Baudayana, Mitra Misra, Jimuta Vahana, and Devananda are unfavourable to women's capacity for inheritance, while the opposite view has the support of Vijneswara, Nilakanta, Vachespathi Misra, Vidhyaranya, Apararka and a few other commentators. Jaimini in his *Mimamsa Sutrās* clinches the matter by stating that Vedic texts show that women have the capacity of owning and possessing wealth. No distinction is made between wealth acquired by other modes of acquisition. The question of sacrifices played an important part in the eyes of the ancient doctors, and as wealth was necessary for sacrifices and women could not take part in sacrifices, they declared that the various modes of acquisition of wealth including that by inheritance should not be open to them. It is for this reason that a widow was confined strictly to maintenance if she had sons and even when there were no sons, she was given a limited estate, which she could dispose of absolutely for sacrificial purposes, but which she could only enjoy during her life-time otherwise. Seeing that at the present day the roles are reversed and even men, whether Brahmins or Kshatryas, do not offer sacrifices and women are as a matter of fact more deeply religious than men and more inclined to devote their means for the performance of ceremonies and sacrifices by the employment of priests, for their own, their husbands' and their children's benefit, the distinction made between the sexes is at the present day, unnecessary and without justification.

The widow's estate, as at present conceded, has given rise to endless complications. 'There are difficulties concerning alienations by them and the rights of alienees, intricacies surrounding the reversioners, consent to alienations and adoptions, mysteries of surrender without acceleration and of estoppel upon succession, the unequal competition between the rights of a widow and those of the sons adopted by her, in which the latter are sacrificed by the agreement of the natural father, problems and conundrums in the law of divesting when an adoption has



been made or is sought to be made, doubts as to whether a widow is or is not to bind the inheritance as regards *Resjudicata*, limitation and compromise and questions as to whether or when one reversioner represents others for purposes of litigation'. Large estates moveable and immoveable are locked up during the lives of widows without affording stimulus to commercial enterprise. The Hindu widow's estate is at present the result of an unnatural compromise between the rights of the widow herself, of the reversioner, of the alienee from the widow and of the son adopted by her. Jurisprudence knows about an absolute estate and an estate for life, but this unnatural combination which is given to a widow, which is for some purposes an absolute estate and for others merely a life estate, has been at the root of all the trouble and litigation relating to woman's property.

A simpler rule like that adopted in the Indian Succession Act or Muhammadan Law would not only be much more favourable to women, but also much less liable to be made the subject of litigation. In the first place, the widow must always be declared entitled to maintenance when her husband has not left any estate. Her comfort should not be made to depend on the good will of a son or his wife, a brother-in-law or his wife, or a father-in-law or mother-in-law. Even if she is willing or able to earn her living, she should not be deprived of this right, which should be regarded as one which was assured to her when she was married. It should be placed on the same footing as the right to maintenance of a wife, because her right becomes if anything more valuable and important to her after her husband dies. It should, therefore, not be made dependent on proof of chastity. It has to be remembered that there are twenty-six million widows in British India and the legislative councils hesitate over a measure, which secures to them their just rights. It is more likely that a widow will sell her person when she has no means of maintaining herself than when she is adequately provided with a comfortable livelihood. If she submits to the embraces of another man, that other, being the really guilty party,

ought to be compelled to maintain her as well any children that may be born of the irregular relationship. At present, the woman is punished with a starvation maintenance when some man is responsible for leading her astray. The widow is kept on the shortest commons possible for fear that some man may tempt her. There are widows enough elsewhere and they do not all go wrong merely because they have a share of their husband's estate to live on. In India where she inherits self-acquired property from her husband, she does not go astray. In Bengal, when a widow inherits the estate, whether ancestral or self-acquired of an undivided co-parcener, there is no reason to think that she is unable to resist temptation. At present the right of maintenance comes into existence only if she does not get any property by inheritance. I am suggesting later a regular share for her out of her husband's estate; the question of maintenance will not, therefore, often arise. Suits for maintenance are very rare in Bengal, as the widow's rights are better protected and conserved there. If she gets no property by inheritance her sons if there are any, her father-in-law, or the joint family of which the father-in-law is the manager, should be made liable to support her legally as well as morally so that she may not have to beg for bread or to take a life of pleasure. This elementary right the Rishis had always conceded to her, and it is not necessary to deprive her of it in these modern days.

Again even if she has sons or sons and daughters, she ought, when there is any property left ancestral or self-acquired by the husband, to be entitled to share along with her children. At present she is left to the tender mercies of her sons or grandsons, if her husband was divided or her father-in-law and brother-in-law if he was undivided. Fortunately the sons are usually ready enough to remember their obligations to their mother and keep her in food and raiment, but among the poorer classes, they often make her life miserable at the instance of their wives and sometimes drive her to the Courts to obtain maintenance for herself. Grandsons do not always

realize their privilege or responsibility and brothers-in-law as a rule do not. I have ventured to suggest elsewhere that the right to a share by birth should be abolished and that a father in possession of property, whether ancestral or self-acquired, should have an absolute estate in it irrespective of there being sons. If there are several brothers living together, each of them should be deemed to be entitled to a fixed and ascertainable fraction of the family estate, not one variable by births and deaths in the family, as it is now under the Mitakshara School. Where the husband has left sons, it would be well to give the widow a definite share in her husband's estate, say half the share allotted to a son on division. On her death, the said half share may be made divisible among the sons and daughters, their enjoyment of it being postponed during their mother's life-time. When there are no sons, her possession ought to be made simpler and less liable to litigation than it is now. There is no more fruitful source of quarrels and litigation at the present day than the widow's power of alienating her husband's estate. If she is given a strict life estate which allows her to enjoy as she likes her husband's entire property during her life-time, but not to alienate the corpus for any purpose, it would undoubtedly be a simpler and more helpful arrangement than the present unnatural compromise known as the widow's estate. There is, however, a still fairer and more reasonable course open to the legislature. It would make for even greater elasticity and enterprise, if the widow is given in the absence of sons and daughters an absolute estate in half her husband's property, the remaining half going at once to her husband's reversioners. When her husband is dead, the other half of the partnership remains, and it is consonant with equity and justice to endow that remaining half, as Jimuta Vahana says, with a moiety of the property, which the husband and wife enjoyed during their joint lives. The widow should have absolute power of disposal over the half of the property thus inherited by her from her husband. In the event, however, of her dying without disposing of the property either during life-time or by will it might be made descendable to

her *Stridhanam* heirs. If she has daughters but no sons, she should share the property, ancestral or self-acquired, equally with the daughters. The daughter's son is just as much a person entitled to offer *pinda* to the deceased husband as a son's son. The daughter, according to Brahaspathi, is just as much descended from the father's limbs as the sons. She ought to have a share in preference to collaterals and the mother would share equally along with her.

These three proposals if carried out would greatly simplify the existing law and substantially diminish the volume of litigation that gathers round a widow's estate. It would also give her a fairer and more assured position, consonant with modern notions of justice and in line with other forms of personal law. As the widow will get a definite share of the husband's property as her absolute estate, a great number of suits now filed to set aside alienations by her or restrain her from alienating property, are got rid of at a stroke. That branch of law which sets out the purposes for which a widow may alienate and the purposes for which she may not, becomes unnecessary. At the present day no person will purchase an estate from a widow if he can help it. He knows for certain that there will be litigation and in consequence he recites a nominal price but pays only a small portion of it. In order to secure a decent title, he makes other male relatives join in the sale, which leads to fresh complications, as they set up claims on their own account to the property. The uncertainty and difficulty of the law relating to reversioners and the frauds and falsehoods connected with it are got rid of; either they get a definite share on the husband's death or they get nothing at all. The question of the widow binding them by her acts does not arise. As the widow has a definite share, whether she has sons and daughters, or daughters alone or neither, she has a free hand in dealing with it. Twenty-six millions of widows are not fettered and imprisoned, totally helpless, with bars and restrictions on every side, but can live and breathe as independent creatures. They, on the other hand, will perform funeral ceremonies for

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the deceased as they get a definite but not unreasonable share of the estate. The law relating to divesting and the assent of *sapindas* goes over-board; and another fruitful source of litigation is avoided. The widow can still adopt a son but no consent of *sapindas* will be necessary; the adopted son will inherit to her only when she dies and not deprive her of it when she is still in the flesh.

These proposals depend of course on the Mitakshara school falling into line with the Dayabagha, as regards its conception of a coparcenary estate. The latter conception is, it is admitted, more advanced and reasonable, has made for greater enterprise and initiative and has worked much more smoothly, than the Benares school. It is not too late to overhaul asteric ideas embodied in the Mitakshara and take a step in advance in line with our brethren in Bengal.

## CHAPTER XIII

### Rights of a Daughter

There can be no substantial improvement in Hindu society or in the legal position of women, till some at least of the defects and inequalities now existing in the law applicable to daughters are remedied and they are accorded a status in which they can respect themselves and evoke respect from others.

It is not here suggested that Hindu parents do not treat their daughters with the affection and regard due to them. On the other hand, there can be little doubt that while in their parents' home, the daughter occupies a position next only to that of the mother, and receives the maximum of liberty and affection that she is likely to receive at any period of her life. The mother, in particular is so obsessed with the idea that very soon the daughter will be removed from her control and sent to the *terra incognita* of her husband's and mother-in-law's home, that she lavishes all her tenderness upon her and sees that she is properly fed and dressed and appears on all public occasions bedecked with jewels and ornaments suitable to her station in life.

All the same it must be confessed that the legal position of a daughter is unenviable. As has been already pointed out in the chapter relating to education, the only two rights to which she is absolutely entitled are the rights of maintenance and marriage. So long as she is unmarried, she is entitled to be maintained by her father or, if he is dead, by her brothers or other members of the joint family. She is also entitled to be given in marriage at the proper time and to have a reasonable amount of money spent on her for jewels and in connection with her marriage ceremonies. She can inherit in certain circumstances to her father, but these are so hedged about with limitations and restrictions

and so far postponed to the rights of a son and numerous other males, that in practice her rights are negligible.

If her mother happens to have *Stridhanam* property of her own, the daughter is the first in the succession of heirs who could inherit the same. Commentators, however, have so whittled down the items of property which are entitled to be classed as *Stridhanam*, that her rights in this also are precarious, to say the least.

She cannot inherit to her brothers till after all the *sapindas* and *samanodakas* are exhausted and curiously enough she is postponed to her own son.

As a daughter she does not inherit to her father at all, if he is a member of a joint family and is undivided from it. Her father's brothers and her own brothers would inherit the property and will be liable only to give her maintenance when she is still a maid, but if her father has self-acquired property or has become divided from the other members of the joint family and in partition become entitled to separate property of his own, the daughter will inherit if there are no sons and no widow. Even here so many nice distinctions and limitations are introduced that, in practice, she is more likely to inherit litigation than cash. Supposing that a father had separate property, and supposing again that he dies without leaving sons or a widow behind him, then all the daughters together take a limited estate which is also a joint estate. As between themselves, all sorts of distinctions have to be borne in mind.

As between an unmarried daughter and a married daughter, the unmarried daughter takes the father's property excluding the married daughter, however poor she may be.

As between married daughters, the poor daughter excludes the rich. As the law has laid down no standard by which to estimate poverty and riches, and as there are very few cases in which one sister lives in affluence, a great deal of evidence has to be received in the Courts, before it is settled as to who is the indigent daughter entitled to inheritance.

Another line of distinction is that based on chastity.

The rule that a chaste widow can only inherit has also been applied by recent commentators to daughters in some schools, so that if at the time the inheritance opens, a daughter is or the daughters are reputed to be unchaste, they are deprived of their rights. This leads to false imputations by one daughter against another and by the reversioners against daughters generally, that though they are the persons primarily entitled to inherit, they have forfeited their rights by unchastity. Fortunately in South and West India this question is of little importance, as under the decisions a daughter can inherit whether chaste or otherwise.

In Bengal another curious distinction has to be borne in mind. A daughter likely to bear a son is preferred to a daughter not likely to bear sons. This excludes a barren woman who is maltreated by her husband on the ground of barrenness or a woman who has only borne daughters, widowed daughters who might be living in extreme indigence, and daughters deserted by their husbands so that there is no possibility of a legitimate offspring. That is to say, in all the circumstances when they are most in need of help from the father's estate, they are deprived of expectations that they can legitimately entertain.

The question of the legitimacy of the daughter has also to be borne in mind. An illegitimate daughter is not entitled under Hindu Law to anything, not even to maintenance. Under the Criminal Procedure Code her father if alive may be compelled to maintain her, but Hindu Law, both in the case of the twice-born and Shudras, definitely lays down that an illegitimate daughter is not entitled to inherit to him in any circumstances, nor is she entitled to maintenance out of her father's estate, if he is dead.

The nature of the estate which a daughter takes has also its distinct and characteristic limitations. It is a general principle of Hindu Law that no woman who inherits to a male can take an absolute estate. A daughter, therefore, like a widow succeeding to her father's property, takes only a limited estate, which is too, as has



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already been described, an unnatural cross between an absolute estate and a life estate. She can enjoy the corpus of the property during her life-time, but she can alienate it only for her father's spiritual benefit or in order to pay off his debtors or for her own maintenance. Reversioners who are lying in wait for the property are only too anxious to pounce upon her on the slightest suspicion of mismanagement or alienation and to impute to her charges of malversation, improper alienation, etc. Further if there are several daughters, they are said to take jointly, so that if one of them dies, it does not descend to her children, but to her sister for life and afterwards to the reversioners of the deceased father. This provision has the effect of tying up the property belonging to the deceased father till the daughters are all dead one after another, making the property incapable of investment in business or enterprise of a productive character.

I have mentioned the principal limitations and postponements subject to which a daughter inherits to her father. The reason why a daughter is treated with such little regard in the home now becomes patent, and it is equally clear that till she is made to occupy a more reasonable or favourable position in the eye of the law, she cannot come to regard herself as a person entitled to any respect from others nor will others treat her with the respect that is her due. Her brothers and nephews can afford to pass by her with contempt, as a person having no legal status in her own father's family; and her parents can only shed a few pious tears over her when she is thus ignored, but cannot help her or enable her to get justice.

Under the Indian Succession Act, which is applicable to Christians and others, a daughter is exactly on the same footing as a son. If a father leaves an estate with a widow, sons and daughters, the widow takes one-third, the remaining two-thirds is divided equally among sons and daughters. This is perhaps the fairest position that is given to daughters in any system of law.

Under Muhammadan Law the daughter is a sharer.

If there is a single daughter she takes a half share. If there are a number of daughters they take together two-thirds when there is no son. When there is a son a daughter becomes a residuary taking out of the residue in certain proportions, which depend upon the existence of a widow and upon the number of sons and the number of daughters. But the law as to a daughter's rights is laid down so clearly and with such mathematical correctness that there is no room for controversy once the property has been ascertained. It will thus be seen that Hindu Law of the present day is the hardest on daughters, but this was not always the case. Under the original Hindu Law, a daughter occupied a comparatively advantageous position. Brahaspathi says, 'The wife is pronounced successor to the wealth of her husband and in her default let the daughters inherit who are unmarried. As a son so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth.' Katyayana says: 'Let the widow succeed to her husband's wealth provided she be chaste; in default of her let the daughters inherit if unmarried.' In spite of these generous dicta in favour of the daughter, the commentators have engrafted all sorts of tortuous limitations and restrictions which exist at the present day. A daughter occupies the most favourable position in Western India; next to that, in Bengal, provided she has a chance of bearing male children; then in Southern India; the least enviable position being that occupied under the Benares School. The *Vivatha Chintamani* says that on the failure of a wife, the heritage devolves on the daughters and relies on a text of Narada to that effect. 'On failure of male issue the daughter inherits for she is equally a cause of preserving the race, since both the son and the daughter are the means of prolonging the father's line.' Parasara says that 'a maiden daughter takes the heritage of one who dies without leaving a male issue; if there be no such daughter, a married one shall inherit.' There are indications in Manu that in Vedic times the daughter was entitled to a definite share of her father's estate which was

either a third or fourth of that falling to the share of a son.

I have already ventured to suggest in earlier chapters that there can be no real improvement in the position of women in India, till daughters are put on the same footing as sons, though the shares allotted to them may be smaller. Where a father dies possessed of self-acquired property, the sons alone now inherit. It would be a move in the right direction, if when the shares of the sons are allotted, half at least of the share that falls to a son is given absolutely to a widow and half to each daughter. The amount that has already been spent on her jewels may be deducted from the amount assigned to her share, but otherwise she ought to have a definite aliquot fraction of her father's estate. If there are no sons, the daughters and the mother should share equally; and the estate they take must not be the unnatural life estate, but a full or absolute estate. To give her a limited estate, then to make her joint with other sisters, and finally to make the limited estate depend upon half a dozen remote or unconnected contingencies such as whether she was married or not, whether she was chaste or not, whether she is likely to produce male offspring or not; then to make her owner of this limited estate along with all her sisters and finally to postpone such a limited and qualified estate to all the sons and male lineal descendants and to all uncles, grand-uncles and their male descendants, is in effect to prevent her from having the benefit of her own father's earnings to which she has, under the saying of Brahaspathi quoted above, a first and irrebuttable claim.

## CHAPTER XIV

### Stridhanam

By the term *Stridhanam* is meant women's peculiar or exclusive property over which she is endowed with full powers of disposal during her life-time, and which on her death devolves upon her own heirs. In this variety of property, she has an absolute estate, as distinguished from the peculiar limited estate, which she enjoys in property inherited by her from males.

Jimutha Vahana after finishing his discourse on *Stridhanam* remarks: 'Thus has been explained the most difficult subject of succession to a childless woman.' If the subject of *Stridhanam* was thus regarded as anomalous or complicated in the days of Jimutha Vahana, it has grown to be much more so at the present day. Different Law-givers start by giving conflicting accounts of what is included in the term *Stridhanam*. Commentators who purport merely to interpret and reconcile their conflicting views have, if possible, made the complication more complicated and fall into diverse schools, which hold contradictory views on the subject. The Privy Council has given the go-by to the bold attempt made by the enlightened Vijnaneswara to simplify the law relating to *Stridhanam*, so that at the present day the subject is full of anomalies and pitfalls for the student as well as for the Courts. It is time that a simpler and fairer arrangement more in accordance with the just or liberal views relating to women now beginning to be prevalent in the country should be formulated by the legislature.

Sir Henry Mayne who investigated the origin of *Stridhanam* has this classical passage. 'Among the Aryan communities as a whole, we find the earliest traces of the separate property of a woman in the widely diffused ancient institution known as the bride-price. Part of this

price which was paid by the bride-groom either at the wedding or the day after it, went to the bride's father as compensation for the patriarchal or family authority which was transferred to the husband but another part went to the bride herself, and was very generally enjoyed by her separately and kept apart from her husband's property. It further appears that under a certain number of Aryan customs, the proprietary rights of other kinds which women slowly acquired were assimilated to their rights in their portion of the bride-price, probably as being the only existing type of woman's property.' (Mayne, *Early Institutions*, pages 321-324.) According to this view, the *Stridhanam* was originally confined to *sulka* or bride-price. When society expanded and became more complex, and the Rishis were expounding views which were on the whole more liberal and favourable to women, various other items of property given to them on different occasions or acquired by them by their own effort were placed on the same footing as bride-price and made alienable by them at their pleasure, being treated as their absolute property. There was as yet, however, no attempt to give a satisfactory or logical definition covering all the items of property enumerated under the head of *Stridhanam*. Vijnaneswara was the first person who attempted such comprehensive definition, and if his account of the matter had been accepted and followed, the entire law relating to *Stridhanam* would have become greatly simplified and liberalized. But unfortunately for the country a trend in the reverse direction had already set in. Instead of later commentators being generous or just to women, they were inclined to whittle away one by one the rights which they had previously enjoyed, each school of thought vying with the others in reducing the list of property that could be included in the term *Stridhanam*. They likewise began to attack the valuable incidents of *Stridhanam*; less and less of the items included within the term were made alienable by them at their will or descendable after their life-time to their heirs. At the present day, therefore, there is no uniformity of view either as regards the classes of

property recognized as *Stridhanam* or the powers possessed by women with reference to various items of property which are allowed to be women's peculium, or about the rights of succession to such heads of property. Here as in other matters justice to women as well as the insistent call of order and progress require that the legislature should give the go-by to the subtleties and hair-splitting distinctions devised by the commentators and go back to the simple rule suggested by some of the older and authoritative Law-givers.

Instead of attempting to give an account of the doctrine of *Stridhanam* as laid down by the eighty or so Law-givers who deal with the subject, it seems best to confine oneself to the three leading authorities.

Manu says, 'What was given before the nuptial fire, what was presented in the bridal procession, what has been conferred on the woman through affection, and what has been received by her from her brother, her mother or her father, denominated the six-fold property of a woman.'—*Manu IX. 174.*

Yajnavalkya is inclined to expand Manu's idea: 'What has been given to a woman (before or after her nuptials) by the father, the mother, the husband or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife (as also any other separate acquisition) is denominated a woman's property (*Stridhanam*), so that which is by kindred as well as her marriage fee (*Sulka*) and given anything bestowed after marriage.'

Vijnaneswara's *Mitakshara* purports to be a commentary on Yajnavalkya's *Smṛiti*. It admittedly occupies the foremost position among the commentaries and is universally accepted by all schools as of the highest authority. In Bengal alone it yields to the *Dhayabaga* on those points where they happen to differ. After citing the passage quoted above from Yajnavalkya, Vijnaneswara proceeds, 'That which was given by the father, by the mother, by the husband or by a brother and that which was presented to the bride by the maternal uncles and the rest (*Adya*) at the time of the wedding before the nuptial

fire and a gift on a second marriage or gratuity on account of supersession as will be subsequently explained and also property which she may have acquired by *inheritance, purchase, partition, seizure of finding* are denominated by Manu and the rest *Stridhanam*.' The portion italicised would thus include within the scope of the term *Stridhanam* almost every kind of property that a woman could obtain from whatever source and give her absolute and unrestricted powers of disposition over them all. The commentators who followed Vijnaneswara, were however, not inclined to adopt such a sweeping reform and explained away his definition, the only definition that was ever attempted of the term *Stridhanam*, by leaving out some or all the items sought to be included within the ample sweep of his description. The Madras High Court was at one time inclined to follow an enlightened view more in consonance with modern requirements. It held for example in *Salemma v. Lachmana*, 21 Madras, page 100, that whatever was described in the Mitakshara as *Stridhanam* property should be held at the present day to be *Stridhanam*, unless the leading commentators were all agreed in laying down that they were not *Stridhanam*. 'It is scarcely necessary to say that Vijnaneswara's statement that *Stridhanam* is not to be understood in a technical sense was not a mere philological observation. By laying down that proposition Vijnaneswara and other commentators who followed him succeeded in effecting a beneficial change in the archaic *smriti* law and placed women almost on a footing of equality with men as regards the capacity to hold property.' It is unfortunate that the Privy Council in *Mangalprasad v. Mahadevprasad* (1912) 34 All., 434, gave the go-by to the liberalising tendency exhibited by Vijnaneswara and adopted a narrow view based on books which are authorities in the Benares school and which excluded various items of property from the scope of *Stridhanam* and is not descendable to her heirs or alienable by her at her will. In Madras it does not often happen that a widow obtains property on partition. Even in other provinces, it is an event that occurs but rarely. She would in very few instances

obtain in this manner properties which would otherwise be descendable in the male line. There does not seem to be any valid reason why, in these days, such property should be excluded from the scope of *Stridhanam*.

Property obtained by a woman by her own labour or by the exercise of arts and crafts ought surely to be included in the term *Stridhanam*. The Courts have always been willing to hold that if wealth was acquired by *either a maiden or a widow* by the exercise of skill or labour, she should be entitled to hold the same as her *Stridhanam*, but they have come to enforce a different rule as regards property acquired by her in this manner when she is a wife. The argument in support of the distinction thus drawn is based on the obsolete notion that the wife is not an independent person, but merely a chattel belonging to her husband, that her time too is not her own, and that whatever may be earned by her during the leisure that she ought to have devoted to her lord and master is really his property, which she cannot be allowed to dispose of without the consent of the husband. The entire argument is an obvious rule of archaic days and insistently calls for revision. On her death it may be made descendable to the husband, as one of the heirs of his wife; but during her life-time surely there is no valid reason for fettering her discretion to deal with it.

All schools are agreed that gifts and bequests made to a Hindu female whether during maidenhood, coverture or widowhood by her parents and relations or by her husband and his relations are *Stridhanam*. The Dayabhaga makes an exception in favour of immoveable property made the subject of gift to her by her husband; she is not allowed to alienate such a gift without her husband's consent. The rules are more complicated as regards gifts or bequests from strangers. If such gifts were given during maidenhood or widowhood or at the time of marriage (that is to say before the nuptial fire or during the bridal procession) they are *Stridhanam* according to all schools. But property given or bequeathed by strangers to a Hindu female *during coverture is Stridhanam*.



according to Bombay, Benares and Madras schools, but not under the Mithila or Dayabhaga schools. The reason usually advanced in support of this difference is that the husband may at any moment be reduced to distress and in such a contingency he should be endowed with the right to take for himself the property that was made the subject of gift to his wife by strangers; though the property may be hers for purposes of descent, she should not be allowed to alienate it or have independent power of disposal over it so long as her husband lives. More recent commentators would go further and introduce another fanciful reason which, however, does not appear to have occurred to the wiser Law-givers of an older day, viz., that if the wife is allowed to receive gifts from strangers, it might interfere with the husband's control over her and induce her to go astray. If these or either of them were valid reasons, property acquired by a woman when a maiden or at the time of her wedding ought also to have been excluded from the scope of the term *Stridhanam* and made liable to be disposed of by her only with her husband's consent when she marries, and no attempt, however, has ever been made to extend the rule in this direction, and such a development will be recognized as manifestly unjust and retrograde. It will help all schools of law to come into line if the wife who receives gifts from relations or friends during coverture is put on the same footing as a maiden or widow, and allowed to deal with the property as her own, irrespective of the region in which she lives and the school of law which she is supposed to follow.

The crux of the dispute really relates to wealth which is acquired by a woman by inheritance. All schools of thought are agreed that property given to her in lieu of maintenance or as a result of a compromise or obtained by adverse possession or by finding should be hers absolutely to deal with as she likes. But as regards property inherited by her whether from males or females, the Law-givers have uniformly treated her ungenerously, as they believe that to give her an absolute right would have the effect of taking the property away from the joint

family and transferring it to the heirs of the woman. A further distinction is also made between property inherited by a female from a male and property inherited by a female from a female. As regards the former, it is the common doctrine of all the schools that the property inherited by a woman from a male, say, from her husband or brother, should be held by her only as a limited estate, which she could enjoy during her life, but which she could not alienate except for certain purposes specified by the law, e.g., her own maintenance, the spiritual benefit of her husband or his parents or the payment of their debts. It might be a big inroad to introduce any improvement in this branch of the law, but it is equally clear that till women obtain independent rights of absolute inheritance to their fathers and husbands, they would continue to be as people of no status in the eye of the law and be deprived of the portion of influence and respect which is their due, retaining perhaps such formal social regard as may be shown to them by reason of their age, relationship or life of virtue. In view of these circumstances and with a view to enable them to maintain themselves in comfort and live in independence, I have ventured to suggest in earlier chapters that a married woman should be entitled, if she has no sons or daughters, to inherit absolutely half her husband's property, and if she has sons to obtain half the share which a son would get. A similar right should also be available to daughters, each daughter being entitled to obtain on her father's death half the share which a son obtains. But as a just offset to the concessions thus made in their favour, when the inheritance again falls open by their decease, the absolute estate enjoyed by them may in its turn be made descendable not to daughters alone as at present in the case of *Stridhanam* property, but to daughters and sons, each daughter taking one share and each son taking a half share. The law would then be reduced to this degree of simplicity and uniformity that when males and females inherit to males, the male child will get double the share that a female gets, and on the other hand, when males and females inherit to females, the male gets half what the female gets.

Then there is the other portion of the existing law that in Bombay property inherited by a woman from a female becomes her *Stridhanam* in all cases. She can dispose of it by an act *inter vivos* or by Will, and on her death intestate, the property passes to her *Stridhanam* heirs. Under all other schools property inherited by her from a female also is property in which she is allowed again to have only a limited interest. On her death, the property passes not to her heirs but to the next heir of the person from whom she inherited, that is to say, to the *Stridhanam* heirs of such last owner. At this stage, the modification above proposed would introduce the impartment referred to, namely, that even where a woman inherits to a female whether during maidenhood, coverture or after widowhood, the property thus inherited should descend in two shares to a daughter for every share that would go to a son. At present the question whether property is *Stridhanam* or not depends on, first, the manner in which the property is acquired, e.g., by way of gift, inheritance, adverse possession; second, her status at the time of acquisition, that is to say, whether she was a maid, wife or widow; third, the school to which she belongs; and fourth, the nature of the property. Likewise, the question as to who is to inherit her property also depends on a number of different and somewhat irrelevant circumstances, and the question as to whether she has absolute or restrictive powers of alienation during her life-time is similarly dependent on a number of circumstances. For the purpose of reducing the law to a uniformity these slight differences, which really do not appear to be of any serious moment, ought to be slurred over, and a simple uniform rule may easily be devised by the legislature once for all.

BOOK II  
Caste

## CHAPTER I

### Introduction

INDIA may truly be described as the original home of caste. In all areas where people are established on any considerable scale or for any length of time they will probably be found to fall into classes more or less clearly distinguishable from one another; but nowhere else are caste barriers so rigidly graded or so insurmountable. There must always be differences between man and man in intelligence and physical stamina, and in the opportunities which wealth of different kinds affords; in every well-established society there is probably cleavage of some kind between the rich and the poor, the landed and the landless, the classes and the masses, freemen and serfs. But when such distinctions operate permanently to create disabilities or cause crushing injustice, migrations take place or revolutions occur, or the depressed classes make common cause with an invader with a view to relieve themselves of their bondage.

Conditions in India are peculiar inasmuch as class divisions have become established on a hereditary or birth basis, and obtained the sanction of religion with which it has become identified. Society does not fall loosely into classes but has become *organized* into castes, some of which have remained the same for thousands of years. Any reasonable person will be prepared to admit that the system had its uses and was found to be on the whole beneficial; otherwise it would not have lasted so long. But it is also perfectly clear that arrangements which were devised in ancient times and worked well enough when society was primitive and simple are now actively causing hardship or injustice to vast and helpless millions.

Speculation has been busy from the earliest times as to how this hoary and all-embracing form of social

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organization came into existence. The Vedas contain no reference to caste, though there are prayers for victory over the Dasyas. There is an allusion to it in the Purusha Sukta which, however, is considered a late interpolation. We hear of caste when the Smritis came to be written. Manu, one of the earliest of Smriti writers gives the following account of the origin of caste :

‘ For the preservation of all this creation, He of great effulgence laid down separate duties for those who originated from His mouth, viz., Brahmanas, from His arms, Kshatriyas, from His thighs, Vysias and from His legs, Sudras.

‘ The study of the Vedas, teaching, performance of sacrifice, gift-making and the acceptance of gifts are the duties of Brahmanas. Protection of the people, gift-making, performance of sacrifices, study of the Vedas and abstention from luxury are in general the duties of Kshatriyas. Rearing of cattle, gift-making, performance of sacrifices, study of the Vedas, merchandise, money-lending and agriculture are the duties of Vysias. Only one work did the Lord ordain for the Sudras, viz., ungrudgingly to serve the three above said social orders.

‘ From the fact of his having originated from the mouth, for the reason of his being the eldest born of Brahma, for the reason of his being the repository of the Vedas, a Brahmana is the ruler of all creation, inasmuch as he lays down the duties (of all the social orders).

‘ Him, the self-originated One, having practised Tapas, created from out of his mouth, for the preservation of creation, and in order that the Pitris (manes) and the Devas (Celestials) might obtain their (portions of the sacrificial) oblation.

‘ The Brahmana has originated as the eternal embodiment of virtue. His origin is for the furtherance of virtue ; he becomes of the essence of Brahma.

‘ Born as a Brahmana, he wields the supremacy of the world, the ruler of all creatures, the custodian of the treasure of virtue.

‘ Whatever property (wealth) is in this world belongs to the Brahmana, for the fact of his being the eldest born

(of the creator) all wealth legitimately belongs to the Brahman.'

Chapter VI of Manu's Code goes on to describe in detail the rights and duties of different castes. The principle on which the entire Smriti proceeds is that there should be no single or uniform rule for all citizens but that the regulation of duties, the determination of offences, the distribution of punishment or reward, and the reception of evidence, depends upon the caste of the offender.

Hindu Rishis trace caste, as they do almost everything, to the gods, with a view to invest it with the help of a sacred sanction. Undoubtedly the main or original reason for the separation of the people into castes was to enforce the distinction between the Aryans, who came as invaders into the country and the aboriginal Dravidian and other inhabitants whom they found established in the land when they arrived. The Aryans were a fair and warlike, virile race when they first came through the passes, while the peoples already naturalized in the country must have been either dark-skinned Sumerians or yellow Mongol races. The word caste is of Portuguese origin (from Latin *Costus*, purity of breed); but the Sanskrit equivalent of it is '*Varna*,' which means colour and involves the inference that the original basis of distinction was merely the difference in colour between the invaders and the Aborigines. 'There is nothing new under the sun.' 'Colour prejudice,' the 'Yellow Peril,' the 'rising tide of colour' were thus just as much problems for our remote ancestors as they are to-day. In order to keep the Aryan race pure and free from intermixture with the aboriginal inhabitants and in order possibly also to preserve intact the more virile and strenuous habits and customs of the incoming race, it was thought necessary to distinguish between the Aryans and the Dravidians in the same way as some Occidentals would now draw barriers between themselves and the Oriental races.

It will be further noticed that among the Aryans themselves a further distinction was made on the ground of

occupation or profession, those who devoted themselves to philosophical and religious study, somewhat after the manner of Plato, being the highest class, the military being the middle and the traders and agriculturists being the lowest class. By the time the principal Smritis came to be written, several other castes had come into existence, some of them recognized as falling within the above main groups, others mostly constituting subdivisions of the Sudra caste. We read of artisans and oil pressers, hunters and fishermen, weavers and dyers, and even of horse-trainers and executioners becoming separate castes. These divisions and sub-divisions came to be crystallized partly because their members lived together in specific areas in cities or villages, and partly because they tended to develop a uniform set of customs or practices favourable to the perpetuation of the group. Incidentally they formed trade guilds somewhat like the famous guilds of the middle ages in Europe and cultivated *esprit de corps* among themselves, the outstanding men among them sharing their superior skill and knowledge with the less advanced, and the young being imbued with the aptitudes and acquired ability of the older men as a result of working in their presence. The skill of the artisan and the agriculturist, the expert smith and the master carpenter have thus been conserved in the caste and acquired aptitudes are inherited by sons from their fathers.

The idea that mixture between different castes gave rise to new castes appears somewhat fanciful; but as the old legislators allowed members of the higher class freely to take wives for themselves from all inferior classes, while prohibiting the women of the higher caste from marrying members from any of the castes deemed lower in social scale, the theory is not altogether unreasonable.

'Sons, begotten by members of the (four several) castes on lawful married wives, belonging to their respective social orders (castes) in the due order of enumeration and with unruptured hymens at the time of marriage, should be regarded as the best (of sons). Sons begotten by twice-born ones on wives not belonging to their respective castes, do not become of the same castes with their fathers; they belong to different castes. Sons begotten by members of twice-born



castes on wives belonging to the next inferior castes (in the order of enumeration) are said (by Manu) not to obtain the castes of their fathers owing to the degraded castes of their mothers.

'Thus the status of sons begotten by fathers on wives respectively belonging to their next inferior castes has been described; now hear me discourse on the status of sons, begotten by men on wives belonging to the next but one or next but two inferior castes of their own.

'Sons begotten by Brahmanas on their lawfully married Vaisya wives are called Ambashtas; sons begotten by Brahmanas on their Sudra wives are called Nishadas or Parasavas.

'Sons begotten by Kshatriyas on their Sudra wives are called Ugras; they become cruel in deeds and temperament owing to the natural mental traits of their respective parents.

'Sons begotten by Brahmanas on wives of the next three (inferior) castes (i.e., Kshatriya, Vaisya and Sudra) those begotten by Kshatriyas on wives of the next inferior caste (Sudra) in their order of enumeration, should be regarded as six inferior (Apasada) sons.

'A son begotten by a Kshatriya on a Brahman woman becomes a Suta by caste; sons begotten by Vaisyas on Kshatriya women are called Maghadhas, and sons begotten by Vaisyas on Brahmana women are called Vaidehas.

'Sons begotten by Sudras on Vaisya women are called Ayogavas; those begotten on Kshatriya women by them are called Kshattas, and those which they beget on Brahmana women are called Chandalas, the most abominable creatures. Thus the mixed castes are originated.

'Sons begotten by men on wives, belonging to castes next by one to those of their own, computed in the order of enumeration such as the Ambashtas and Ugra, bear the analogy with Kshattas and Vaidehas, which are begotten by fathers on wives belonging to castes next by one to those of their own, counted in the inverse order of enumeration.'

Risley in his well-known book on the *People of India* considers that even at the present day new castes are constantly coming into existence by crossing, and gives instances by such castes. The Shagirb Teishas, Oraon Mundas and eight other castes from Bengal alone have sprung from miscegenation. In Nepal nearly half the population now in existence appears to have sprung from inter-mixture between Rajput or Brahmin males and the Mongolian women of the country, who were apparently only too willing to welcome the southerners to their favours.

A great many modern castes have undoubtedly come into existence owing to the formation of sects following new sectarian leaders. The Lingayats for instance were originally a single democratic caste but now they observe

distinctions between Veera Saiva Brahmins, Kshatriyas, Vaisyas and Sudras. The Vaishnavas again have many religious leaders like Ramanuja, Ramananda, Chaitanya, Vallabacharya and each group has become a separate caste or set of castes.

The same principle which led to the separation of the Aryans from the Aboriginal inhabitants of the country still operates on a smaller scale; when the Hindu community absorbs a new tribe or race into its fold, it gets organized as independent caste. The Mundas were originally a tribe; now they are a caste. The Kochh were likewise a separate tribe but at present they are a caste. The Ahirdoms and Dosadh of the United Provinces, the Jats and Rajputs of Rajputana, the Mahrattas of Bombay, the Namasudras of Bengal are all instances of separate races or tribes becoming known as higher or lower castes.

There have been other causes which led to the formation of new castes on a smaller scale. When a caste migrates from one region or province, it comes to be regarded as a new or inferior caste. Quarrels between different sections of a caste on religious or secular grounds have led to bifurcation: a caste may go up or come down in the scale by adopting or giving up a practice considered important, e.g., eating meat.

Generally speaking, therefore, the organization known as caste was in the first instance ethnic or tribal in origin, but other principles like occupation, sectarian division, regional distinctions, mixture of castes, migration and bifurcation have all played their part in creating the three thousand odd castes now in existence. A book like Thurston's *Castes and Tribes of Southern India* reads like a romance, the most interesting part of which is the legendary account that each caste gives of itself.

At the present day, however, the system though well-established and offering the strongest possible resistance to change of any kind shows so many defects and has led to so much injustice that the time has undoubtedly come for stopping the process of further division and starting a stream of tendency in the opposite direction with

a view to evolve a homogenous nation in India. Out of a population of about 240 millions who are nominally Hindus, about seventy millions are out of the pale of Hinduism altogether as they do not follow any recognized form of religion and are so low in the social scale that no temple or festival would have anything to do with them. There are said to be fifty millions in India at the present day who live on the verge of starvation, being unable to obtain more than one meal a day. There are vast sections of the population which spend their entire lives without enjoying any opportunities of raising themselves in status by study or self-improvement in one form or another. More than 200 out of the 240 millions who are known as Hindus fall within the Sudra class. They cannot study the Hindu scriptures or perform ceremonies. Any Moksha they enjoy must be on earth because they have no hope of any in the heavens according to the orthodox Scriptures and here their existence is more of a hell than otherwise. A Sudra was originally a slave or Das: under the legislation of Manu and other law-givers, he was bought and sold as such. In the same way as a slave in ancient Roman times could not hold property, whatever a Sudra won by his efforts belonged *ipso facto* to his master and his wives and children were also on the same footing. Though slavery as such is not in existence in the present day, we read in books written a century and more ago of cultivators as serfs attached to the soil and passing when the soil was sold to the purchaser as part of the appurtenances to the soil. Even at the present day in most places the ryotwari or Zemindari tenant will hesitate to leave the home of his fathers and seek more profitable employment elsewhere because he knows that sooner or later he would have to return to his home and when he does so he would have lost his right to cultivate a portion of the land or to take a turn in the village offices. The people engaged in cultivation show little tendency to migrate from one portion of the country to another. There are movements towards profitable fields abroad like Ceylon, Malaya, Fiji, Mauritius and South Africa, from certain parts of India

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but taken in connexion with the vast inert masses which lie paralysed into inactivity, these migrations may be described as negligible. But generally speaking the caste system taken together with the arrangement known as the joint family has made for poverty, degradation, stagnation and want of enterprise.

The greatest draw-back, however, is that it serves to split up the people of the country into numerous subdivisions which will not unite and are incapable of uniting for national purposes. If the divisions were vertical or regional instead of being horizontal, there would be room for healthy emulation between different sections as there is in foreign countries. But as each community constitutes a separate stratum of society and is endogamous and exclusive in matters of eating and drinking, not only is the sense of national feeling lost but friction ensues and there is plenty of room for contentions and quarrels for office, precedence and honours. Since the advent of the British a general wave of democratic feeling has been induced and a man of the lowest caste can claim to be treated in the eye of the law at least as a person equal in rights and privileges with the highest; there is also a great deal of conscious or unconscious toleration allowed to castes which tend to be progressive and push forward. But at the same time, the caste system has curiously enough tended to become more rigid and exclusive; communal quarrels which probably did not exist in former times have become the order of the day and are more likely to increase in magnitude and virulence rather than diminish as the years go by. It is too much to expect that communities now enjoying power and privilege will make a gift of them to those whom they have been accustomed to dominate. The die-hards among them will probably wait till their privileges are snatched from their hands by a resurgent proletariat rising up in arms, and creating a revolution. No community however backward will agree permanently to consent to arrangements by which all opportunities, emoluments and honours go to certain classes and it is difficult or impossible for others to get within sight of them. A wise observer

has remarked that even the contention between the Hindus and Muhammadans is at bottom a quarrel for honours and position. Hindus by reason of their having taken more advantage of the opportunities of education open to them have obtained a monopoly of offices and dignities in many provinces and though the Muhammadan has many qualities which the Hindu has not, such as strength of character and dignity, nerve in times of danger and administrative capacity or ability to exact work and preserve discipline, he finds that he is elbowed out of office by people whom he is accustomed to regard as men of inferior calibre in these matters. In times of peace the fighting classes do not enjoy the opportunities of distinguishing themselves which will be available to them in times of war or unrest, and they will not naturally consent to an arrangement whereby they are permanently relegated to a back seat. They will, unless they are bamboozled, be apathetic or indifferent towards the attainment of a Swaraj which will probably accumulate all political power in the hands of the few who have now opportunities of study and progress and place themselves more under the heels of the higher classes than they are now. They would probably prefer the even handed justice they get now to the tender mercies of higher castes absorbing all political power into their hands.

The system though meant to preserve hereditary qualities and aptitudes which have in the first instance been acquired by the exercise of some definite profession or other is apt to crystalize habits and practices which make for weakness and corruption instead of for progress. The caste is a social group in which the voice of an outstanding leader of reforming tendencies counts for little or nothing and the mass opinion of a great number of people who are unintelligent or backward counts for a great deal more. When a community has developed peculiar habits or characteristics, they are apt to become set and rigid, especially if they are evil and tending to degeneracy, and cannot be thrown off except here and there by individuals who are willing to take up an attitude of protest. Even intelligent and enlightened groups con-

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vinced of the need of social reform are unable to move in the direction of progress because of the dead weight of unintelligent opinion dragging the whole community downwards.

The most serious difficulty in the way of effecting any real progress in matters of caste is that the State is not likely to move in such matters for fear of tumult or fanatic opposition. When the Shanar community claimed rights of temple entry and other caste privileges on the strength of the strides that they have made in education and trade, there was a holocaust at the instance of the Maravars; hundreds of homes were burnt and thousands lost their lives. Each caste is an autonomous community governed by its own rules and precedents, and it is scarcely possible for the legislature to dictate to such autonomous communities as to what they should do or what they should not do. Even if such legislation is promulgated it is more likely to fail by reason of non-observance than to be honoured by obedience.

There are only two pieces of legislation in connexion with caste. One of them is Act 21 of 1850 known as the Freedom of Religion Act which provides that no person shall be deprived of his rights of inheritance or property by reason of his renouncing his religion or caste or being deprived of his caste. The section runs thus:

'So much of any law or usage now in force within the territories subject to the Government of the East India Company as inflicts on any person forfeiture of rights of property or may be held in any way to mar or affect any rights of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion or being deprived of caste shall cease to be in force as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories.'

The community imposes penalties on a person who is guilty of breach of caste rules by depriving him of right of worship or social rights like the right to be invited to a marriage or other ceremony or by subjecting him to pecuniary penalties or in extreme cases by putting him out of caste altogether. These penalties are inflicted for the breach of some rule which in the opinion of the caste

is an inviolable caste custom, e.g., crossing the seas, or marrying a widow, or keeping a woman of higher or lower caste, or dining with prohibited persons, or eating prohibited food like beef or pork or food cooked by prohibited persons like Muhammadans, publicly throwing away the sacred thread, or embracing an alien religion, or by a woman eloping with a man or becoming pregnant when she is a widow. But though a caste might have the right to deprive a member of social privileges or perquisites belonging to him, it ought not to be permitted to deprive him of all his natural or legal rights as a human being, and accordingly the above provision which is a reproduction of section 9 of Regulation VII of 1832 of the Bengal Code has been enacted. It is a wise and beneficent though a negative provision and has shut the door on caste oppression effectively in directions where the legislature can interfere to some purpose.

The Civil Procedure Code enables Courts to try actions of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. See section 9 of Act V of 1908. (Explanation: A suit in which a right of property or office is contested is a suit of a civil nature notwithstanding that such rights depend entirely on the decision of the question as to religious rights or ceremonies.) Where in a given suit a caste dispute is the principal question in issue, the Courts will not interfere. But where it is a subsidiary question which has to be determined before a right to property or other similar right is established or denied, Courts are bound to deal with even caste questions for the express purpose of settling such disputes. A caste is treated as a self-governing body which has power to make rules for the guidance of its members and punish those who act in contravention of those rules. The courts are usually unwilling to interfere with the powers of an autonomous body like it. They are also conscious that even if they passed decrees in such matters such decrees are incapable of being carried out. Where, however, a person is deprived of his caste by a person not competent to do so or for reasons which are inconsistent with the principles of

natural justice, the Courts will interfere and pass injunctions preventing injustice being done to him. The head of a caste who has powers to impose penalties or the majority of the caste members of a community can expel a member ; but their action must be *bona fide* and not influenced by malice. They must have some reason to justify the expulsion and should have given notice to the offending person and an opportunity of explaining his conduct: they must have acted strictly according to caste custom and exercised the powers given to them according to such custom. At one time suits for restoration to castes were made expressly cognizable by Bengal Regulation III of 1873. But even then Courts could not direct Hindus against their will to ask other Hindus to come to their house or entertainment. The corresponding Bombay Regulation provided that no interference on the part of the Court on caste questions was warranted beyond the admission and trial of a suit instituted for the recovery of damages on account of alleged injury to the caste and character of the plaintiff, arising from some unjustifiable conduct on the part of the persons expelling him. Though these decisions deal with the limits within which an autonomous body like a caste could act with reference to its members, judicial pronouncements on the question as to whether members of a higher caste can impose disabilities on those of a different or lower caste are rare.

Fortunately members of backward communities do not now suffer from legal disabilities. They do suffer, however, from a number of unwise or improper restrictions made for them by their own caste rules. They suffer more occasionally from irritating restrictions imposed upon them by members of other communities. It must frankly be admitted that there has been a general improvement in condition all round since the advent of the British regime and that backward classes are now enjoying opportunities which they never had before. Owing to the exigencies of modern city life, the introduction of railways and steamers, the establishment of Courts and other public institutions open to all, great sections of the



## CHAPTER II

### Inter-caste Marriage

In order that a Hindu marriage may be valid, the bride-groom must marry a woman of the same caste as himself. This rule, however, is subject to certain exceptions to which reference will be made presently. The so-called rule itself was not in existence in early times and is not observed in its strictness even at the present day in all parts of India. When the caste system was first organized and had not yet taken definite root in the country, the main idea in the minds of the ancient Lawgiver was to keep the Sudras, who were probably the aboriginal inhabitants of the country, apart from the higher castes. Even in those early days a marriage between a Brahman and a Shudra was not unknown or interdicted. Later when caste ascendancy developed, inter-caste marriages were customary but began to be treated with growing disfavour. It was in much later times that the commentators of the die-hard variety took a much stronger line and declared that a man must marry only in his own caste and could not go out of it. Manu says :

For the first marriage of twice born men, wives of equal caste are recommended, but for those who, through desire, proceed to marry again, the following females chosen according to the direct order of the caste are more approved.

It is declared that a Sudra woman alone can be the wife of a Sudra, she and one of her own caste the wife of a Vaisya, those two and one of his own caste the wife of a Kshatriya, those three and one of his own caste the wife of a Brahmana.

*Manu* III. 12-13.

In the chapter relating to inheritance it is further declared that :

If there be four wives of a Brahmana in the direct order of the caste, the rule for the division of the estate among the sons born of them is as follows :

Let the son of a Brahmana wife take three shares at the remainder of the estate, to the son of a Vaisya a share and a half, and the son of a Sudra may take one share. Or the Brahmana son shall have four shares. The son of the Kshatriya wife three, the son of a Vaisya wife shall have two parts. The son of a Sudra shall take one share.

Sankha, Likhita and Parthinasi ordain in the same manner. Later Law-givers like Vishnu and Vasistha tend to make a stricter rule which, however, was clearly a departure from the customs prevalent at the time.

Book IX contains an extreme list of castes which inter-marry with one another. It even provides for a man raising himself in caste by means of inter-caste marriage. If the daughter of a Brahmana by his Sudra wife is married to a Brahmana and the daughter of that union is again married to a Brahmana and so uninterruptedly up to the seventh generation in the female line, then at the seventh generation the issue of such union is divested of its Parasura caste and becomes a Brahmana. Thus a Sudra may obtain the caste of a Brahmana and a Brahmana the caste of a Sudra; similarly the sons of Kshatriyas or Vaisya fathers may acquire higher or lower castes.

*Manu IX. 64-65.*

At present inter-caste marriages are valid in those parts of India where there is a recognized custom in support of the practice. The Allahabad High Court (*Padam Kumari v. Suraj Kumari*, 28 All., 458 at page 461) concedes the validity of a marriage between a Brahman and a Kshatriya woman as supported by local custom in Nepal. In Punjab the inter-marriage of a Rajput man with a Khatri woman (*Haria v. Kanhaya*, P.R. 72, 1908) and in Bengal that of a Vaithya man with a Kayasth wife were upheld as supported by local customs (*Ramlal v. Akhoycharan*, 7 C.W.N., 619). The law has been thus summarised by Gour (*Hindu Code*, p. 244):

1. All Shudras can inter-marry among themselves. As Brahmans only form a small minority in South India, and the rest of the community is usually classified for caste purpose as Sudras, this elastic rule

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affords considerable latitude for inter-marriage between castes and sub-castes but in practice it is very rarely resorted to.

2. Persons belonging to the primary castes may inter-marry notwithstanding the practice against such marriages. At first owing to the interference of orthodox Pundits a man had to marry not merely in the primary caste but within the same sub-caste to which he belonged; but a course of decisions commencing with *Inderun v. Ramasamy*, 13 M.I.A., page 141 allows inter-marriage within the caste regardless of the numerous sub-divisions which have sprung up in recent ages. (See also *Fakirganda v. Gangi*, 22 B, 277. *Ramamani, v. Kulandai*, 14 M.I.A., 346. *Muthusamy v. Massillamony*, 33 M., 342. *Upoma v. Bholaram*, 15 Cal., 708.)

3. Persons belonging to the mixed and new castes may inter-marry, if permitted to do so by their own customs. Illegitimate children who possess no caste are allowed to marry in the caste of their father or mother or other near caste. According to the theory of the Sastras the various sub-castes have arisen by the principal caste members inter-marrying with one another. For this reason the new sub-castes are allowed to marry with one another.

4. Where inter-caste marriages are permitted by custom they only permit hypergamous marriages, i.e., they permit only men of the higher castes marrying women of the next lower caste, but not *vice versa*. The ban on inter-marriages was undoubtedly the result of growing caste exclusiveness. Such unions are not common where caste conservatism is most rigid, but where, as in the Punjab and Frontier regions, caste has never taken a strong hold on the people inter-caste marriages are quite common.

It is desirable that there should be a single uniform rule all over India so that there may be no difficulty in determining the validity or otherwise of a marriage which comes into question in the Courts. To make inter-caste marriages valid where there is a custom in favour of it

and invalid in other places adds needlessly to the complexities and uncertainties of the law and raises unhealthy controversies as to legitimacy of children, and the real domicile of parties. No one can complain if the legislature harks back to the elastic rule sanctioned by the ancient Rishis and merely insists on registration of such marriage for the purpose of providing evidence of its solemnization. Even now the doctrine of *Factum valet* is constantly invoked in the case of technically invalid marriages so as to seal them with binding consequences. The doctrine means that what has happened as a matter of fact will be upheld; if two persons have gone through a form of marriage and lived as man and wife, the law will not interfere to set aside the relationship. Purohiths of the priestly classes may not be willing to perform inter-caste marriages but where they are *fait accompli*, it is desirable that the ancient and well-tried maxim *semper praesumitur pro matrimonio* should be given effect to. If the maxim is not invoked, then the issue of each such relationship becomes at once illegitimate. If the marriage in question has taken place among Dwijas (twice-born castes) the son obtains no rights of inheritance whatever; if it is a Sudra marriage the illegitimate son gets only half what a legitimate son is entitled to. This is a direct violation of the ancient precepts laid down in the Sastras. The old Law-givers were so much in favour of progeny and especially of male issue that even when there was no proper marriage they recognized sonship and gave to the sons the privileges of offering oblations and inheriting to their fathers. They recognized inter-caste marriages as a legitimate method of bringing new castes into existence and actually went to the length of allotting separate functions to the new castes, so brought into existence. According to Vishnu (XVI) an Ayogava (son of a Sudra by a Vaisya woman) lives by artistic performances; a Pukkasa (son of a Vaisya by Kshatriya woman) by hunting; a Magada (son of a Sudra by a Kshatriya woman) by eulogy; a Chandala (Sudra by Brahman) by execution of criminals; a Vardhchaka (Vaisya by Brahman woman) by keeping

dancing girls; a Suta (Kshatriya by Brahman woman) by managing horses. Romesh Chunder Dutt calls in question the truth of this theory, but it was undoubtedly held by many sages to be the source of caste sub-division, though probably differences of race, habitat, doctrine and occupation were probably the real dividing causes.

There can be no doubt that feelings of loyalty to the race or nation as a whole and feelings of patriotism towards the Motherland have been corroded and eaten into by differentiation of castes, each caste trying to protect its own interest, if necessary at the expense of other castes. The communal quarrels and dissensions which are such a blot on public life in India at the present day can only be neutralized by providing for the validity of inter-caste marriages. They will serve to arrest the race decay which has set in, owing to non-eugenic mating, and improve the Hindu physique and civilization generally. Any disturbance due to discrepant ideals or habits may be left out of account, as the character of the Hindu ethos is much the same everywhere. Nor will any serious difficulty be felt owing to change of religious dogma as the girl's religion begins generally after her marriage and she easily adjusts herself to her new home, and the general eclecticism and tolerance which are in the air will help the easy intermingling of castes. Incidentally, concubinage will be discouraged as no one need resort to it when the law allows him to marry out of his caste. A simple procedure by which all marriages have to be registered, and in cases where a regular ceremony celebrated by Purohits with orthodox rites is out of the question, a ceremony like that in *Manu* ordained by Law performed in the presence of a Marriage Registrar or other Public Official provided for the purpose, will meet the needs of the case. If Hindu law has become unnecessarily inelastic since the advent of British Courts, the caste system has to an even greater extent lost its fluidity and elasticity and works out into watertight or hermetically sealed compartments. There is certainly no necessity at this time of day to give legal sanction to a practice which cuts up the country into warring and

discordant divisions, and indefinitely holds up the possibility of national unification. If inter-caste marriage is permitted or sanctioned by law, fusion will naturally commence at once and tribal or caste loyalty will give way to common patriotism to the Motherland.

The Brahma Marriage Act III of 1872 was undoubtedly a step in the right direction; but after fifty years' experience it stands in urgent need of expansion or reform in the light of the requirements of an ampler day.

In the first place the clause requiring the parties to declare that they do not profess one or other of the eight principal forms of faith prevalent in India should be deleted. Marriages constantly take place between Christians and Hindus or Hindus and Buddhists in Ceylon without any disastrous consequences following and will on the other hand distinctly lead towards toleration and friendly enquiry. Enlightened people who have been abroad or have more liberal notions of marriage than the limited outlook of their caste, would have a simple and at the same time effective form of marriage available for use. The Registrar is the only person authorized to perform marriages under the Act. The power must be extended so as to include officials who will be accessible even in small towns and villages of considerable size.

The provisions as to bigamy, divorce, certificates and registration must be retained, but some simple rules should be added as to the rules of inheritance applicable to the issue of mixed inter-caste or inter-creed marriages. The provisions in the Indian Succession Act XXXIX of 1925 or the Parsee Succession Act may be adopted wherever possible.

## CHAPTER III

### Inter-dining

Yajnavalkya says :

Of Sudras, the food of a servant, of a cowherd, of one with whose family hereditary friendship has been maintained, of one with whom one cultivates land in half shares, of a barber and of one who entirely surrenders himself could be taken.

(I. 168).

Parasara has this passage :

'A Brahmana can safely partake of the boiled rice of a Dasa, Napita, Gopala, Kulamitra and Ardhasiri, among Sudras, as well as that of one who has resigned himself (to his care). A son begotten on the person of a Sudra's daughter by a Brahmana, and duly consecrated with Brahminic rites by another Brahmana is called a Dasa. A son thus begotten, but not consecrated, is called a Napita. A son begotten by a Kshatriya on the person of a Sudra's daughter is called a Gopala whose boiled rice a Brahmana can safely partake of. A son begotten by a Brahmana on a Vaisya's daughter and duly consecrated is called an Ardhaka (Ardhasiri), certainly whose boiled rice may be partaken of by a Brahmana.'

Manu lays down the circumstances in which a Brahmin can accept food from lower classes and gives as illustrations the cases of Vamadévah, Bharadwajah and the holy Visvamitra, who did not lose caste though they ate forbidden substances or received food from classes generally interdicted. The rules contained in *Manu* as to the reception of and feeding of guests of different castes shows that existing strictures as to eating and drinking are extremely modern. From the Vedas themselves as well as from *Manu* it is abundantly clear that the twice-born classes including Brahmins were not only accustomed but actually directed to eat the flesh of animals which had been offered up as sacrifices, a practice which still obtains in North India. While flesh of certain animals and birds were prohibited by Manu, others were not only permitted but ordained on account of their food-values. (See Book V.) It is clear that when such practices were

prevalent, the strict modern interdictions as to eating and drinking could not have been in existence.

When caste system was more fluid and accommodating than it is at present, and intermarriages freely and constantly took place between members of different castes, the rules as to eating and drinking must have been more democratic. Like other corruptions of old Vedic practices, these interdictions have become set and hardened only with the advent of late commentators of the priestly caste, exalting the classes to which they belonged at the expense of others.

Even now there is considerable difference between the practices prevalent in Northern India and those which are accepted as proper in the South and West of India in this regard. In the North and particularly in the Punjab, Hindus like to keep an open table and dispense truly Vedic hospitality to guests and visitors irrespective of caste or faith. This is possible partly because the sharp distinction existing in the South between vegetarians and meat eaters does not obtain there, and partly also because the lines of cleavage between different castes have not become so set as they are elsewhere. Extremely orthodox persons of the Brahmin or Kshatriya communities may and frequently do confine themselves to their own homes and refuse to go and dine elsewhere. The rules are so exclusive in some instances (e.g. Kanojians) that a man is prohibited from dining even in his father-in-law's or uncle's house or in the house of his sister or daughter if they are given in marriage outside the family. There is a saying :

'Three Kanouj families require thirteen kitchens.' This however is the exception, not the rule. In the North a further distinction is drawn between those classes from whom articles of food which are fried in ghee or oil can be received and eaten and those from which boiled food can be received. Conditions are very different in South India. There is little or no hospitality worth the name as between different castes and communities. Within recent years in cities and large towns there have been public dinners in which members of different castes



have sat together to partake of a common meal, but these proceedings are carried on in the teeth of caste custom as it is known in South India. Members of a caste may refuse to sit down and take a meal served on ceremonial occasions if anybody outside the caste or a person of doubtful antecedents is ostentatiously introduced as a guest. They may do so even if some member of the caste who has been outcasted for crossing the black sea or marrying a widow or keeping a low caste woman has been invited. The rules as to Dhrishti Dhosam go so far that a member of a different caste should not even see a member of another caste sitting down and taking his meal. It came out in a criminal case that a member of a higher caste, who was dying of injuries received, refused to take water from a member of lower caste even though he was suffering from extreme thirst prior to expiry.

While it is impossible to compel persons to invite others to their feasts or ceremonies there does not seem anything unreasonable in enacting that a person should not be deprived of membership of a caste merely because he has eaten in the house of another. 'Publicly eating beef, pork or fowl, publicly eating food cooked by a Muhammadan, Christian, or low caste Hindus' are mentioned by Bhattacharya as acts which may lead to exclusion from caste. It is well known that though caste men everywhere are breaking these antiquated regulations nothing ever happens to them, if they happen to be men of means or position. No one will think of out-casting a man who is guilty of elopement or adultery or of gross fraud on his own brothers and sisters. There is no immorality or moral turpitude so great as would justify excommunication from caste. Is it not too much to lay down that a stray meal eaten publicly or privately should not be allowed to be treated as one of the causes justifying exclusion from caste?

The modern Railway and the numerous eating houses that have sprung up in connection with it, the hotels and restaurants that have been established in every important street in cities and towns and the modern sporting club have done more to break down these sanctimonious rules

of exclusiveness than many flowery speeches unctuously delivered from Congress and conference platforms. In public institutions like schools and college hostels, hospitals and asylums the concession now made of having distinct kitchens or separate cooking should be minimised or put an end to altogether. There is one college hostel in which there are forty-two separate kitchens. This, it will be admitted, is the limit.

I remember to have read that in connection with the Congress held at Ahmedabad 30,000 men of all castes and creeds sat down to have a common meal. I do not see why electors to Municipalities and Legislative Councils should not insist upon it that their representatives should show their fellow-feeling by sitting down for a common meal with their fellow members. The majority of the electors in any particular division probably belong to the Sudra or outcaste sections and they are certainly entitled to ask for something more than pious professions of sympathy. Why should they not insist on some tangible proof of the candidates' recognition of their oneness with the electors, such as sitting down to an election dinner? It is certain that the common mess or Syssitia prevalent in ancient Sparta was meant to strengthen the feeling of solidarity in the community as a whole. The feasting that went on in India in ancient times at times of marriage must have brought together members of different castes who were related by family ties. There is nothing that is likely to break down the unmeaning prejudice which exists between one caste and another and promotes friendly feelings as common meals.

The custom of dining exclusively or in solitary grandeur was introduced so as to help the superiority complex. If now a democratic equality complex is to be substituted the most effective method is to abolish exclusive habits and introduce free inter-dining.

## CHAPTER IV

### Temple Worship

If there is any feature of Indian life which must appear more inhumane than others, in the eyes of disinterested observers from foreign lands, it is the doctrine by which millions of the Hindu population are prevented from enjoying the privilege of worshipping in the temples of their own religion. India has always been known as the home of spirituality. Even the classes which have not enjoyed the advantages of studying the sacred scriptures are extremely religious by nature and are willing not merely to give liberally of their substance in order to placate the priests and deities, but are ready to undertake pilgrimages involving endless privation and suffering and go through fasts, penances and sacrifices not heard of elsewhere. Yet the temples can only be entered by the higher castes for purposes of worship and the vast majority of people who constitute the lower classes are jealously excluded from them. The result is that if there is any cultural or refining influence to be had by worshipping the higher gods like Siva and Vishnu, it is not rendered available to great multitudes in this country who have to rest satisfied with ritual of the crudest character addressed to deities equally primitive and unspiritual.

It has been argued that temples have been endowed for the benefit of the higher classes and it is not just or legal to deprive those castes of the exclusive rights enjoyed by them in the course of ages. There is reason to think however that the extremes of caste exclusiveness now prevalent have come into existence only in recent times. It very rarely happens that Brahmins endowed any temples. The vast majority of such institutions in South India must have been brought into existence by gifts from Sudra chieftains or princes or contributions from the Sudras generally. A

heavy percentage of the offerings made at the time of festivals and poojas in the temples is even now contributed by classes which are now treated as outside the pale of temple worship. The funds so contributed were probably carefully husbanded and temple buildings erected therewith and walls enclosing them, stronger than forts, put up for the purpose of keeping out the very people who contributed most to the erection of the temples. The largest and most munificently endowed temples are probably to be found in the South and West of India. While there are a few fairly big temples in North India in places like Benares, Puri, Gaya and Hardwar, there is no comparison between them and the magnificent edifices which preside with such grace and grandeur over the landscape of South India. If one traces the history or ancestry of a South Indian temple, one will find that originally there was a very small temple put up in honour of a local deity that was probably ministered to by Sudras, and that as Brahmins came in and found a rich harvest waiting to be reaped, the worship fell into their hands. More substantial temples were erected in place of the insignificant ones which existed in former times, sometimes by Sudra princes out of taxes paid by all their subjects, more often out of Sudra offerings and contributions; a sthalapuram was brought into existence giving the mythical or actual ancestry of the god who was the subject of worship; and funds were collected by the Dharmakarthas of those temples for the purpose of placing the services on a permanent footing. The original temple was thus probably in most cases a Sudra temple. There may be exceptions here and there to this custom. It may have occurred now and then that a wealthy Brahmin erected a temple and endowed it. But in ninety-nine out of hundred cases it was undoubtedly the fact that both the funds for erection and subsequent endowments were contributed by people, the majority of whom are at the present day either rigorously excluded from the precincts of the temple altogether, or allowed to go only as far as the second Prakaram from the Moolasthanam. When the temples came into existence, and before they

became surrounded by fortress walls, it is scarcely likely that the Sudras, whose contributions were desired, were excluded as they are at present. It is also certain that both in cases where there are rich endowments, and more particularly in institutions which have no such resources to fall back upon, the current upkeep of the temple and the performance of the festivals and numerous Kattalais connected with it from day to day are dependent upon free will offerings of worshippers, the vast majority of whom are Sudras. They must therefore have a first claim or *prima facie* right to the benefits of temple worship. In these modern days of communalism and caste upheaval they are not slow to assert their rights and push forward even though they know they are not wanted. Sudras have gone so far as to ask for the dethronement of the Brahmin from his office as family or temple priest. More often they agitate for and sometimes institute suits to have their rights in connexion with temples established by judicial decisions.

The best known case relating to temple entry is what is known as the Kamudi case, *Sankaralinga v. Rajeswara Dorai* reported in 31 Madras, 236. The plaintiff sued for a declaration that as hereditary trustee of Madura temple he was entitled to exclude therefrom persons of the Nadar community, as their presence and participation were considered repugnant to the religious principles connected with the worship of Siva. This case was fought out strenuously by the Nadars, who though originally a despised community have raised themselves in recent times by education and commerce to a respectable position in the social scale. When the case went up to the Privy Council it was held that Nadars had not made good their title to enter the temple and the fact that they had another temple of their own in the neighbourhood was held to strengthen the contention that separation in worship between the two classes was not accidental but rested on deeper grounds. This cautious attitude was perhaps justified owing to the violent caste feeling that existed about that time between the Maravars to which community the temple trustee belonged and the Nadars.

Maravars were so jealous of the claims put forward by the Nadars that on one occasion they planned arson on a large scale and a massacre of the Nadar community, and about 2,000 people lost their heads, while entire villages were destroyed beyond repair. While this incident shows the necessity for caution on the part of those who would introduce reforms in matters of caste, there can be little doubt that the modern judicial habit of making caste rules and conventions rigid has put an end to the ease and flexibility with which in an earlier day communities went up higher in the social scale when they became wealthy or conversely came down when they became poor or failed to pursue their proper avocations.

A similar case is that reported in 26 Indian cases, page 7 (*Gopala Moopannar v. Subramania Iyer*). Plaintiffs who were members of the Elavaniar community sued for the establishment of their rights to proceed as far as the Sabapathi Sannadhi and the front of the Paliarai in the Amman Sannadhi in the Sri Ramalingaswami Koil at Panakudi, and for a permanent injunction restraining defendants who were Vellalas, Mudaliars and Brahmins from interfering with their rights. The prejudice against oil-mongers is said to be due to an old verse in *Manu Samhita* chapter IV, verse 85, which states that an oil-presser is ten times as vile as a butcher or meat-seller. At the present day the prejudice certainly seems antiquated if not unwarranted. Sadasiva Aiyar J. threw the onus of proof in a case of this sort on the temple trustees who want to exclude and not upon the caste which wants to worship the god by approaching him within reasonable distance. It lies upon a person who wishes to restrict a Sudra or one who has a higher status than a Sudra from proceeding beyond the Dhvajasthambam into the next hall to establish by proof of recognized usage in that particular temple that individuals belonging to that community are not entitled to go beyond it.

In *Kuttichami v. Rama Pattar*, 41 Madras, 980, a member of the Moothan caste who bathed in a tank inside the Hindu temple near the Nagambalam was convicted

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of an offence under Section 295 of the Indian Penal Code for defiling the temple. It was the case for the prosecution that Brahmins, Ambalavanas and Nairs could enter that portion of the temple and bathe but Moothans never did so. The High Court held that the caste of Moothan was not shown to be inferior to that of Nairs and there was nothing to prevent Moothans from entering or making use of premises which were open to Non-brahmins generally.

In 4 *Law Weekly*, page 444 it is incidentally found that in Malabar there usually is outside the main building of a Dewaswom, but as an adjunct to it, an idol of Ksetrapala whom the untouchables are allowed to worship. These cases are merely quoted to illustrate the typical ways in which caste disputes have arisen in the past in connexion with entrance into temples, the attempts made by higher castes to keep the depressed classes in their place and the energetic but ineffective attempts made by those branded with a sense of inferiority to assert their rights in respect of worship and ceremonial.

Strictly speaking there is no such thing as congregational worship among the Hindus. The result is that each individual is interested in getting as close as possible to the deity making his offerings to him and presenting his vows and devotions in person. He has certainly a grievance if while intent on fervent devotions, he is kept by men of higher castes at considerable distances from the god to whom he wants to offer his worship. No doubt the question as to who endowed the temple or for whom it was endowed are important legal considerations in deciding about the exclusion of inferior castes, but in most cases there is no reliable history behind a temple and the evidence advanced by the men in charge is usually interested and worthless. It will be more in consonance with modern ideas of justice and fair-play if at least all those who contribute at the present day towards the maintenance of worship and ceremonial in a temple are by statute allowed to participate in the worship. To say the least, there is no fairness in temple

authorities hastening to receive gifts and offerings from men of all castes and then proceeding to exclude some or most of them from the privileges of the temple and confining them to just a few who probably contributed little or nothing. No doubt the customs and conventions established in a temple should be taken into account, but the testimony given in such cases usually shows that feelings have become rigid only within recent times, while more latitude and toleration prevailed in earlier ages as between different sections of the community. The evidence adduced about the history of the existing conventions is usually so vague and indefinite and often so far from the truth that it seems safer to lay down a general legal principle that those who pay the piper should call for the tune. Those from whom the temple authorities are in the habit of receiving or exacting contributions should have the privilege of worship at least along with others who do not contribute anything. It is certainly unfair that some classes do all the giving and spending and others who will not give a brass farthing should have all the privileges and perquisites. It seems likely that if the justice of this claim is not recognized in time, the lower classes will take the law into their own hand and refuse their offerings and contributions till the trustees are starved into submission, or they may go a step further and rush into the temples from which they are jealously and in many cases unjustly excluded.



## CHAPTER V

### Use of Public Roads

There is no right of a public character which has more frequently been the subject of litigation in the Courts than the right to use public roads or the right to exclude certain castes and communities from such use. In some instances the roads are sought to be retained for the exclusive use of the higher castes, and the depressed classes are prohibited from passing along them at any time or for any purpose. Where the roads in question pass through Aghrahams or in front of temples there might be some justification for such exclusion. Where in addition they are private roads never dedicated to the use of the general public or originally started and now maintained out of private funds, there is certainly legal ground for the persons who maintain them to confine them to certain classes or within such limits as they choose. It is when roads paid for out of public funds to which all tax-payers contribute are sought to be reserved for the exclusive use of a few or of the higher castes alone that the depressed classes rise up in wrath and are apt to assert their rights. More often the question as to the use of roads has arisen in another form. The higher castes are prepared to allow men of the lower castes to make use of such public roads for ordinary purposes of travel, i.e., for passage for vehicles or conveyances and for foot passengers. But they are not willing in some cases to allow marriage or funeral or other private processions of inferior castes to pass through them with or without the necessary melams; in others religious festivals or processions are sought to be excluded from them. Where Hindus are in the majority their religious feelings are allowed free play and they do not like to allow Muhammadan or Christian processions to pass through them; even festivals in honour of the lower deities to which the depressed classes address their worship are shut out.

The case of Vaikom in Travancore will be familiar to every one. The road in question was constructed and admittedly maintained out of public funds to which members of all castes contributed. It runs however by the side of a temple to which the higher castes have exclusive access. The temple authorities had no objection and no right to object to a Christian or Muhammadan or Buddhist using that road, even though these latter may themselves have been recruited from the lower castes, but when a Hindu Ezhava or Thiya attempted to pass that way he was prohibited. Educated public opinion even in Travancore was in favour of the lower castes exercising their right of free passage along this road. Congress volunteers, among whom there were many Brahmins and Nairs, started what is known as a Satyagraha campaign and they were waiting with Ezhavas and Thiyas to force a passage for their friends of the lower caste. The situation became dramatic by reason of the fact that the Travancore Government posted armed constabulary to bar their passage by night and day. The two parties were stationed face to face with one another for months and no passage was allowed.

The legal position is said to be this. The roads under the control of the State are divided into two classes, Class A which is open to members of all castes and Class B which is exclusively confined to the use of certain castes. The Vaikom road though maintained out of public funds falls within Class B and the State accordingly considers it part of its obligation to prevent its being used by low-caste Hindus. It is said that the enlightened Rani who now presides over the destinies of Travancore is herself in favour of allowing free egress and ingress to all communities, and there is no doubt whatever that civilized opinion in the State and elsewhere is in favour of relaxing the rule, and yet authority supported by the opinion of a narrow oligarchy was able to enforce the prohibition for a long time till it was settled by consent. The same or a similar position exists at the present moment with reference to a road in Tirupur.

Another telling instance comes from Tinnevely. The trunk road running into Tinnevely town becomes a street in the forefront of which dancing girls and prostitutes live while further on there are a number of Brahmin houses. Before the road takes a turn it passes through a sort of preliminary Mantapam which faces the main temple in Tinnevely being divided from it by a broad public road. A pariah died in the town and his corpse was sought to be taken out through this road. But the higher castes prohibited it altogether and the corpse was lying for a whole day in front of the Mantapam mentioned above while a fierce riot was going on, several people losing their lives. The Collector had to intervene in person with a large body of constables to restore order and eventually the dead body of the panchama had to be taken by lanes and by-lanes and over paddy fields to be cremated.

In *Kandasamy v. Subbaroya*, 32 Madras, 478, the trustees of the Subramania Temple sued for a declaration that they were entitled to take their idols in procession through Koothadum Pillayar Street and Jeyarama Chetti Street, Saidapet. The defendants denied their right to do so and the Magistrate passed an order under Section 144 forbidding them. It was held that the right to go through a street in procession attended with music is a natural right inherent to every subject of the State and no length of use was necessary for the establishment of such a right. The adherents of one particular religion cannot prevent the followers of another faith from carrying on a religious procession or assembling for public worship in the street. In *Mannada Mudali v. Nallayya*, 4 Indian cases, 870, weaver caste people were allowed to take their deity Kumarasamy with Sakthi Melam along a certain street, the objections of Vellalas notwithstanding. In 6 Madras, 203 it was further laid down that for purposes of ensuring public peace when a caste or followers of a faith assemble for a religious festival or ceremonial in a street they should give notice to the Magistrate or Police about the hours when they customarily assemble for worship, in order that the

similar rights of others may not be unduly curtailed. The Police are now in the habit of issuing licenses specifying the particular streets through which and the hours during which a procession may pass. No sect is entitled to deprive others for ever of the right to use public streets for processions on the plea of the sanctity of their place of worship situated on that road. In *Muthialu Chetty v. Bapun Sahib*, 2 Madras, 140 the dispute was between Hindus and Muhammadans. It was held that the right being a public right the order of the Magistrate prohibiting music at all hours of the day while passing the masjid was *ultra vires*. The cases of *Parthasarathi v. Chinnakrishna*, 5 Madras, 304 and *Sadagopachariar v. Rama Rao*, 26 Madras, 376, the last of which went on appeal to the Privy Council and is reported in 30 Madras, 185 were disputes between Vadagalai and Thengalai Brahmins of the Vaishnava persuasion. Persons of whatever sect are at liberty to conduct their worship and carry processions irrespective of the opposition of a rival sect which may have exclusively used the street till then.

In *Sambalinga Moorty v. Vembarry Govinda Chetty*, M.S.D. 1857, page 219 at page 223, a Guru of the Devanga caste sued to establish his right to be carried in a palanquin in procession through certain streets in Salem, attended by his disciples with band and music. The defendants contended that it was contrary to custom for members of the plaintiff's caste to go in procession through their streets. It was held that the right claimed was an inherent right in every subject of the State, and it lay on those who sought to restrain the plaintiff to prove some law or usage having the force of law depriving him of a right. In 1 *Madras High Court Reports*, page 50, *Sivappa Achari v. Mahalinga Chetti*, a goldsmith successfully asserted a right to conduct a marriage procession along the public highway though the defendants sought to exclude him therefrom on the ground that the road ran in front of the Padubidre Pagoda. In *Andi Moopan v. Muthucceera Reddy*, 29 M.L.J., 91, four members of the Pallar community sought to establish their rights to

go in procession through certain public streets (1) taking articles of worship to the Hindu temple (2) carrying a bride and bride-groom during processions and (3) taking presents to master's houses when any death or marriage took place; and the rights were allowed. The case of *Velan Pakkiri Taragan v. Subbian Samban*, I. L. R., 42 Madras page, 271 was instituted by the Pariahs of Kottikulam against the Muhammadan inhabitants of the same place for a declaration that they were entitled to conduct marriage processions along the public road. The Sub-Magistrate passed orders prohibiting such processions. It was held that the order was illegal and plaintiffs were entitled to the right claimed by them.

The question of using public roads for festivals and processions has assumed an all-India importance since the commencement of the Hindu-Muslim trouble in North India. Hindus have become aware that they have a right to take their religious processions through public thoroughfares and if they so pleased they could carry flags, torches and cars, use fireworks and play music as they go in procession. Muhammadans have usually no objection to such processions as they themselves claim similar rights to march for religious purposes through the same streets; but they protest against music being played when they are engaged in prayer in their mosques built on the streets used for processions. Fanaticism on both sides adds fuel to the flame. Hindus time their processions just at the very moment when Muslims are known to be engaged in prayer and their music rises in volume and clangour just as they pass mosques. Muhammadans, on the other hand, go on praying so as to make it impossible for Hindus to go in processions with music for hours, or time their prayer so as to clash with the processions. Muhammadans again consider it an essential or important part of their ritual that they should kill goats or cows or oxen. Slaughter by Muhammadan butchers in private is tolerated by Hindus but the public killing of cows is extremely repugnant to their feelings. Muhammadans insist on the public decapitation, though it is not an obligatory but only a

permissive part of their ritual. Hindus, on the other hand, instead of passing Muslim ceremonies by as things with they have no concern, gather in large numbers, to prevent the cow-killing just because it is done in public places to which they also have access.

Though these disputes do not directly arise out of caste rules, they raise the issue as regards the use of public streets in a form which calls for careful solution.

There ought to be a legislative provision which prevents any person or body of persons claiming that any public street or road maintained out of public funds has become confined by exclusive use to one particular section or caste or the higher classes alone. A private person may construct a private road and keep it for his exclusive use or the use of himself and his caste men. If he happens to dedicate it to the public he can then by express writing limit its use or declare that it is available only for certain classes; but if he wants so to limit it, he must be asked to maintain that road himself. There is no justification for his requesting the public to maintain the road (initiated by him) out of local or Municipal funds to which all classes have to contribute equally, and insisting at the same time on its being confined to himself alone or a limited body of persons, in whom he is interested. Likewise if any body of persons, a caste like Brahmins or Mudaliars, or the trustees of a temple, want to treat a road as one intended for their exclusive use, that body must be asked to maintain it and the Municipality or Local Board should refuse to metal or gravel it or build bridges or pavements, or maintain lamps in it. If such a body wants its exclusive rights declared or established, they should pay such sums as the Municipality or Local Board fixes as the amount necessary for its up-keep. A road cannot be treated as both public and private. It cannot be public in the sense that the general public has to pay for it, and private or semi-private in the sense that one class or the higher castes alone can use it.

When on the other hand a road, whatever its origin, is being maintained out of public funds, there should be an irrebuttable presumption of law that it belongs to all

members of the public, from the highest to the lowest caste, including outcastes and non-Hindus. No evidence should be allowed to be received to contradict the above presumption or to prove that though maintained out of public funds, it is exclusively confined to high castes alone or certain castes which consider themselves high. Such claim to exclusive use is really a mischievous or selfish taking advantage of the fact that the higher castes wield influence or power and can look for support of their exclusive claims from their co-caste men. If Christians or Muhammadans claimed the exclusive right to use a public road which Hindus help to maintain, the claim would scarcely be tolerated. The irrebuttable presumption suggested above would not apply to a private road maintained by an individual or a temple or mosque, within their limits or outside them.

Employment of public roads, for private processions connected with marriages, funerals or ceremonies of the like character should be treated as a special privilege for which the persons claiming the right to go in procession should be asked to pay. Such processions interfere for the time being with the free right of passage to which others are entitled; when the procession goes through the principal or the only road in a town it is a serious nuisance to way-farers. Likewise the house owners on either side suffer by the crowd, noise and smoke and damage may be caused by sparks falling on their houses; or mischievous men entering them when the inmates are attending to the festival. These inconveniences are realized by people living in cities who do not indulge in private processions in the same number as people do in villages. There is no reason why a man who wants to be specially honoured by being carried in a palanquin in procession should not be asked to pay handsomely for the privilege. This would have the effect of stopping mischievous processions by irresponsible persons and provide some compensation to the general public for the inconvenience caused to it. In time it would effectually restrict the number of such processions.

Different considerations apply when religious festivals

or processions are taken through public streets. The provision that an application should be made to the Police and licenses obtained from them is probably strictly enforced in cities, but it certainly is not in towns and villages. Serious additional responsibility is imposed upon the Police and the District Officials who are expected to be present. Constables have to be posted in many places and careful precautions have to be taken against conflicts and stampeding, against pickpockets and mischievous persons. I do not see why such processions should not be prohibited by the legislature unless they are licensed in all cases. The licensing authority would then be able to fix the time and order of such processions and give notices to the general public as to closing of thoroughfares. A fee regulated according to the magnitude of the procession should be leviable, to pay for the special arrangements that have to be made, and the expenditure of the time of public officials who have to be present to maintain order. When such processions have resulted in loss of life or danger to public safety the public official may insist on the deposit of a substantial sum which he can declare forfeited in the event of disturbances breaking out again. The enforcement of these or similar provisions will not only enable the authorities to maintain law and order, but effectively check the recrudescence of mischief or violence.



## CHAPTER VI

### Wells, Tanks and Water Courses

Water is everywhere one of the prime necessities of life but its importance is nowhere greater than it is in India. While there are a few favoured tracts in which water is always to be had in abundance, there are large parts of the country where there is not enough of it to go round among all the people, and especially among the poor who are most in need of it. The uneven distribution of water is nowhere more evident than in the incidence of rainfall. The highest rainfall in the world is registered in Assam and the neighbourhood of Mahabaleshwar in Bombay runs it a close second, while regions not far from it in Rajputana and Central India suffer on the other hand from nearly the lowest rainfall in India. A diminished or failing monsoon such as frequently occurs twice or thrice in a decade puts the utmost strain upon the resources of people. Towns and cities are usually fairly well provided with water as there is either an artificial supply available or the cities themselves are erected on the banks of perennial water-courses. The large majority of the inhabitants of India do not, however, live in towns but in the 677,000 villages scattered the country, over most of which have to get along with a precarious quantity of water, which diminishes rapidly when it is needed most. In such circumstances it seems obvious enough that people of all grades should be provided with a supply adequate to the ordinary needs of a hot climate, viz., for drinking and cooking, bathing and cleaning.

But it is just in this respect that exclusive caste arrangements interfere with the bounty of nature and re-distribute the water in such a manner that some waste it or have much more than they need, while the majority is cut off from all pure sources of water-supply and has either to resort to dirty ponds or put up with such pittance

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as it can obtain from the castes above them, disease or death awaiting them as a consequence.

In a good many villages the inhabitants are dependent for their supply of drinking water on a single well or on two or three wells. Where these belong to private individuals there is nothing unjust in the owners appropriating the water to their own use and giving the surplus, if any, to those in whom they are interested, whether they are their own family members or fellow caste men. The question arises in an acute form only when the reservoir in question is a public well dug out of Local or Municipal funds or the origin or history of it being unknown, is now repaired and maintained out of public or local money. In such a case in theory all the inhabitants of the village who pay taxes are entitled to share equally in the water but in practice it happens only too often that the best wells or the only well in the village that is useful for drinking purposes is appropriated by the well-to-do classes, while the poor are driven to slake their thirst in the muddiest of dirty pools in the neighbourhood. The law does not intend or permit this form of selfishness but caste custom comes to the aid of the well-to-do classes and enables them successfully to assert their privileges to the exclusion of those who need water most sorely. It often happens that even when a well has been dug at public expense or is maintained in the same manner the higher castes claim the well as their own and let in evidence that they have all along been using it to the exclusion of others. Sometimes they are able to obtain an order under Section 144 of the Criminal Procedure Code preventing others from interfering with such wells. More often on the ground of such exclusive use or enjoyment, they are able to assert their prescriptive rights and obtain orders under Section 145 Criminal Procedure Code. The poor man is unable by reason of his poverty to dig a well of his own or even to assert his rights as against the higher castes and finds it cheaper to drink from ponds and lakes even at the risk of contracting the diseases incident to such use. In *Venkatroya Gowndan v. The Very Rev. N. Roudy*, 7 Indian Cases 343, which is quoted merely as a

typical illustration, Christians in a village were being prevented from drawing from a public well by members of the higher castes on the ground that they were men of a lower caste. The Magistrate made an order restraining Venkataroya Gowndan from obstructing the Christians from taking the water from a well and directing him to remove certain walls put up round the well for the purpose of preventing the lower class from resorting to it. The case was taken up on appeal to the High Court. It was held that the Magistrate was not entitled to make such an order as no urgency or emergency had been made out under Section 144 of the Criminal Procedure Code, the result was that the Christians were shut out from the use of the only available well. Instances of such selfishness can be quoted from every province and district in India. In two at least of the districts in South India money is specially collected for digging what are known as Panchama wells for the use of the poor, side by side with Local Fund wells misappropriated by the well-to-do.

There are numerous tanks in India but very rarely are they private property. They are sometimes attached to temples and even then they have originally been dug or are being maintained at present out of funds collected from the general public. If one could study the history of any one of these tanks one would probably find that some philanthropist appealed to the general public in the name of the local god for funds to sink a tank from which rich and poor alike could draw their supply. Money was liberally contributed by all classes. The tank was dug, protecting walls were built all round it, and steps or ghats leading down to the edge of the water were constructed. But owing to its close proximity to the temple it came to be used more and more by the higher classes, who were able by reason of their assertiveness to exclude others who probably contributed even more liberally than themselves to the sinking of these tanks.

But apart from temple tanks there are plenty of other tanks in villages which must obviously have been dug by the general public. Even these are often confined to the exclusive use of the well-to-do and the very classes for

whose benefit they were originally intended are kept out of them. In [1913] *Madras Weekly Notes*, page 247, *Mariappa Nadan v. Vythilinga Mudaliar* a suit was instituted by seven Nadar residents of Kallorani village against Hindu caste people for a declaration that the Nadars were entitled to the use of the tank and of a well within it which alone contained water during periods of scarcity. The defendants who were Brahmins, Mudaliars, Pillais and Maravars contended that the wells were exclusively used by castes higher than the Nadars who therefore had no right to use the same. Justice Sadasiva Ayyar, who was well-known as a judge of liberal or reforming tendencies, was able to hold in that case that the well was dedicated to the use of the general public including Nadars, Muhammadans and Christians all of whom had a right to use the tank water but at the same time he felt constrained to lay down that the custom of excluding Nadars and still lower castes like Barbers, Washermen, Pallars, Pariahs, and Chucklers from directly drawing water from the well must be upheld by the Courts whether it appears reasonable to civilized nations or not. Reference has already been made to *Kuttichami Moothan v. Rama Pattar*, 41 Madras, 980, where an accused who belonged to the Moothan caste was prosecuted for bathing inside a Hindu Temple in Palghat and convicted of the offence of defiling the temple. On appeal it was held that other caste men like Nairs were in the habit of bathing in the said tank without desecrating the temple and it was not proved that the status of the Moothan was less than that of a Nair.

It does not often happen that the tendency to exclusiveness is allowed to have its way in connection with continuous canals or water-courses and especially in connection with regular rivers. The higher castes who live near the banks of such water-courses may be able to exclude the depressed classes from the area in which they actually live or from ghats or steps specially built or presented by them for their own exclusive use. But it is impossible either in law or in practice to exclude land-owners who own lands adjacent to the river from using

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the water course for their benefit or the lower castes from resorting to it either higher up or lower down at stages not frequented by the superior castes. But even here certain portions of rivers like the Ganges or the Godaveri are reckoned as sacred for some reason or other and though the lower castes may be found actually residing in the neighbourhood they are not allowed access to the water. For irrigation purposes the law of water-courses provides that those who own lands on either side of them can freely make use of the stream provided they do not interfere with similar use by people who live lower down the stream. In normal times when supply is plentiful no difficulties arise but when there is a precarious supply or when it comes only in certain seasons, the well-to-do classes are always able to enforce supplies for themselves while the poor are very often put to heavy expense, bribing subordinate officials before they obtain the water that is their due; in many cases they have to go without water.

The simplest remedy for this state of affairs appears to be to enact a provision that all sources of water-supply which were originally brought into existence or are now being maintained out of public funds should be deemed to be available for the use of all classes. There are various presumptions of an irrebuttable character set out under Section 114 of the Evidence Act. It will not be difficult for the legislation to add another presumption that every well, tank or river which belongs to the public or which is maintained out of public funds should be presumed to be available for the use of all classes, the presumption not being allowed to be rebutted by evidence of exclusive use by anybody. In the case of wells such a presumption may not be of much practical benefit to the poor classes as they would never learn about it or have the courage to enforce it and it will accordingly remain a dead letter. The appropriate method of securing to all classes the right to use such well-water would appear to be to compel caste men to make arrangements to keep the poor supplied with it. If higher castes do not want well-water to be polluted by the use or approach of the lower

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classes, they should be compelled to put themselves to the expense of building a cistern near the well and of maintaining a cooly to draw water therefrom and fill up the cistern from time to time so that the lower classes may have as free and abundant supply of water out of the cistern as they themselves can obtain directly from the well. Once it is granted that the reservoir belongs to all, if any person or class of persons wants to keep it for his exclusive use for fear of pollution, it is only just that he should bear the expense of preserving himself from pollution and making arrangements by which other men can draw the water to which they are entitled as of right. There ought also to be legislative provision that those who misuse wells, tanks or rivers by accumulating dirt in the immediate neighbourhood, or causing nuisance near it or allowing sewer water to soak into them should be punishable by law. The existing provision in the Penal Code (Sec. 277) only applies when the water in the reservoir or spring is directly polluted and does not refer to perennial rivers.

## CHAPTER VII

# Chatrams, Schools, Offices and Public Institutions

Under the proclamation promulgated by Her Majesty Queen Victoria in the year 1858 public offices and all the benefits brought into existence by Government should be available to all classes of Her Majesty's subjects irrespective of caste, creed or nationality. Fortunately this proclamation is not a dead letter. Vast areas of life from which the so called depressed classes were rigorously excluded in ancient times are now laid open to them and year after year they are pressing forward; where their ability or education enables them to do so, they take their legitimate place among their fellow countrymen irrespective of social drawbacks. The same taxes are collected from all classes and equal punishment is at least in theory meted out to men of all castes. If the British regime has done nothing else it has at least released vast numbers of inhabitants held in bondage for centuries and enabled them to enjoy the same advantages of light, air, education and good government as their social superiors.

In spite of the tremendous progress that has been made and is being made year after year, there are still areas far from cities and beyond the reach of European influence, where old time prejudice against the so called inferior castes is at work making it difficult for them to enjoy rights to which they are legally entitled, or subjecting them to so many indignities or inconveniences that they are not much better off than they were before. It is impossible to specify in detail the ways in which these old time prejudices are at work to the detriment or injury of the depressed classes but a few illustrations may be given from the areas with which I am familiar.

There are numerous chatrams or inns erected in the principal stations in South India for the accommodation

of travellers. Some of them date from pre-British times ; but most of them came into existence after the arrival of John Company and at the present moment all of them (excepting perhaps a very few which are attached to temples) are maintained out of local or public funds. Theoretically members of all classes and castes are entitled to accommodation therein when they are stranded for a night. In practice what happens is that they are confined to the exclusive use of the higher castes who are able successfully to keep out the depressed classes from the enjoyment of the accommodation to which they are entitled. In some chatrams separate provision has been made for the poorer classes but the number of such institutions is small. Well-to-do classes are not likely to suffer much from the absence of such chatrams as they will always be able easily to obtain hospitality for themselves from fellow members of their caste. It is the poor people that stand in need of shelter in times of darkness or the monsoon and it is these very classes that suffer by being excluded from them.

Theoretically again schools and hospitals are public institutions which are meant for the benefit of all. In a village school the teacher is necessarily the master of the situation and when he belongs to a caste regarded as high, he is able to keep his low caste pupils at a distance, and woe to the student who protests or rebels against the arrangement. Every person who is familiar with the facts knows that there are places where the higher caste pupils are lodged and taught inside school rooms, while those of an inferior caste have to study in the verandas or under neighbouring trees or cannot get admission at all. The former by reason of their natural intelligence and aptitude for learning need probably less assistance from the teacher and can get on in many cases quite well without him. The classes that need most attention are the pupils recruited directly from the soil, but it is these very classes who have to study under such disadvantages that learning either becomes burdensome or absolutely impossible. Similar hardships occasionally occur in connection with hospitals and other



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philanthropic institutions maintained partly or wholly out of public funds.

Theoretically Courts established by statute and public or Government offices are open to all; but how often one has seen a witness of a lower caste giving his evidence not from the witness box but at a considerable distance from it. If such a person has requests or complaints to prefer to the Tahsildar or other public official, he is not able to get within hearing distance of the officer and has often to wait for hours before he has a chance of making known his wishes; probably he has eventually to go through one or two intervening subordinates before he has access to the ear of the official and is put to the necessity of bribing such intervening official. The persons most in need of free grant of land on Darkast are probably members of the depressed classes; if only need or desert or meritorious service counted they should get the land for the asking but curiously enough, till recent rules made it hard for them to do so, the higher castes always found it much easier to obtain on Darkast lands which they themselves were unable to cultivate but which they leased at a handsome rent to the cultivating classes. When a member of the depressed classes has qualified himself for an appointment, he has usually little chance of obtaining office unless he has the ear of a British Official or an exceptionally liberal minded Indian officer free from the usual prejudices of his class. If he does get an appointment his slightest faults are magnified, unless he is abjectly subservient to those in authority; and he very rarely obtains the promotion or encouragement which is his due. If he makes any mistake or is subject to any misfortune his services are dispensed with at once, while the higher caste man is found to have so much merit that all mistakes and misfortunes can be overlooked. Clubs and eating houses maintained by higher castes which were formerly unavailable for the use of the depressed classes are now laid open to their use, provided the requisite money is paid and the applicant is camouflaged in decent costume. The laws protecting the interests of

tenants either of agricultural land or of land on which he has put up buildings have come as a great boon. It is not so easy at the present day to expropriate them from their holdings or do any injustice which can form the subject of a complaint, civil or criminal, in the courts. Societies have been formed for improving the conditions of the poor and performing social service among them. But the improvement is apt to be confined to towns and cities, while in remote villages conditions to-day are probably very much where they were fifty years ago. Unless a member of the lower class has either obtained education or attained to a degree of wealth and position which cannot be ignored, his status is still unenviable.

## CHAPTER VIII

### Mass Education

It is a welcome sign of the times that the subject of education is approached from different angles within recent years and studied thoroughly from many different points of view and with varying objectives. If there is any justification for this chapter it is this that it takes up the question from a fresh aspect, namely from the point of view of reducing the existing inequality between the castes. In addition to the differences existing between man and man in native intelligence there is also a sharp man-made inequality and it is clearly within his province to take note of it and rectify it by all the means in his power. There may be those who opine that this also is likely to prove a superhuman or impracticable task, but we have only to point to the example of those Western nations the vast majority of whose citizens were till forty years ago in the same situation in which the submerged masses are in India at the present day; but owing to the introduction of free and compulsory education, the gulf between the classes and the masses has effectually been bridged and the inequality rectified. It must be admitted that the problem is much more serious in India than it is likely to be anywhere else because of the immense numbers with which we have to deal, because of the circumstance that they follow diverse warring creeds, making it impossible to formulate a uniform system of education acceptable to all, and finally because the literary education now in vogue is so very lopsided and constitutes such an unsuitable basis for the introduction of mass education. At the same time it must be admitted that there can be no true popular government or democracy, no government by the people for the people, till the electorate as a whole is so far educated as to be able to decide what is to its advantage and to the welfare

of the nation as a whole. The school and university courses now in existence have become so heavily graded that they have become a hard grind even for the literary classes and at the same time so expensive that they are beyond the reach of any but those who are already more or less abundantly provided with leisure and a fair proportion of this world's goods. The net result is that education does not fulfil the purposes that it ought to serve, namely, of enlarging the vision and training the character of the people as a whole. Instead, it has created new caste divisions and placed the uneducated even more at the mercy of the educated classes than they ever were before. The problem is to devise a method which will be cheap and simple, and can be employed in the remotest regions. We have to go for inspiration and guidance to the systems that were in vogue before the advent of the British in Buddhistic and pre-Buddhistic ages, to regions like Burma where education has always been cheap and universal, and to foreign countries like America and the Philippines which have specially aimed at educating the masses.

A valuable and potent instrument which was made use of largely in former ages has in recent times been allowed to become moribund. If education is almost universal in Burma among boys as well as girls while at the same time there is no compulsion and no separate assessment for the purpose of supporting education, it is because it has been in the hands of self-sacrificing Buddhistic monks and nuns, the Phoongyes. These religious orders regard the raising and enlightenment of their fellowmen and women as such an important obligation laid upon themselves that they give up all prospect of advantageous employment, assume the garb of mendicants, accept whatever food the villagers in the neighbourhood are willing to give them and devote their whole time and energy to the education of such boys and girls as live in the vicinity. A system somewhat like this though not quite so widespread or so systematic was in vogue during the Middle Ages when the monasteries and nunneries which were established over the length and breadth of

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Europe were the means of diffusing the light of culture among the peoples who were just as illiterate as the lower classes are in India at the present day. Throughout Buddhistic India, priests and nuns took upon themselves the task of enlightening the people with little assistance from the State. Muhammadans likewise even now have their own religious schools for teaching the Koran; the methods in use are apt to be primitive, but they recognise and make full use of the only dynamic that will lead to mass-enlightenment. There were also similar schools, perhaps not quite so numerous or so well organised, in connection with the Hindu Mutts and religious establishments. Owing to provincial Governments, public bodies like local boards and municipalities and private bodies like missions undertaking the task of education, these antique religious schools have fallen into desuetude. It is beginning to be more or less clearly recognised that a great mistake has been made in divorcing education from religion. There can be no better use for the wealthy endowments attached to mutts and temples (usually wasted so flagitiously by people who are supposed to be ascetics) than to utilize them in spreading general education. The considerable sums of money received as offerings in smaller temples may likewise be used at least in part towards the same purpose without impairing the efficiency of the establishments attached to them. If the education formerly connected with these religious institutions is revived, there will be the additional incidental advantage that it will not be a secularised and materialised form of education as is prevalent at present but one more in accord with the genius of the race. The rules set out in the Second Book of *Manu* made for real reverence towards the guru and yearning for spiritual ideals, elements which are wholly wanting in modern education to the detriment of the race. Imposing fresh heavy taxation for the purpose of spreading education is not likely to be welcome or to reach the masses who stand most in need of training. The wisest plan would be for the Legislature to take full advantage of endowments or other similar resources

which are already in existence as it has already done in one or two mutts and earmark a portion of it by statute for education.

In days when Government confined itself to the elementary duty of preserving law and order, it was considered enough to have as village officials a headman or monegar who reported cases of breach of the peace, a karnam who kept account of the lands in the village and of the produce likely to be yielded or actually harvested from those lands and a Talayari, Vettiyan and other village servants who were either connected with the keeping of the peace or the collection of the revenue. Now that there is an enlightened vision as to the functions of the State and it is definitely recognised that it is part of its obligation to provide for the raising of the masses by means of education, I do not see why the village teacher should also not be regarded as an officer entitled to be maintained out of a Manibam or portion of the income from the village and entrusted with the duty of supervising or organising all the instruction given in the hamlet. The number of villages within the British area (6,77,000) is so enormous that it would be impossible to maintain schools in each of them graded and furnished with apparatus according to the existing requirements of the Educational Department. On the other hand the renovation of the indigenous pial school, opened or maintained by private persons in the village with a capacity to teach but under the general supervision of an elected village official is a feasible proposition which can be carried out without much expense or interference with existing arrangements. The officer in question need not himself be a teacher unless he is also a qualified person willing to undertake that responsibility. He can, like the village munsiff or accountant, be one of the respectable heads of the village; his task will be mainly to induce the villagers to put up a cheap shed or pandal with their own labour for the purpose of housing the school, deciding on the kind of vocational education that would be most advantageous to the village and organising it by inducing old men of leisure in the village who are qualified to

teach to undertake the elightenment of the younger members, and parents of pupils to send them to the school. I will return presently to the type of vocational education that will be most appropriate to villages, but the aim should be to make the village self-sufficing and not look for wind-falls from elsewhere and to develop all the resources in the village for the purpose of training its younger members. The special village official referred to above, who will be a leading citizen of the village, will be the eye and hand of the Educational Department, to encourage and organize education in the village and bring it into line with what takes place elsewhere.

According to immemorial practice each caste follow a separate profession like carpentry or weaving or cultivation; the younger members of the caste as they grow up are trained under the eye of the elder till they are able to set up as independent workmen and receive orders on their own account and execute them. The main justification that can be urged in support of the existence of separate castes is that it forms a guild or close corporation which preserves and transmits hereditary aptitudes from father to son and gives the benefit of the experience garnered by the community in the course of ages to younger members apprenticed to the senior men of the caste who are experts in their trade. Many treatises have been written in recent years as to the range and variety of the arts that were cultivated by the guilds which were such a prominent feature of the middle ages of Europe. The wonderful cathedrals in that continent which the present generation is wont to admire but is unable effectively to imitate, the solid furniture and household implements made in those days and various kinds of manufacture then in vogue which have now fallen into desuetude would have been impossible but for the fact that there was a special trade or industrial guild for each particular type of work (e.g. chandlery or hosiery) and all its members were trained for their business under the eye of the heads of the guild till they became expert workmen in their several callings.

In India even now the father or uncle trains the artisan's son as he grows up; the children of cultivators who cannot afford to obtain education go to work in the fields and gardens along with their elders and pick up the elements of husbandry from them. The suggestion now is that the instruction thus given should be organized so as to render the oldest and best experts in a caste guild available for training purposes and to bring every youth who is unable to afford a literary education to be placed under the training of such experts till he qualifies as an expert himself. Each professional caste should be encouraged to open and maintain communal schools in appropriate localities for training its junior members. Villages of any considerable size would have schools in which half the time is devoted to the three R's, and the remaining half to instruction in husbandry. Towns on the other hand would specialise in vocational schools in the different arts and crafts favoured in that locality. Those who have given thought to the subject are becoming increasingly convinced that it is not only a waste of money but a mischievous and foolish proceeding to scatter literary education broadcast among all classes, making them despise the handicrafts for which they have hereditary aptitudes and look down upon the manual labour to which they were accustomed for ages. Vocational education is at present very much in the air; but the problem as to how provision is to be made for the various vocations and how education can be inexpensively imparted in all has not been seriously tackled. Agriculture which is the profession of sixty-seven per cent of our people ought to form the staple of one set of vocational schools, viz., those in agricultural villages; every one will recognize this but the importance of adding to it horticulture and gardening and allied profitable industries like cattle farming, poultry breeding, bee-farming, sericulture and game preservation should also form part of the villagers' curriculum. In towns, on the other hand, there ought to be provision for guild schools as above mentioned for spinning and weaving, carpentry and wood-carving, the work of blacksmiths, brass-smiths and founders and in



larger towns and cities for the fine arts like architecture, painting and music.

It is matter of common knowledge that our ancestors did not go to the expense of building up huge libraries. In fact in those days as in these, the man of one book thoroughly digested and reduced to practice was much more to be dreaded than the man who allowed himself to be distracted by much learning which is a weariness to the flesh. The scholar of ancient times mostly carried his learning in his head ; so did the artisan, the doctor and the lawyer. Information relating to any particular subject was digested into the crispest and most condensed of slokas or sutras. They were so carefully memorised when the pupils were young that they were never forgotten afterwards. Even to-day the most effective of grammars and the best books on arithmetic, medicine and music are in sutras which when got up by memory are much more permanent possessions of the persons who have learnt them than books gathered in libraries which moth and rust do corrupt. While it is desirable to have popular books on subjects of current importance written not in high classical stilt but in conversational vernacular language, there is room for composition in condensed form of all the knowledge available as regards the subjects which have already been mentioned. If a doctor can carry in his head all the verses relating to the various ills to which the human frame is heir, I do not see why the elementary rules relating to the culture of the indigo or the palmyra, the cotton or the coffee plant and rice and wheat should not also be reduced to a few stanzas which are imparted in the schools that I have just described to the pupils as they are growing up. Much more important than actual memorising is of course the training of the hand and eye through experience under the supervision of the skilled expert. No slokas or written instruction can convey this kind of experimental or empirical knowledge which after all is the most valuable part of practical work in the field and the workshop. The vocational school in town and village would have fields, gardens or workshops attached to it in which in the afternoon the

three R's are imparted, but in the morning practical instruction is given by the expert in the trade under the eye of the village official above mentioned.

Corresponding to schools for boys there should be homes for girls in which half the time is devoted to practical subjects like cooking, nursing, gardening, sewing and weaving and the other half to literary pursuits in which the proverbs, the folk song and the literature of the race are given prominence.

## CHAPTER IX

### Village Sanitation

The only justification urged for keeping up the gulf between the different castes is that the lower classes do not observe the rules of cleanliness and pollution by which the higher classes hold themselves bound. If we turn to Manu or Parasara or one of the old law-givers we find whole pages full of rules (too long to quote) as to pollution which even the most orthodox Brahmin of the present day does not care to observe and which ninety-eight per cent of the people of this country have never heard about. Conditions of living have changed so much that it will be impossible or at least extremely inconvenient to practice most of them. But while the tortuous rules as to pollution have sunk into well-deserved oblivion, there is no reason why the wise regulations drawn up in ancient times as to personal cleanliness, the cleansing of an individual's clothes and vessels, and the purification of a house or village should not even now be observed. Owing to the steady increase of population and the congestion which is observable even in villages and which has become such an intolerable feature of our modern crowded cities, it has become more and more essential to observe rules of cleanliness. Numerous diseases start from persons who are themselves usually immune from them because they live in unhealthy surroundings and have become inoculated with the poison; but their clean and healthy neighbours catch them the more readily because they usually live in a purer atmosphere. Any one who has anything to do with Indian villages and compares them with the manner in which they are kept in England or Germany or Japan would at once be glad to confess that while we have many more precepts than those nations as to the value of cleanliness, the practice of the virtue is in inverse propor-

tion to the number of precepts. The average village is usually provided with a very limited or precarious source of water-supply. Usually there is only a tank or a few wells. Occasionally there may be a stream, canal or other water-course, but it is a uniform feature of our village life that nearly always these reservoirs are contaminated at the source by insanitary habits, as Mahatma Gandhi has often pointed out in forceful language. The water used in cleansing or bathing is allowed to accumulate in the neighbourhood of wells and tanks: other forms of filth or garbage are also permitted to rot round and poison the life-giving water which ought to be the means of clearing up contamination. It is perhaps impossible to avoid all dirt in the streets, but surely even in a village there can be effective arrangements for having the dirt removed once or twice every day according to the size of the village.

The most noticeable feature of our village life is that there are always a certain number of superfluous inhabitants who do not know what to do with themselves and the task of keeping the village wholesome and pure may well be allotted to these and a village official specially elected and detailed off for the purpose of enforcing cleanliness. The cleansing of roads and watercourses, the removal of garbage to the fields where they will be exceedingly useful as manure, the allotment of places where nuisance can be committed and arrangements for keeping them clean, the making of arrangements when malignant forms of fever or cholera or epidemic, or cases of leprosy show themselves, must be under the control of this individual who may be dubbed a village Health Officer and given an honorarium if necessary, out of a Manibum in the village.

The village magistrate, the village accountant, the village teacher, the village educational authority and the village health officer will form a Board or Panchayat, for the protection and improvement of the village. Some or all of them may be elected by house-owners and hold office for two or three years, and be eligible for re-election if they prove competent.

The Revenue survey now apports the land in a village as tank, dry land, wet land and nattam (residential land). Portions of the nattam ought by statute to be set apart for exercise and play; two or three convenient portions for latrines; and still other portions for the collection of cattle manure and garbage. There ought to be arrangements for allowing the fields to lie fallow once in five years and for rotation of crops during the four years. Manure appropriate to each kind of crop will be stored in places appointed near where it is likely to be used. There should be a village garden or park in which trees and fruit bearing and flowering plants likely to thrive in the soil may be cultivated and may prove a source of pleasure to the people. The profits of the village market, if any, ought to go to the village to be used as a common purse for introducing improvements in the village. The village authority will see to the location of a suitable number of wells, and to the maintenance of the distinction between those whose water is used for internal consumption, which must therefore be kept specially free from contamination and the other wells used for washing, bathing and planting. The survey authorities usually demarcate the land set apart as road-ways but there is nothing to prevent the accumulation of manure or night-soil on the sides of a street or public path so as to form sources of infection to passers-by. The road itself gets over-grown with cactus or other prickly plant which serves as a refuge for snakes, and thieves and people intent on spreading contamination and disease by careless defecation. The village Panchayat should have the right as in olden days to marshal the able bodied men on appointed days in the year to clean up the roads and make them passable. Both in old England and old India, the inhabitants of each village were held responsible for the maintenance of roads, bridges, waterways and ferries within its limits. Though it may be out of the question to go back to the old days of compulsory labour there ought to be some arrangement by which householders are held responsible for the maintenance of clean and passable roads in each village and pure streams or water-ways.

## CHAPTER X

### Communal Associations

If there is any feature of the times which calls for special notice it is this, that each caste wishes to stand by itself and form its own communal associations with a view to assert its rights and obtain special privileges for itself. Sometimes these associations are purely political bodies meant to prevent the communities concerned from going to the wall in the struggle for existence and to enforce its rights or obtain special prestige or privileges for itself or make good its claim for a greater number of jobs. More frequently they are formed for religious purposes, e.g., to build a temple, or create an endowment to be attached to a temple or conduct a festival or Kattalai in honour of the caste. No one objects to such associations when they are brought into existence purely for religious purposes. But when they are promoted with political ends in view the higher classes are apt to look askance at them as attempts made to deprive them of privileges or perquisites which they have always enjoyed.

I have spoken elsewhere of associations being formed for specific useful purposes. The Sirdars of Rajputana formed themselves into an association for the purpose of minimising expense at times of marriage and introducing rules which will make the selection more general and eugenic than it is now. The Namasudras of Bengal have formed a similar association which is said to have accomplished some of the purposes it had in view. The great development of the future should be communal associations for promoting the welfare of the particular caste concerned in all aspects of its life. Many castes are now, owing to want of common action, in danger of forgetting the special Dharma or usages or arts and crafts for which they were famous. The Brahmins are

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losing their spirituality, the fighting classes their grit and muscle and the Vaisyas the heritage of their accumulated skill. The muslin and calico, the ivory and brass work, the stone and wood carving, and the carpets and shawls for which India was famous in ancient times are becoming things of the past.

They ought to establish and encourage communal schools of their own to train their younger members in the industries or arts and crafts for which they have always been famous. Some of the public schools in England were originally founded by professional guilds and have altogether been endowed out of the funds collected by such communal bodies. The leaders of each community should exert themselves to start or found such communal schools. The wealthy men should be induced to sustain it by gifts and endowments. Older members should run the schools and give the benefit of their experience to the younger members. Such a school should not only promote *esprit de corps* in the community but provide a common meeting ground for discussing its peculiar problems and initiating progressive reforms called for by their profession or social needs.

Such a communal association should look ahead beyond the immediate present and promote such measures as would improve trade morality among its members and build up or expand the business which it represents. There are Medical associations and Lawyers' associations in England for the purpose of avoiding professional dishonesty or slackness. A communal association like what is suggested above would know exactly when its members are apt to go astray in pursuit of selfish advantage (money lenders, milkmen, goldsmiths and merchants are notoriously apt to give way to temptation) and devise rules for the proper ordering of caste morality. At the same time arrangements may be made to expand or improve the business for which the community stands, by proposing high standards of efficiency, use of improved methods, and better arrangements to dispose of the commodities that have been turned out in favourable markets. Such associations

should also promote the business interests of their caste by entering into commercial relationships with similar business abroad and arrange for exchange of parts or instruments, materials and colours. Individuals, however enterprising they may be, would not have the money or the time to enter into such business relations, but the community as a whole would be well able to do it.

India is such a vast continent that no particular reform which is even admitted by the majority of its inhabitants to be needful or desirable can be carried out as somebody or other is likely to be adversely affected by it or entertains an invincible prejudice against it. But if individual communities acted, as and for themselves, they could easily secure the reforms they need and get the assistance of the legislature when that may be necessary. The Parsees had difficulties at one time as regards their marriage and divorce laws; but though few in numbers they are an intelligent and enterprising community and soon managed to get just the law that they needed in the shape of the Parsee Marriage Act. Likewise they have devised special rules of inheritance for themselves which are now embodied in the Parsee Succession Act. The Brahmos have also been able to obtain a special marriage Act for themselves; and Christians have several Acts which are applicable to them alone. If any statutes are necessary to put the affairs of a community in order the communal association concerned should be able to obtain it from the powers that be.

Much more important than legislative action is the good that a community can do to itself by discussing its special problems and arriving at decisions and seeing that they are effectively carried out. Each community knows best about the defects in the rules relating to marriage or inheritance among its social customs and practices. Wherever the evil has attained such a magnitude that it is recognized to be a source of danger calling for immediate action it is for the community itself to meet and discuss it and bind itself to carry it out. The Namasudras have gone so far that if any member of the community breaks the re;



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solutions that they have arrived at about marriage customs and expenses, the said member is out-casted and deprived of caste privileges. Entire clans or tribes have been known to migrate from one province to another, or take up new occupations, to assume new forms of faith such as Hinduism, Muhammadanism or Christianity or adopt the usages and practices of a higher caste and thus improve their status as a caste. Unless communal action is taken in obedience to the call of progress, the corrupting and disintegrating influences existing in each caste are allowed free play and drag it down to lower and ever lower levels.

## CHAPTER XI

### Reclamation of Castes

In the previous chapter, I have suggested that each caste should form a communal association for the purpose of protecting its interests and guiding it along the road to progress. This suggestion is useful only with reference to those communities which are capable of taking intelligent action by concerted effort. Generally speaking even the higher or more highly educated castes rarely show much cohesion for public purposes, or capacity to organize themselves. Firms and companies are started with much enthusiasm for business purposes but are soon broken up for want of the spirit of give and take and the active co-operation that such institutions require. Larger political and social associations are incessantly changing in character and personnel and often become moribund, if not extinct, after being worked for two or three years with hectic activity. It is scarcely to be expected that members of the more undeveloped communities will form themselves into effective combinations for the purpose of remedying the defects and inequalities from which they suffer and taking action calculated to promote their common welfare and progress. The necessary measures have to be devised by other people from outside for their benefit. It is almost unthinkable that Thugs left to themselves would ever have organized an association for getting rid of their thieving habits. Thuggism however has been put down by statute and is fortunately a thing of the past. Female infanticide appears to have been widely prevalent at one time in certain provinces in India and among certain castes (See *Government Census Report, 1911*) but the legislative measures that were devised by Government and the steps taken to enforce them have proved sufficient to kill the practice or at least drive it under-ground. Likewise the old Indian practice of burning widows had wide appeal at one time to primitive instincts found in

certain castes and communities ; but the same has been prohibited by statute and though it is still said to occur in remote tracts, it is not carried out openly and is admitted by public opinion to be an evil which should be rooted out.

The British Government has done a great deal for improving the resources of the country and promoting its material welfare but it has not ventured to take action for the amelioration of castes for fear that it might arouse the hostility of vested interests and feelings of fanaticism. By providing protection and equal laws for all, it has enabled the depressed classes to regard themselves as men and to carry themselves with independence. But except sporadically here and there it has not taken to trouble to study the special problems of each caste or community and provide means for elevating them. Royal Commissions are constantly coming out from England for investigation of questions connected with commerce, or agriculture or irrigation but why there should not be similar commissions for the purpose of devising measures for reclaiming castes which are incapable of reclaiming themselves or for the purpose of getting rid of the injurious habits and practices which are in vogue among particular communities, it is impossible to see.

There are communities which, though on the whole capable of looking after themselves, still possess evil habits which can only be dealt with by outside interference. There are others which grow up in such an atmosphere of immorality or degradation and superstition that they have no reasonable chance of looking up and receiving the light. There are other entire communities which are so hopelessly backward that unless measures are devised and help is rendered to them from outside, there would never be any chance of their coming forward to help themselves.

Take, for instance, the single subject of practices connected with marriage. The Census reports state that in certain castes circumcision is practised among girls as well as boys ; the account given of it shows that it must be a very painful operation indeed, as it is performed just immediately prior to or after the girls' marriage by ignorant old women operating with very crude instruments.

The practice is supposed to increase fertility. In a certain caste there are rules under which a girl is formally given in marriage to a man, but she does not live with the man to whom she is formally married, but must live for sexual purposes according to caste custom with another man of her choice. Another variation of the same rule is the custom prevalent in certain areas by which a grown-up woman is given in marriage to a child a year or two old, whom she can and sometimes does carry on her hip as if it was her own child; but she lives for connubial purposes with the child's father. This is apparently done because the child is an uncle's son or other preferential husband and the arrangement keeps the wealth in the family. Among certain castes young girls are constantly given, soon after they are born, in marriage to the gods; but later when they grow up, they cannot be given in marriage to anybody else, but have to eke out their livelihood as public prostitutes. Among a number of castes, girls are given in marriage before they attain puberty and sent at once to the husband's house. There is no mother by her side to watch over her and many instances occur, some of which are to be found in reported cases, where the girl is treated cruelly by the husband's people or forced by the husband himself before she attains maturity. Among certain castes there is a practice that as soon as a girl attains puberty, she has to submit herself to a man not her husband and then only she becomes fit for marriage and she is wedded sometime later to a man of her own caste. These practices, however interesting they may be as relics of an antique past, are unhealthy or barbarous customs which cannot be got rid of except by concerted action taken by the general public. The Government, however, moves in such matters with caution learnt in the school of bitter experience: because in the first instance it is afraid that any rule made by it will remain a dead letter, if it is so far ahead of public opinion in the caste that it is not willing to subscribe to it, and secondly because any evil or undesirable practice may at any moment be brought under the shelter of religion and its abolition may give rise to a fanatic revolt or outburst. Till the days of the Mutiny,

the British Government was freely interfering with such dangerous or unhealthy practices and in some instances dealing with them with a strong hand. But since that event, Government caution has gone to such lengths that even when public opinion as a whole is in favour of a certain reform, British officials range themselves with Pundits of the die-hard variety and vote against reform by statutory action, for fear it would give rise to fanatical outbursts.

There are also entire communities which pursue occupations or follow certain practices as part of their profession, which public opinion in the twentieth century emphatically condemns. There are still various castes whose profession is theft. Fortunately there are settlements for reclamation of Kallars and the reform of some criminal tribes. But these touch only the fringe of the trouble. Concerted action on a larger scale is necessary if these evils are to be put an end to.

There are castes which make their living by conjuring, fortune telling and soothsaying ; if many of them escape their proper destination, viz., the criminal jail, it is only because those who suffer by their confidential tricks do not desire to make laughing stocks of themselves by figuring as prosecutors in Courts. According to the Census there are 33,18,771 beggars or vagrants in India, many of them putting on the garb of Bairagis or ascetics and committing offences under the shelter of that specious cloak. Cattle poisoners and cattle lifters form a community by itself and dealers in cowdung, rags and cattle refuse form another, according to the Census report.

In the United States, campaigns are started in connexion with evils which oppress or corrupt the community like leprosy, syphilis, unemployment, drinking saloons and gambling halls. When the Universities or Public Bureaus which interest themselves in such questions have accumulated a sufficient quantity of accurate information they start educating public opinion and then initiate campaigns for the removal of such evils by statute. Temperance legislation and Immigration laws are recent instances of successful effort to remove social evils.

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There ought to be similar activities initiated by those who have the good of their country at heart and they should deal with such questions as beggary and vagrancy, prostitution, gambling and intemperance.

BOOK III  
**Joint Family**

## CHAPTER I

### Introduction

The personal law applicable to Hindus has grown up mainly round the institution known as the joint family, and owes all its peculiar incidents to that institution. The system is a chronological development of the patriarchal family, which was a recognized feature of ancient life not only in India but in Greece and Rome, in the England and Germany of the pre-Christian era, and in many other parts of the world where such a constitution was found to answer to the needs of the people. Elsewhere, the patriarchal family usually grew into a gens or clan which together with similar gentes made up the race or nation. On the other hand, for purposes of internal economy and enforcement of legal rights, it broke up into families which either preserved a joint character as in India, or placed themselves under the government of an autocratic head as elsewhere. It is not surprising that a structure devised in very ancient times shows gaps and cracks everywhere in these modern days and is found to be unsuitable to the requirements of present day life. That it was a wholly admirable institution when it was first devised and that it effectively served the purposes for which it was brought into existence cannot admit of any doubt.

In the first place, it fulfilled the purpose of shielding the individual and preserving the family as a whole from aggression from without. In days in which law and order had not become so well established as they are at the present time, might was right, the strongest chief took what he could snatch by fighting and marauding, and the individual who elected to live by himself would have been nowhere; he would soon have been swallowed up and his property confiscated by his more powerful neighbour. Again, when the nation or race as a whole was arming for warfare with an invading race, the leaders found by



experience, as Cæsar tells us in his *De Bello Gallico*, that if the warriors grouped themselves according to their families and clans and stood and fought alongside of their fathers, uncles, brothers and sons for the protection of their wives and children and their hardwon property, they acquitted themselves with much more valour and self sacrifice than they otherwise did.

Tying up of property, so that it may be preserved intact from generation to generation, was undoubtedly a more important consideration in the eyes of those who devised the joint family system. The wealth that had been acquired by the foresight and energy of a progenitor had to be made available not merely for that individual's needs, but also for the requirements of his wives, sons, daughters and dependents. Arrangements had to be devised which would preserve the property from being broken up by thoughtless or profligate youth, and provide for its being efficiently and economically looked after by a person who had the interests of the entire family at heart. The management of the property was accordingly entrusted to a Kartha or family head, who could use it without accounting to the other members of the family for all the ordinary requirements of family life such as maintenance, marriage, education of sons and religious ceremonies and sacrifices, but who, on the other hand, was not allowed to speculate with it or waste it for purposes that were not beneficial to the family as a whole. He could possess and spend it, but could not give it away in gifts or dispose of it by Will. He could disburse the income pretty much as he chose, but was not allowed to alienate the corpus except for family necessity. The object was to preserve the property intact for the benefit of the entire group of which the Kartha was the representative, and to constitute him, in the language of the Privy Council, a trustee to look after the property during his life time and pass it on to the next senior member of the family on his death.

From the point of view of morals or ethics, the greatest advantage secured by the joint family system was that it made for mutual service and helpfulness. Now-a-days

the whole structure has been dragged from the ethical heights on which it was erected and thrown down to a much lower level, because co-parceners have everywhere begun to talk of the rights of individuals constituting the family as distinguished from their duties; the ancient rishis would have been horrified by any unit in the family claiming to have rights, and attempting to enforce them as against the senior or managing member of the family. They proceeded on the footing that the needs of life could be properly provided for and could be satisfied smoothly and effectively only on the basis of each person doing his duty or dharma and laid down elaborate rules defining the obligations which each member of a caste or family had to fulfil. Every member was expected to give of his best, his earnings and belongings being placed under the control of the managing member for the good of the whole. Even the Kartha or the king was not allowed to speak of his rights, but had to keep a watchful eye on the duties that he had to perform from his station towards the people entrusted to his care.

Probably the ultimate purpose of the joint system was to preserve the family faith and deities intact, and to hand down without breach of continuity the lares and penates and the religious usages and practices which had become consecrated by antiquity. If every young man was allowed to live or think or act for himself, he might well feel inclined to strike out a new path and give the go-by to the worship and usages held dear by his ancestors. If, on the other hand, the senior male member was entrusted with the power of laying down the law for the entire family and prescribing the ceremonial and religious practices to which all others had to conform, the cause of conservatism was served, and this has been the actual way in which, though other forms of faith have materially changed in the course of ages, Hinduism has contrived to remain practically what it was centuries ago.

As already indicated, the joint family system was devised to meet the requirements of an archaic age. The need for protecting the family from the aggression of

neighbours does not now exist. The cosmogony, the impressive theology, and the sublime ethical system, which still evoke admiration from foreigners and a whole host of fasts, penances and observances all of which lent strength to the system, have fallen away and become forgotten. The peculiar features which made for the conservation of ancient usages and practices is now tending towards deterioration or degeneration rather than towards progress.

While the legal institution known as the joint coparcenary was admirably calculated to preserve the property belonging to the family for the use of all, it was of little use when any commercial or industrial enterprise was started, which required the adventuring forth of property or change of it from one form to another. Where a patriarchal family was self-sufficing and made for itself all or nearly all the simple commodities that it required for its use, the joint family system worked well enough. But under modern conditions the family members scarcely make one of the things required for its consumption. Most of the articles used by it have to be purchased in open market out of the means of the family, and an arrangement by which the purchasing power of the family is raised to the highest pitch and each individual is induced to earn all that he could by his skill or labour is what is required in these modern days. Especially is it true, that no commercial or industrial development on any considerable scale could be possible in this country so long as property is tied up in families in such a fashion that the younger and more energetic and enterprising members of it could not handle it at all for the purpose of embarking it on any new venture, and the Kartha is so fettered by rules and limitations that he has to proceed with the utmost caution, in order not to expose himself to litigation or endanger the interests of the family. If Hindus have remained for ages predominantly an agricultural people and have never taken to worldwide commerce or industry in the sense in which Muhammadans or Christians have been able to, if nearly ninety per cent of the population still lives in the 677,000 villages of India

leading a primitive life, it is because of the restrictions imposed by joint family law. Not only is there thus no scope for enterprise but a premium is put on idleness and obstruction, as the drone of the family could always obtain his food and clothing for the asking. In theory every member is expected to work and give of his best to his family, but in practice the eldest male member has to answer all needs and is required to give the lead in business as well as in religion; younger members have no incentive to work or even to study, except in so far as they may happen to be imbued with a strong sense of duty. In days in which religion was much more of a driving force than it is to-day, reliance could be placed upon spiritual motives for each member contributing of his genius or skill to all. But in these modern competitive days, when each man looks to himself and the hindmost goes to the evil one, and individuals talk of rights rather than duties, the tendency is to fill the house with quarrels and bickerings, to blame the older men for all mistakes, and ask for partition at the earliest possible opportunity. The family house which is meant to be a temple of peace and spirituality only too often degenerates into a cockpit breeding endless rivalries and quarrels, many of which eventually find their way to the criminal or civil Courts.

As I have already ventured to point out in an earlier part of this book, the Mitakshara Law relating to the joint family is extremely hard on women, if not positively unjust to them. A man may become a millionaire by his own efforts but his widow gets only maintenance if there are sons and a life estate if there are none. His daughter is only entitled to maintenance and marriage expenses if there are sons. If there are none she is postponed to the widow and even then gets only a life estate. A sister is not in the original list of heirs at all and comes long after her own son. These arrangements leave even the nearest female relations very much at the mercy of men, and disables the very persons who would like to help them most and see justice done to them by giving them their due.

The joint family system was a necessary institution in

days in which the hereditary skill or aptitude acquired by a progenitor had to be passed on to all its members and descendants and each junior member learned the Vedas, the profession of arms or the secrets of a trade or industry like weaving, carpentry, dyeing, etc., from the senior expert members of the family. This system, however, is now visibly breaking up. Brahmins do not impart the Vedas to their children, Kshatriyas, if they exist anywhere, do not communicate the secrets of archery or swordsmanship to their sons and grandsons as of old. Even among people who follow one of the trades, it is found that an apprentice learns more by turning his back on his family and placing himself in a public institution or under a person who has learned the modern ways of workmanship than by studying in the home or learning the use of the primitive instruments which his ancestors have used from generation to generation. While the rest of the world is moving in the twentieth century, it is not possible to compel the younger members of our families to be satisfied with the instruments, weapons and the form of training which were good enough centuries ago. There are die-hards who firmly believe that in religion and philosophy the best that can ever be said has been already effectively said by our ancestors. But even these ardent conservatives will be willing to concede that a person trained in the archery of the age of Mahabaratha or the carpentry of the first century, A.D. would be of little use at the present day, if he failed to familiarise himself with the weapons of warfare and industry that have been recently forged. The joint family system makes for conservatism, but has proved itself an enemy to progress and enterprise.

Even in the world of thought, there can be no harking back and no finality. Each generation has necessarily to learn not merely all that earlier ages have to teach it, but has to construct its own philosophy and art and make its own literature so as most adequately to meet the needs of its own day. It is said by some that modern writers are merely making a rehash of what the ancient Srutis had already stated or adumbrated or foreseen. But there can

be no progress in intellect or morals, till a man learns to think for himself and arrive at his own conclusions as the result of his private experience of the world in which he lives. It is only in that sense that his knowledge can become his own, instead of being borrowed feathers totally out of keeping with his environment. No sensible person, however antiquated he may be, would want to bargain away all the knowledge that modern science has added to the general store or the host of improvements in machinery and material that have been perfected during the last two or three centuries. If our ancient doctors thought out all the problems of their day effectively and on the whole admirably with a view to the requirements of their times, the present generation should tread in their footsteps and do the same for our time. The joint family system which was devised to meet the needs of an elder day and which clogs progress all along the line, stands crying for adjustment to modern conditions.

There are certain well-known directions in which adjustments have already been made with great benefit to the people whom it was meant to serve. The original theory of the Hindu joint family did not make any provision for what is now known as self-acquisitions. A man's wives and children, his dependents and cattle were all equally his chattels. When a family member earned anything he could not have claimed to keep it for himself but had to throw it into the family hotchpot so as to render it available to all his fellow members. Now however, it is recognized that if a person receives gifts from strangers or acquires properties by his own labour or skill without detriment to the joint estate as 'the gains of learning or science' he is entitled to keep them for himself. This arrangement, though confessedly an inroad upon the law as it originally stood, has been accepted by all recent Law-givers and has undoubtedly made for greater enterprise.

Likewise, the arrangements introduced by Jimuthavahana in Bengal are a considerable advance upon the original rules laid down by the Mitakshara. The head of the Dayabaga family is unquestioned master of the

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property in his hands and could embark it upon any enterprise or adventure without risk of action from the junior members. When the Kartha is dead, each member has an ascertained fraction of the family estate to his credit, to which he succeeds not by right of survivorship but by right of inheritance. It would take too much space to describe the manner in which the reforms introduced by Jimuthavahana have made for progress and enterprise; we have only to look at the respective provinces, to see the difference that it has made in public and private life.

Wills were unknown to Hindu Law and are totally inconsistent with the joint family system; the law of probate and administration would have been looked upon with horror by the Smriti writers of an elder day. These two branches of the law have, however, been grafted upon the ancient stem without doing any material damage to it and are taken full advantage of by professional people living in the cities and in the more advanced provinces. It will be the purpose of this book to throw out suggestions for the removal of excrescences from the joint family law and the introduction of reforms which will make for peace and progress, enterprise and suitability to modern conditions.

[The rules applicable to a joint family seem to an outsider hard, if not unfair, to women as a class. Several suggestions regarding possible improvement of their lot are made elsewhere, vide Book I].

## CHAPTER II

### The Principle of Survivorship

The arrangement by which ancestral property is held in joint or co-parcenary ownership is peculiar to Hindus. It is, however, so archaic in character, and so irksome or burdensome in the limitations that it imposes upon its owners, that it has been found necessary to graft a large number of exceptions upon it. The incidents of a co-parcenary are never applied to property known as obstructed heritage or *Saprabandha*, and do not obtain under the Dayabaga law prevalent in the province of Bengal.

Ancestral property is defined for this purpose as wealth obtained by a man from his father, grandfather or great-grandfather on the paternal side. It is conceivable that the lineage may be longer than this in a given case and that a man may have the good fortune to see his grandfather's grandfather alive and get property from him. In such a case the doctrine obviously does not apply. Likewise, where a man inherits from his uncle or grand-uncle or his brother, nephew or son, the property is not technically regarded as ancestral, and is not subject to its numerous limitations and restrictions. But when a man gets property from his maternal grandfather it is regarded as ancestral in Madras.

With reference to ancestral property described as above, the rule is that every male member of the family obtains an interest in it as from the moment of his birth. If a Mitakshara father gives birth to four sons, the latter become entitled from their birth to shares equal to their father in the ancestral property, i.e., each is entitled to a fifth. From thenceforth they or some one on their behalf can elect to treat the head of the family as a mere manager; they can contest the validity of his gifts, sales, mortgages and other transactions, and institute suits in the courts to have it declared that they are not binding on



them; they can insist on a partition and claim mesne profits from the day on which they demanded it; they can compel the expenditure of money on themselves. Another consequence which flows from ancestral property belonging to a family being held in joint ownership is that when one member of it dies, the remaining members do not inherit the property from him, but merely succeed to it by survivorship. If a family consisted of a father and a son and the father died, the son who was entitled to half the property when his father was alive obtains on his death the other half, not by inheriting to his father but in his capacity as a surviving member of the joint co-parcenary.

Now this doctrine leads to endless complications. It ties up property in an unnatural manner and imposes heavy fetters upon it. Free use or flow of wealth is impeded as it prevents its being boldly invested in business or disposed of quickly in an hour of need. It makes titles uncertain and litigation certain. No purchaser can be sure of an absolutely safe title.

If the vendor of immoveable property is a Christian or Muhammadan, there is very little investigation to be made, except to see that he had title deeds and they were in order. But if a person intends to purchase joint family property from a Hindu, he dare not move without taking legal advice and making the most elaborate enquiry. He has first to construct a genealogical table running back to three generations, and trace out all the male members of the family entitled to be regarded as co-parceners. He has to continue his explorations, till he has ascertained all the wives and widows and daughters who may be entitled to rights of inheritance, maintenance or residence. As the co-parcenary is a loose fluctuating body to which additions are constantly made by birth, adoption and marriage, and from which subtractions are as frequently effected by death or separation, the would be purchaser has to make elaborate enquiries as to every one of these incidents for a number of years reckoning back from the date of his intended purchase. If the members of the co-parcenary are grown up adults, they

must all be made to join in the alienation. If one or some of them stand out, there can be no sale, unless a partition is forthwith effected. If some of them happen to be minors, as is often the case, further heavy billows have to be faced, as the manager can only sell or mortgage in case of necessity, and there are only half a dozen cases of need which are recognized by law. Where property is in fact sold to satisfy one of these recognized needs, the purchaser is supposed to get an unimpeachable title. But as all sale deeds, including those which are not for recognized needs, blandly recite that money was required for one of the half a dozen purposes sanctioned by law, the purchaser has always to face the risk of litigation by some interested person suing on the ground that the property has not been sold for a necessary purpose and therefore the sale is invalid and not binding upon himself. Frequently the very person who sold property to a purchaser and pocketed the sale proceeds sets up his own sons or other relations to call in question the necessity for, or the binding character of, the sale. There may have been a time when estates were small, and severe limitations had to be imposed in order to prevent them from being alienated by Karthas to the detriment of co-parceners; but in an age like the present, when large estates are accumulated in a few years and are constantly changing hands in the interests of good management or commerce, education or marriage, these limitations act as the most irksome of fetters and greatly enhance the risk of litigation.

A further set of difficulties arises from the fact that a son can make it difficult, if not impossible, for a father or grand-father to administer the property in any manner that may seem efficient or business-like, or dispose of it for necessary purposes (except those recognized by law). A member of the co-parcenary who has become entitled to a share in it by birth can always insist on a partition. Even when he is a minor, suits are constantly brought on his behalf to enforce a partition on the allegation that the father is living a wild or immoral life and mismanaging the property or misappropriating it or disposing of it for

purposes not binding on the family. At a time when sons were much more under the control of their fathers than they are now and observed the rules of obedience and self-effacement, which are laid down in the ancient shastras, the son probably rarely called in question the acts of his father or instituted suits against him. If he ever did so, it must have been in cases where the Kartha was really guilty of maladministration or waste. But sons of the present day cannot usually be accused of such subservience. They have familiarized themselves with the powerful weapons furnished ready to their hands by the law, and do not hesitate to flagellate their own parents with them whenever the fit takes them. Suits by sons charging the father with all kinds of immorality or wastefulness, accusing him of improper alienation and asking for partition, are all too common. In many, if not most, of the cases, the allegations made in such suits are gratuitous or exaggerated.

It follows from what has already been said that this rule operates with great hardship on women. A father cannot out of ancestral property give gifts according to their deserts to his daughter (except as a marriage gift) or his wife. They are not entitled to share in the family property during his lifetime or after his death. They are merely entitled to rights of maintenance and residence. The daughters are in addition entitled to be married off at the family expense. The ancient rishis solemnly assert that the daughter is as much derived from the limbs of the father as the son. Why then should she be differently treated? But for ages men have taken advantage of their pre-eminence in physical strength and education to deprive the women of rights, which they must have formerly enjoyed. Originally according to the antiquarians, who have made a special study of primitive institutions, inheritance was traced in India through the mother. The matriarchal family preceded the patriarchal everywhere and property descended through females as it does even at the present day among a number of communities in India. It is only by a series of retrograde steps bearing hard on women that the present rule has become developed.

Jimuta Vahana made a move in the right direction when he abolished the rule of succession by survivorship. In Bengal there is no difference between obstructed and unobstructed heritage. When a father inherits ancestral property, the son does not obtain any right in it by the consummate merit of electing to be born. He cannot ask for partition till his father dies. He cannot charge him with immorality and wastefulness and maladministration or alienation of property for improper purposes in a real or pretended suit for partition or setting aside alienation. The father is at liberty to dispose of ancestral property in the same free way in which he can handle his own self-acquired property. The immense litigation which turns on the distinction between ancestral and self-acquired property is done away with at a stroke. The result is that sons are more under the control of the father and property can be more easily adventured in business and industry. There are parts in Bengal where the Mitakshara law prevails in preference to the Dayabaga system introduced by Jimuta Vahana. It has often been remarked that those parts of Bengal which observe Mitakshara rules are much more backward than those which follow the rules of Dayabaga. As between Bengal on the one hand, and the other provinces which follow the Mitakshara, on the other hand, there is an even more noticeable difference in these respects. Bengal therefore is in line with the rest of the world, while the major portion of India is in this respect in a backward condition following an archaic rule, which works very great hardship at the present day.

The Mitakshara system works with so much hardship, more especially in cases where the whole of a family's wealth is embarked in trade, that a number of exceptions have been made to the original rule. As I have already observed, the highest tribunal in the land has, in the first instance greatly limited the kind of property known as ancestral property. Property inherited by a Hindu from a person other than his father, grand-father or great-grand-father on the paternal side was excepted from the scope of joint family property. Gifts of ancestral moveables

and properties obtained by grant from Government by one member are not subject to its limitations. Property obtained by a co-parcener by his own exertions, without any assistance from ancestral property, is also fortunately excluded from its scope. If ancestral property was lost to the family and recovered by a co-parcener without assistance from joint family funds, such property as well as the income from it are classed as separate estate. Property held by a sole surviving co-parcener or received by a co-parcener who has no male issue are also likewise excepted. After making this series of exceptions, the Privy Council has now introduced exceptions to these exceptions for the purpose of swelling the property known as ancestral. For instance it has been held that property inherited from a maternal grand-father is ancestral in Madras. If property is acquired by any one who has obtained more than elementary education or education suitable to his position as a member of his family out of a joint family estate, it is described as gains of science and the same becomes ancestral. If a son, who has acquired property on his own account, without receiving any aid from joint family funds, makes gifts out of affection to his father or poor brethren, this is apt to be construed as putting self-acquired property back into the common stock, quantity so as to swell the quantity of ancestral property subject to division. Probably the worst part of the mischief is wrought by the rule throwing the burden of proof on the person who has to show that a certain family is not joint but separated. The onus of establishing that any part of property owned by a co-parcener is his separate acquisition is thrown upon the person asserting that proposition.

There is reason to believe that but for the fact that the system of administration of justice has become so set and crystallised that no change can now be introduced by the steady force of custom, and a rule of law can be modified only by the Imperial Legislature, after running the gauntlet of a number of Government departments in Delhi and the provinces, a great many changes would have been introduced. As one watches the growth and

development of Hindu Law, one finds that the doctrine of self-acquisition, to which more explicit reference will be made in a later part of the book, the doctrine about receiving gifts from relations and holding separate property, have all been evolved in the course of ages though inimical to the original spirit of Hindu Law. Since the advent of the British regime, very substantial changes have been introduced by the rules relating to Wills, of which there is no sign in the original Hindu Law, the law governing trusts, and that dealing with administrations and bankruptcy. If such wholly foreign ideas can be ingrafted on Hindu family law without doing it any damage, I do not see any reason why the doctrine of inheritance, which is already in existence in Hindu Law should not be expanded so as to get rid of the doctrine of survivorship. There ought to be no distinction between the ancestral and self-acquired property of a father. Both of them should be made capable of inheritance or division only after the lifetime of the owner. He should be permitted to dispose of them by sale or otherwise during his lifetime for purposes of business. Changes like these have been introduced in Bengal without any material damage to society but with great advantages in the direction of progress and enterprise. At any rate, it is a great point that the constant bickerings, quarrels and jealousies, which have become such a common feature of domestic life under the Mitakshara system owing to the tying up of the members of the family in an unnatural nexus, will be got rid of when the father is absolute owner of the property and the sons are not treated as his equals in rights, entitled to take him to task during his lifetime, though bound to offer veneration to his spirit when he is dead.

## CHAPTER III

### Self-acquired Property

‘The stimulus to individual enterprise, the hope of leaving an augmented share to one’s own wife and children, and the ambition of making a fortune for oneself while retaining one’s separate individuality in a wealthy Hindu family are not sufficiently fostered by the existing system.’—S. Srinivasa Aiyangar. Conditions, therefore, which favour enterprise and industry, and a steady increase in the volume of capital, and which at the same time put an end to the bickerings and litigation now encouraged by other members of the family being put on a footing entitling them to call in question all or any of the acts of the Kartha, have to be propounded.

Without making any serious inroad upon existing law it seems possible to make certain easy adjustments which will favour the tendency towards individual enterprise.

One of these is to place self-acquisition on such a footing that it cannot be coveted with greedy eyes by the person who had nothing to do with its accumulation, but is rendered freely available for all time for investment in new enterprises. It would then devolve on the heirs of the acquirer, but will not be subject to the risk of going back to the drones of the family.

At the present day property which is acquired by the individual effort of a co-parcener can be disposed of by him as he likes during his life-time and inherited by his heirs after his death. But once it is inherited by the heirs of the person who acquired the property, it again falls into the co-parcenary estate and becomes subject to all the limitations incident to joint family property. This is an unnecessary and unjustifiable retrogression towards archaic conditions, and has prevented the wholesome doctrine of self-acquisitions from yielding all the fruit which it was capable of producing. When it has reverted as joint family property, the drones enjoy it equally with

the intelligent and enterprising members of the family. Wealth amassed in one generation is in most cases frittered away in the next by a number of persons most of whom are incapable of making profitable or even good use of it. Even if a Will or settlement is executed by the acquirer with a view to guard the estate from the follies or worse of the next generation, they serve no useful purpose, as the property thus disposed off is treated by law as ancestral in the next descent. A flourishing estate or family trade built up by the labour and energy of a progenitor is only too often ruined by prodigal younger members of the family, who are tools in the hands of speculators in litigation and can enforce a partition in or out of court or allow their shares to be sold in execution or otherwise. The right by birth is apt to be used as an engine of oppression. The days are past when the equal right of a co-parcener was necessary in order to prevent the managing member from squandering the family substance. The son's liability to pay the father's debts and the father's power to anticipate payment on the basis of the doctrine of pious obligation has not only helped to swell litigation but to make the joint family estate a plaything between contending interests. If self-acquisition is treated as property severed for ever and is rendered incapable of becoming joint family property again on descent, it is much more likely to lead to enterprize in capable hands than existing arrangements. If the rule of *stare decisis* had not intervened in the direction of crystallising the law, as it stood about a century ago, the country in the course of its progress would probably have effected this much needed reform. If the change proposed in the previous chapter is brought about, there will be no need for this reform; but that is somewhat of a radical alteration, which may not find immediate favour with the public. In that event, this more moderate instalment of reform may succeed in winning acceptance for itself.

The scope and range of self-acquired property also admits of extension. At present it includes not merely property acquired by a co-parcener by his own exertions



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or as gains of science which are strictly self-acquisitions so-called, but also certain other technical kinds of self-acquisitions such as property granted by Government to a member of a joint family, or given as a gift through affection to a male issue. It also covers property inherited as obstructed heritage by a Hindu from a person other than his father, grand-father or great grand-father on the paternal side. Further if ancestral property has been lost to the family and re-acquired by the efforts or intelligence of one co-parcener, that is also treated as self-acquired property. With a view further to enlarge the scope of self-acquired property and place it on a sound footing, more than one legislative measure has been promoted in the past but in vain. Sir V. Bashyam Iyengar introduced a bill known as the Gains of Learning Bill which was intended to secure valuable property acquired by a man's own exertion to himself and his heirs. The time, however, was not ripe for even such slender changes as he then proposed with the result that though the bill was supported with all the learning and ability of one of the most orthodox leaders of modern times, it failed to find support from the ranks of conservatism. The late Mr. Justice Seshagiri Aiyar promoted a similar bill in the Legislative Council and it also met with a not dissimilar fate. The fact is that, according to the existing constitution, laws affecting the Hindus as a whole have to be enacted by the Central Legislature and have to run the gauntlet of both the Imperial and Local Governments before it is even propounded there. While some portions of the country may be ripe for a certain reform and are clamouring hard for it, there may be other portions which are comparatively backward and which dread the innovation as likely to interfere with the perquisites of drones. Curiously enough lawyers as a class are apt to be conservative and fight in the van of reactionaries. As the law stands at present, a person who acquires a fortune by his own effort, has always to fear the risk of his earnings being claimed for the family hotchpot; if there was no formal partition effected between him and his dayadees, the danger of his self-acquisitions being treated as part

and parcel of joint family property is real. If a member became prosperous, and advanced money out of a charitable heart to the other members of the family, or helped them in the matter of education and advancement in life, or even assisted his father or other needy members of his family out of his earnings in their hour of penury, this is considered sufficient proof of his inclination to throw his self-acquisitions into the joint stock, and his property is treated as capable of division among his brothers, who contributed nothing whatever to the acquisition of the fortune. It was a step in the right direction when the right of a member to keep his self-acquisitions to himself was recognized. It was a backward step, on the other hand, when the doctrine of throwing it back into the common stock was invented, thus swelling ancestral or joint family property at the expense of the new doctrine of self-acquisition. In England, though tenancy of real property was joint, the tendency was towards separation and once separated there is no possibility of re-union. Here the risk is the reverse, owing to the legal presumption that the property of a family is always joint, and in the next generation self-acquired property is deemed by operation of law to become joint. A measure which draws a clear and sharply defined distinction between joint and self-acquired property and includes within the scope of the latter all property acquired by the skill or energy of a member, independent of his family and whether or not at some point of time he touched the nucleus, is certainly urgently called for. An earning member who has received his education at the expense of the family should not be deemed to have made use of the nucleus. It is just as much the obligation of the family to educate a member as to feed him, especially in these days when the object is to get the largest value out of him.

The Indian Succession Act was originally promulgated in 1865 and re-enacted with additions and alterations in 1925 as a piece of territorial legislation binding on all subjects of His Majesty. Various parts of it and particularly the law relating to intestate succession have, however, been made inapplicable to Hindus, Muhamma-

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dans, Jains, Sikhs, and others who have special systems of personal law of their own. It would appear that when the law was on the anvil, it was intended to govern all classes of His Majesty's subjects. But the conservative elements in the country procured the exemption from its purview of the large majority of British Indian citizens, with the result that though it is an exceptionally clear and exhaustive piece of legislation, it applies at the present moment only to Christians, and others not provided with personal laws of their own. I do not see any reason why the undoubted advantages of the Act should not be made available to a person who acquires a fortune and wants to adopt that Act as the basis which should govern inheritance among his heirs and successors in interest. The divisions therein propounded are much more just, and the provisions made for a widow and daughters and other near relations, whether cognates or agnates, appeal to the modern mind as much more reasonable than the arrangements now obtaining among Hindus under the ordinary law of succession applicable to them. In England real property had always devolved under certain archaic rules and personal property has been distributed in an entirely different manner more in consonance with modern ideas. Now inheritance to real property has been brought into line with inheritance to personal property. There ought to be some enabling provision by which a person who acquires property should be able to state that he intends that succession to his self-acquired property should be governed by the Indian Succession Act, or it might be definitely ruled that all such property should devolve as laid down in the Act. This is not the startling innovation that it may appear at first sight. Under the Hindu Law, as it now stands, the Hindu may carry his personal law with him wherever he goes. If he is a follower of the Dayabagha system of law and migrates into a place where the Mitakshara or Aliasanthana law prevails, he is entitled to have the Dayabagha system applied to himself. In the well-known case of *Abraham v. Abraham* (1863) 9 M. I. A. 195, the Privy Council decided that a family on migration or conversion to Christianity is

entitled to say what law should be applicable to it. In the equally well known Tagore's case (1872) 9 Beng. L. R., 377 it was held that though the English law of Wills was never a part of the Hindu Code, it was open to a Hindu to make a Will and import all the rules and peculiarities of the English law of Wills. If a testament drawn up by a Hindu is deemed to attract all the English rules that have been evolved in the course of ages as to Wills, I do not see any reason why, when he dies intestate, he should not likewise declare that all the rules as to intestacy that obtain under the Indian Succession Act (which itself is an improvement on the English law of inheritance) should be made applicable to his family so far as the succession to his self-acquired property is concerned.

## CHAPTER IV

### Testamentary Succession

Hindu Law in its original form knew nothing of testamentary succession. The law of Wills has been grafted upon it in these modern times, and has, within the limits prescribed for it, functioned more or less successfully. When one comes to think of it, the power given to a person, not merely to manage and dispose of his property during his life time, but to say in what manner it shall devolve after his death, is an extraordinary extension of the rights connoted by the term 'Property'. Hindu Rishis would have stood aghast at such an extension, as their entire scheme was to preserve property intact for a long time, so that it may be held and enjoyed by two or three successive generations.

The power to make a Will is thus now available only when a man has self-acquired property apart from the ancestral estate to which he might be entitled by survivorship. It also applies to cases where there has been a partition and a family member has become entitled to a separated share of the family property, or when he is the last survivor of a co-parcenary of which the other members are all dead. It is thus applicable to all property that could have been disposed of freely by a Hindu during his lifetime. It may also be added that the Hindu Wills Act has been made applicable only to the cities of Madras and Bombay and to the province of Bengal. The distinction in favour of Bengal is due to the fact that, under the Dayabagha law, the father has absolute power over ancestral property even though he has sons; even when the property is held in co-parcenary among several brothers, each of them is entitled to an ascertained share in it, which he could dispose of either during his life time or by Will. In places other than the cities and the province above-mentioned, Hindus may and do make Wills as regards property which they could dispose of in

their lifetime, but no strict rules are made as to the form of such Wills or as to their interpretation and enforcement.

The time has come for an extension of the power now available and for the embodiment of the law of testamentary succession as an integral part of family or personal law.

Any law of inheritance, however fair or just it may appear to be on a general view, is bound to cause injustice in special cases. It cannot be claimed for Hindu Law that it is the *ne plus ultra* of fairness. It is hard on women as a class. It is not fair to cognates as distinguished from agnates. It introduces all sorts of complications by recognizing limited or life estates, with reversioners lying in wait to take up the property after the termination of such life estates. Nine persons out of ten, who have property to dispose of, would probably say that if they had the ordering of things, they would dispose of their estate in a manner different from that in which it would devolve under the ordinary law of intestate succession. They should therefore, always have the power to make up for the lacunae of that law, to redress its inequalities, and to provide for a fair adjustment among all the persons entitled to entertain just expectations in regard to it.

Hindu law as it originally stood made little or no provision for a person devising his property after his death for religious or charitable purposes or for creating endowments and trusts in perpetuity for the carrying out of such purposes. If any person wants to do these things, he should do so during his lifetime, and is allowed to do them only in respect of property which he had either acquired himself or held as a separated or surviving co-parcener. The result is that though there are valuable endowments in the country, most of them were made by Rajas or Zemindars in ancient times and just a few by private owners during the last century. No doubt charity should begin at home, but obviously it should not end there. The law should so arrange the devolution of property that in the first instance, dependents of the person

who gathered or owned property should have enough to live on; but where he has acquired property much in excess of this, it is wiser in the interests of the community at large, or even in the best interests of heirs and dependents themselves, that the owners should be encouraged to exercise their charitable inclinations, and dispose of whatever surplus is left for the benefit of the community as a whole, or for such deserving objects as appeal to their minds. There is an extremely generous and healthy precedent set in this respect by the United States. Most of its millionaires and multi-millionaires do not spoil their descendants by pampering them with too much wealth. They recognise that they owe a duty to the community which enabled them to become prosperous, and give donations, liberal beyond the dreams of avarice, for public purposes. A person is most inclined to make such bequests when he is about to depart this life; the law should make provision for the free disposition of property by such Wills, with, if necessary, a restriction as under the Muhammadan Law, that an irreducible minimum, say, a fourth or a third, should be left for his heirs. The rule that a donee must be in existence in order that a gift may take effect would necessarily have to be expunged, as it already has been in Madras.

Generally speaking the aim of the older Hindu writers was to devise bars and limitations, and create embargos upon the power even of a full owner to deal with the property as he liked. The law, as Sir Henry Mayne declared in that wonderful generalisation of his, developed from status to contract, from a stage in which all rights are settled and restricted within severe limits by law, to a state of things in which they are rendered elastic and fluid and capable of free manipulation at the option of parties. The restrictions against all alienations including disposals even for benevolent purposes are relics of an antique past. It would be a step in the right direction if such restrictions are removed, and there is freedom allowed to owners to do as they liked with their property.

A wife or daughter-in-law lives in comfort if not in affluence so long as their husbands are alive; but the moment

the latter die, the widows are entitled to maintenance only. Even when cases of maintenance come before the courts, a very exiguous sum is usually thought to be sufficient and decreed in their favour; in the absence of such decrees, the widows may get much or little and usually, one regrets to say, it is very little. Unless the maintenance is made a charge by order of Court or a special provision is made for residence, the kartha may alienate the entire property free of such rights, turning the widows out upon the street. If her husband was permitted by Will to provide rights of residence or maintenance for his wife after his death on a really adequate scale, such rights will not be the playthings they now are and the widow's portion would be secure. Similarly daughters, legitimate or illegitimate, and their children, poor relations who are dependent on the bounty of a wage-earner, and faithful servants and dependents, have no claim on the estate of a deceased, though when he was alive they ministered to him and lived in comfort. If Wills were encouraged, all such injustice can be avoided by the head of the family and adequate provision made for them, the residue going to the heirs.

The suggestion that I have already made elsewhere (Book I) that the wives and daughters of a propositus should not have limited or life estates but absolute and freely disposable property, works in this direction. If the further suggestion that a father too should have absolute right to dispose of his property whether ancestral or self-acquired during his life time as under the Dhaya-bagha system, and that similarly members of a Hindu co-parcenary should be deemed to have an ascertained fraction of the family property which they can dispose of in any manner they liked is adopted, it would follow as a natural corollary that the rest of India would enjoy the same freedom in the matter of Wills that Bengal alone enjoys at the present day. The Hindu Wills Act may be extended to all provinces and the registration of Wills made compulsory.



## CHAPTER V

### Inheritance

The law of intestate succession applicable to Hindus is a most elaborate and complicated mechanism; but fortunately it is confined within strict limits. Self-acquired property is the main kind of estate which could be the subject of inheritance. Ordinarily joint family property is not, unless the whole of it has survived to the last co-parcener or has been partitioned among its members and is enjoyed in severalty.

There are further peculiarities of the law of inheritance, which make it unfair or uneven as between the different members of a family.

Owing to the fact that males alone offer pinda to their deceased ancestors and females could not, the Mitakshara law of succession, commences with an important distinction between the right to inheritance of a male and that of a female. Where a male is in existence, he would exclude the female. If a man has a son or sons, his daughters get nothing and his widow gets nothing. Even though he might have self-acquired or separate property in addition to ancestral property, the son has the first claim. Where a man has brothers, his sisters get nothing. Where he has uncles and aunts, the uncles will get all and the aunts get nothing. The sister is postponed to her own son. Remote Sapindas and Samanodhakas succeed merely by right of their being relatives on the male side, while much nearer bandus are postponed merely because they claim through females. This uneven division of property must have seemed justifiable in the eyes of ancient doctors of law, who firmly believed that the son was the only person who reproduced the father's soul and renewed the family. He was entitled to carry on the family lineage, while the daughters were unimportant because they went over into new families. If when they were made over to new

families they become entitled to property there, something might be said for the arrangement; but women do not get property either in the family of their birth, or in the family in which they are given in marriage, if there happened to be males to succeed to property.

In those rare cases in which there were sons wanting, and the widow and the daughter successively got an estate, none of them had the status or privileges of a full owner. It is only the male that can be a full owner. A female, however near she may be to the propositus to whom inheritance has to be traced, and however closely connected with him by ties of blood, marriage, affection or just expectation, cannot have more than a limited estate. She can enjoy its income, but she cannot alienate it except for the spiritual benefit of her husband or father or to pay his debts, or for her own maintenance if she cannot maintain herself.

Not only does the law make an immense difference between the male and the female, but it makes a similarly big and even more unjust difference between agnates and cognates. Relations through males are always preferred to relations through females, relations on the father's side to relations on the mother's side. According to the original frame of the law, after six descendants on the male side came six ascendants on the male side and their sons and grand-sons, etc. After these ascendants who are known as Sapindas are exhausted, come the Samanodhakas on the male side up to the fourteenth degree. The Bombay High Court has defined Samanodhakas so as to include all agnates, however remote their relationship. Then according to the original law come the cognates or the Binnagothra sapindas usually known as bandhus. Fortunately by a series of recent decisions some bandhus such as sister's son, son's daughter's son, etc., have been declared to be heritable bandhus as well as various persons like son's daughter, daughter's son's son, daughter's daughter, daughter's daughter's son, sister's son's son, sister's daughter's son, and brother's daughter's son. The extent to which such relations through females are allowed to intervene differs in different

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provinces, the largest being in Bombay, the next largest in Madras and the smallest in other provinces governed by the Mitakshara.

I do not know whether if a new law of inheritance was drawn up at the present day, anybody would recommend that inheritance should depend upon a supposed capacity to offer pinda to one's ancestors, the said capacity being beforehand restricted to males, and agnates. The principle followed in Bengal that religious efficacy should be the test appeals more to the modern mind; but even that arrangement does not make any considerable departure from that obtaining under the Mitakshara. The principle of nearness of relationship by blood or marriage, the claims of affection, and the entertainment of just expectations are a more reasonable basis of inheritance. Therefore, the bandhus or relations on the female side ought to have a chance of coming in, not after all the male relations are exhausted, but after the corresponding male relation is exhausted, e.g., after the son, the daughter, after the brother, the sister, after the brother's son, the brother's daughter, after the grand-uncle's son, the grand-uncle's daughter. Or following the analogy already suggested (in Book I) as regards sons and daughters of a propositus, the female should be allowed to take half the share that a male of the same degree of relationship would take. No one would want at this time of day to revert to the view that samanodhaka relationship extends as far as the recollection of birth and name extends.

Adopting in all their formal correctness the existing stratifications of bandhus, the proximate atma bandhus may be allowed to succeed after the paternal uncle's son, nearer pitri bandhus after sapindas of seven degrees and nearer matri bandhus after agnates of the fourteenth degree; bandhus of the nearer line would exclude the more remote line.

Here is another suggestion: 'After the brother's son should succeed, in order, the son's daughter, the sister, the sister's son, the son's daughter's son, the daughter's son's son. After sapindas of the seventh degree, should

come in the daughter's daughter, the brother's daughter, the sister's daughter, and the sister's son's son. After samanodhakas of the fourteenth degree should come in all other bandhus, such as the maternal uncle, paternal aunt, maternal aunt, their sons and grandsons, etc.'

A much simpler arrangement would be to pass permissive legislation enabling a person to make his inheritance devolve under simple rules like those found in the Indian Succession Act XXXIX of 1925 or the Parsee Succession Act XXI of 1865. This would incidentally have the effect of including within the list of heirs, some who are now unjustly excluded, though they are all persons who stand in urgent need of help, viz., idiots and lunatics.

## CHAPTER VI

### Guardianship

The age of majority as now fixed by statute is a compromise arrived at as the result of diverse considerations. Before the Indian Majority Act was passed, a Hindu boy or girl was supposed to have attained majority on the completion of fifteen years in certain provinces, and at the commencement of it in certain others. For purposes of marriage, he or she became a major on the attainment of puberty. This latter principle also obtained in Muhammadan law. In order that violence may not be done to existing usage, the Indian legislature, as a matter of abundant caution, fixed upon the age of eighteen as that terminating minority and the period of guardianship.

At the same time it was realized that this measure was totally inadequate to meet all requirements. In the case of Zemindars, whose estates have been taken under the control of the Court of Wards, twenty-one has been fixed by statute as the age of majority. In cases where controversy has arisen about a particular minor and a guardian has been appointed by Court, the said guardian continues in office till his ward completes twenty-one years of age. For Anglo-Indians and domiciled Europeans, twenty-one is the age of majority for certain purposes. No one who has any experience of the administration of justice in the courts would care to subscribe to any doctrine which holds that an Indian youth has arrived at complete maturity of understanding on the completion of eighteen years of age. On the other hand, the vast majority of boys are either still at school or college at that time of life, or under some form of instruction or apprenticeship in the trade which they intend to follow. They do not and cannot set up any independent business on their own account till long after that date ; the

age when a young man begins to earn is getting postponed every decade. If a boy of eighteen is unable to earn a salary or run a business on his own account, *a fortiori* he is unfit to hold or manage an estate which has been handed down to him as a treasured inheritance by his forefathers. At that age he is likely to have the vaguest possible notions of managing an estate on business lines, and falls a ready victim to the wiles of the Sowcar, the confidential friend, or the designing scoundrel. It is a well-known fact that a handsome fortune built up by the self-sacrifice and labour of a father scarcely ever continues intact in the hands of his son, much less is it added to or developed. The usual tale is that the son wastes the patrimony that he receives from his father in hasty or improper courses, long before he arrives at the age when he can make profitable use of it. It may occasionally happen that the eldest son of a family has been carefully brought up and proves a skilful man of business, but if one of the younger sons, who has been petted and spoiled, turns out to be a prodigal, the entire estate goes to dogs and is dissipated in litigation or worse. The only adequate remedy is to bring the Indian law of majority in line with rules prevalent elsewhere and raise the age to twenty-one.

The question of guardianship is of little importance at ordinary times but assumes tremendous significance in certain contingencies. When a boy or girl has to be given in marriage, the general rule that his natural guardian has the control of his or her person, and is therefore endowed with authority to dispose of him or her, is applied. So long as a large number of persons are married, in accordance with ancient custom, long before they attain even the low age that is now fixed by statute as the age of majority, there must be somebody in the family who is endowed with the power to bestow the son or daughter in marriage. The law has fixed upon the natural guardian of his or her person, as the most suitable or responsible person for this purpose. The rule rarely works a hardship when the father, as natural guardian, arranges for the marriage of his children, as he usually acts in what he supposes to be the best interests of his children. But

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even he is apt to prove autocratic and give way to his whims and fancies, against the tearful protests of the parties most concerned or their mother. He is apt only too often to subordinate the interests of the son or daughter who has to be married to the general interests of his family or to monetary considerations which are really irrelevant to the issue. The evil becomes much greater when instead of the father, an uncle, grand-father or grand-uncle is in management of the family estate, and has power to dictate the kind of marriage that a young man or woman is to have. Against the wishes and sometimes in spite of the protests of the person who marries or of his mother, a minor is disposed of in marriage, and sentenced to life-long misery.

After marriage too, the bride if she is a minor, passes at once under the guardianship of her husband if he happens to have attained majority, or of his father or the family Karta, if he has not. This rule, though perhaps inevitable, has often led to disastrous consequences. There is no one to shield the young child-wife from bad treatment or even cruelty, if either the husband or mother-in-law or father-in-law is inclined to take it out of her. In cases where the bride goes even before puberty to her father-in-law's house, as she does in certain parts of India, she is sometimes exposed to much unwarranted temptation or persecution, with no one to help or sympathise.

The question of guardianship presents itself in an acute form again when husband and wife happen to separate. The husband may desert the wife for unjustifiable reasons or no reason at all, or the wife may feel compelled to live elsewhere because of continued cruelty on the part of her husband. In these cases the wife is usually, if not always, the injured party, but she is also the person punished by being deprived of her children. The father as the natural guardian of his children can not only remove from her custody grown-up children but even an infant at the breast or a daughter who has specially to be retained under the watchful eye of the mother.

The question of guardianship again comes into

prominence before the courts, when the minor has either an independent inheritance of his own or is a member of a co-parcenary with rights which have accrued to him on birth. Here again when the father is alive, he may act prudently as the guardian of his son's heritage. But cases come only too often before the courts in which the father wastes not only his own substance but the share of his son as well, and the latter is driven to institute suits to save what he can out of a dwindled patrimony. Where it is not the father that is the manager of the property, but an uncle or grand-uncle, the minor's interests nearly always go over-board, and the uncle is apt to take advantage of the minor's helplessness and ignorance to benefit himself and his branch of the family.

A clear line of distinction permits of being drawn between the guardianship of the person and the guardianship of the property. The guardianship of the person should always go to the individual who is likely to treat the child with scrupulous care and tenderness, e.g. the father, or failing him the mother. There is no need to keep to the archaic rule that entrusts him to the tender mercies of an uncle or grand-uncle who may have schemes and interests of his own, conflicting with the best interests of the minor.

Different considerations apply where his property is the subject under discussion. It might in practice prove impossible to make inroads into the established law relating to a joint co-parcenary family. The senior member of the family must necessarily be the manager, but he must be held accountable like a guardian appointed under the Guardian and Wards Act. At present his alienation is liable to be called in question only when he is guilty of wasting the property on immoral purposes. The doctrine of pious obligation sounds well on paper, but only too often it enables a father to bind his posterity when there is no real warrant for doing so, and dissipate their inheritance long before they come within sight of it.

The Muhammadan law has a rule that a girl should always be under the guardianship of a mother, and even a



boy should similarly be in her custody, till he is seven years of age. The age of seven was probably fixed as the child was supposed to derive nourishment from his mother up to that age, there being a general belief that a boy or girl who takes nourishment from the mother as long as possible is stronger in constitution than a child who is weaned early. It is surely unthinkable that any one can look after a child and care for its interests as well as its own mother; there ought to be a rule that a child, boy or girl should not be taken away from her custody even by a father or grand-father, under any circumstances till he or she has passed seven years of age. It may occasionally happen that a child under seven is taken care of properly by a stranger, but if so it will be an exceptional case; during that period the mother's affection and watchful eye are all important and the legislature will be safe in following the natural law by which the mother is constituted a sort of Providence for the child of tender years.

As regards the question of marriage, the rule that the father alone has a right to dispose both of his son and his daughter in marriage and that the mother has no voice in it is apt to give rise to conflicts and mistakes. In the women's conferences that are being held all over India, the new woman is asserting her title to equal rights along with her husband in the question of guardianship for purposes of marriage. Though after the completion of the seventh year the father may be deemed to be the natural protector and therefore the guardian of his children, still marriage is such an important event in the life of the boy or girl, that as regards that particular event, there ought to be a provision that the mother should have an equal voice with the father in the disposal of the minor and is entitled to be consulted. It is not unlikely that conflicts will arise, but if they do arise the fact that the mother's consent has to be procured as well as the father's would tend to make those arranging the marriage proceed more cautiously, so as to satisfy all parties.

In the case of the daughter, there ought to be an inflexible rule, that whether she is under or over seven,

she should be under the care and protection of the mother, unless indeed the latter is proved to live an evil life. Till the girl's marriage the mother should be declared to be the natural guardian of the daughter, and only when she is wanting in either character or discretion, the general rule laid down in Section 17 of the Guardian and Wards Act should be allowed to come into play.

## CHAPTER VII

### Adoption

The Hindu law of adoption is a relic of archaic times. The ancient Romans had a system something like it, but no modern nation has found it necessary to have a branch of law dealing with adoption. The Rishis of the Vedic age, however, were so anxious that there should be male progeny to do honour to departed spirits, and perform the ceremonies which were meant to repay the debt due to one's ancestors, that they cast their net wide so as to catch all kinds of sons. Out of the twelve classes of sons who according to the old Shastras could offer Pinda and perform funeral ceremonies, more than half would at the present day not be looked upon as sons at all; some of them would not even be illegitimate children according to modern conceptions. At present only three out of the twelve classes are recognized, the Aurasa son, i.e. the ordinary legitimate son born of wedlock, the Dattaka son or son given in adoption, and the Krithrima son who was originally bought but now a son given in adoption, but not subject to the ordinary rules of adoption. The ancient practice of adopting females who were likely to beget sons has died out altogether except among dancing girls. The Krithrima form is now prevalent in the Mithila region alone. The Dattaka is still prevalent widely in certain areas and more rarely resorted to in others such as Bengal and Bombay, but still an item to be reckoned with.

It cannot be emphasised too much that the law relating to adoption grew up on account of the archaic notion that women were incapable of managing property or of holding wealth which can be used in the performance of ceremonies. There may be orthodox people who still cling to this pious opinion, but the vast majority of enlightened people would be willing to concede that if a certain

number of women are incapable of looking after property, probably there are an equal number of men similarly inept. The distractions and temptations to which a young man is exposed are much more serious than those likely to confront a woman. In any event, women are usually much more careful with money and are not likely to speculate or gamble wildly with it. The arrangement by which a grown-up woman, who under existing rules very rarely gets even the limited estate which belongs to a Hindu widow, is at once divested of it, in the interests of a small boy, who will almost certainly waste it when he grows up, as he has not put himself to the trouble of earning it, is undoubtedly one that calls for revision in the light of present-day experience.

The widow's power of adoption stands on a different footing in different provinces. Though all sections proceed on the ancient text 'Nor let a woman give or accept a son unless with the consent of her lord,' there are four different schools which interpret this rule in four different ways. In Mithila a widow cannot adopt at all, even if she has express authority from her husband. In Bengal and Benares, a widow can adopt if she received express authority when he was alive. In Madras a widow can adopt even without express authority from her husband, provided he was divided at the time of his death and she obtains the consent of the Sapindas, or if the husband was joint, the consent of his undivided coparceners. In Bombay the law is as above, but if the husband was divided at the time of his death, she may adopt on her own account without the consent of any person. The power of adoption is bounded by innumerable rules which give rise to more litigation than happiness. There are minute regulations as to who may adopt, who may give authority to adopt, who may give in adoption, who may be taken in adoption, and what ceremonies should be performed. When a husband adopts during his own lifetime or authorises a wife to adopt a particular child when he is alive, there is usually little room for controversy. But in other cases there is plenty of opportunity for dispute, litigation and heartburning. Elsewhere I have

ventured to suggest that where a man has no sons of his own born of lawful marriage, a widow should inherit a portion of his property. If he has no daughters, the remaining property would go at once to reversioners who of course are just as much capable of offering pinda to the deceased out of the property that they obtain from him. Where there are daughters, it is proposed to give them shares (Vide Book I, Chapter XIII) and their issue would be able to perform the funeral obligations. The result would be that the only case in which a widow would feel inclined to make an adoption would be where she has no lineal descendants at all and her share of the property is likely to go to the collateral relations of her husband. Even in such a case the adopted son should not at once divest her but should be made to wait till she departs this life. The main motive of adoption, which appears to be to deprive the women of their property on the ground of their presumed incapacity, would thus be held in check. Proposals made elsewhere to extend the privilege of making Wills would also work in the same direction, especially when taken in connexion with the suggested enlargement of the scope of self-acquired property and the abolition of the principle of survivorship. The practice prevalent in certain areas of treating the son-in-law as an adopted son, and letting him offer pinda while inheriting the property is more in consonance with modern ideas and requirements. Any changes proposed in these directions, even if they were drastic ones, would probably be welcomed, as they are scarcely likely to disturb the economy of family life. A timelimit should be imposed within which a widow should make adoptions for the benefit of her husband's soul, and she should not be asked to depend upon the permission of sapindas.

## CHAPTER VIII

### Benami Transactions

The law relating to benami transactions is a superfluous chapter in Hindu Law. It is a fertile source of litigation, and opens the door wide to fraud, false evidence and the creation of insecure or doubtful titles. These evils can be avoided by washing out this branch of law altogether, and relying in its place on the rules relating to trusts, which fulfil all or nearly all the legitimate or useful purposes now served by the law relating to benami transactions.

The word *benami* is of Persian origin, the syllable *be* meaning without and *nam* name. It applies to a transaction which a person goes through, without putting his own name to it, but making use of the name of another instead. An individual may spend his own funds in the purchase of a house or land but take out a title deed for it in the name of his son, wife, or other relation. He may similarly lend money in another man's name or take a lease in the name of that other. The practice is equally common among Hindus as well as among Muhammadans. It is said to owe its existence to superstition. Some persons and some names are considered lucky, while others come to be regarded as unlucky, and property is supposed to carry with it good fortune if purchased in the names of lucky persons. At the present day, it is resorted to mainly when a purchaser desires to act on the sly and conceal his affairs from public observation; for instance when he has acquired money by bribery, fraud or other improper means, and wants to purchase property with it, but knows that he cannot do it in his own name as that would at once betray him. Many benami transactions are put through with a fraudulent intent, for the purpose of delaying or defeating creditors, who are told when they proceed to execute decrees, that the property sought to

be attached belongs to the benami owner and cannot be seized as the estate of their debtors ; sometimes the object is to prevent the property from being seized in insolvency. When a person has a flourishing business and is making large profits, he invests a portion of the proceeds in the name of some one else with a view to avoid envy and greed, and when later he loses in speculation, he has a nice nest of eggs laid away in a quiet corner, on which he could rely for a livelihood but which is shielded from seizure by his creditors or the Official Assignee. He is supposed to be a clever man who eludes the Insolvency Court by thus concealing his property in a skilful manner, and is deemed to be a very eligible son-in-law in certain castes if he has been through the Insolvency Court more than once, as it is held to be certain, that with each bankruptcy, he has put away more property.

The benamidar or person in whose name the property is purchased is usually an individual in whom the purchaser has absolute confidence, say a son, wife or mistress. Where, however, the object is fraudulent, it is sometimes considered safer to invest the property in the name of a person more distantly related or of a friend on whom no suspicion will alight, so that no clue may be available as to the real ownership of the property. Such benami owners sometimes out-Herod Herod by taking advantage of the fact that the property stands in their name. They sell the property and pocket the proceeds, or mortgage the property and make money out of it ; in either case, there may be no means of bringing them to book. If a suit is instituted for the recovery of the property, they are apt to deny that they are merely benami owners, and put forward the story that they are the real proprietors. The fact that they are the persons in whose favour the title deed stands gives them an overwhelming advantage, as the burden of proof is thrown on the other side, namely the person claiming to be the real owner to show that it was he that purchased the property. He usually produces evidence that he advanced the funds or that he is really enjoying the property though the title stands in the name of another or that he is paying the taxes and

receiving the rents and profits or that the title deeds are in his possession or concurrently lets in evidence of all these kinds.

In ninety cases out of hundred a benami transaction is a fraudulent affair, and it does not seem reasonable or just that such an unconscionable coup should be recognized and enforced as an essential part of the law. It is usually meant to prevent creditors from taking their lawful execution against the property of their debtors. Incidentally it defrauds Government of a certain amount of revenue, as otherwise the person who purchases would have to purchase in his own name and then transfer it by way of trust to another. It comes into conflict with several presumptions and rules of the Law of Evidence, and nullifies the beneficent equitable provisions taken over by us from the English courts of Chancery. A still greater objection is the circumstance that, on one side or another, it leads to an enormous amount of false evidence being adduced. It is usually easy enough to see through this false evidence, because the courts look at the substance of the transaction and not at the form, and ascertain who the individual is that really found the funds and is enjoying the property, irrespective of the person or persons in whom the title may stand. The system leads to temptations both ways. There is a great temptation to treat cases of real ownership as benami; there is an even greater temptation to dispute cases of benami ownership by setting up a real title in the name of the benamidar. The fact that the onus rests upon the person who sets up the theory of benami no doubt helps in the adjustment of these disputes, but it is apt sometimes to prove a broken reed.

When a person wants really to benefit another, it is usual for him to purchase the property with his own money in the name of that other. It is a common arrangement in England for a father to purchase property in the name of his son. The legal presumption in such cases is that the property is an investment for the advancement of the son and it is only the latter that can dispose of it. The Law of Trusts provides a safe remedy



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for such cases and the reliefs available under that Law are much more adequate than any that are available under the ordinary law relating to benami. The Law of Trusts recognizes not merely express trusts but implied, constructive, resultant and precatory trusts. In various cases in which though no express trust was intended, the law will draw an inference that one person holds money or property for the benefit of another. In all cases in which a person really wants to benefit another or ought to do so, the intention is carried out by the courts under the beneficent provisions of the Law of Trusts. On the other hand, when he wants to put away property in the name of another, he himself continuing to be the beneficiary, this again can easily be arranged under the Law of Trusts. There is no reason therefore, why the law relating to benami should be retained, when a much more efficient and reliable branch of the law is available to meet all real cases of necessity.

## CHAPTER IX

### Sowcar Transactions

This is pre-eminently a heyday for sowcars. Any person who is acquainted with the actual life of the Courts would readily confess that the modern system of administration has brought into existence, and kept in an exceedingly flourishing condition, a great number of moneylenders, who thrive like disease-microbes upon the sufferings and privations of needy and helpless persons. Muhammadan Law prohibited usury. A person who lent out money to a neighbour could recover his principal, but in no case could he claim interest. The old Jewish law was the same. Under the original Hindu Law interest was allowed, but the rule of *Dandapat* restricted it within severe limits : in no case was interest allowed to exceed the principal. The rule is still applied in the case of mortgages in Bombay, but otherwise it is not now enforced by the courts.

It is no doubt true that capital should be easily available for investment in business, at low rates of interest, as otherwise commercial enterprise is likely to be starved. Persons who have brains for business and initiative are not always furnished with the cash or credit necessary for embarking on profitable enterprises ; those who have the means would scarcely like to venture the whole of their property on some enterprise, which might have its ups and downs and might not end in profit. Especially the building up of large business requires, as a first condition, a free market for capital, which can be borrowed at any time at reasonable rates of interest ; such needs however, are usually met by the numerous banks scattered throughout the country. The co-operative system which has now been taken up all over India has been of some assistance to the small investor, who wants to start enterprise on a limited scale with borrowed

capital. It is a debatable question, how far, apart from big public banks and Government lending concerns, latitude should be given to private bankers like sowcars. Where they carry on a legitimate business, little exception can be taken to their activities. But the average sowcar is a person who has grown expert in the art of inveigling innocent men who are in urgent need of money and profiting by their need, ignorance and helplessness. The Usurious Loans Act of 1928 has no doubt greatly curtailed the scope and range of their exactions. Courts can now reduce exorbitant rates of interest, and are entitled to open transactions which have been closed, for the purpose of finding out the actual sum or sums which were originally lent by a sowcar or money-lender. But it is still true that there is an enormous amount of avoidable indebtedness in the country. Nearly everybody needs money at some time or other. The costly ceremonies which are part of the social life of Hindus and Muhammadans require expenditure on a scale which cannot be met out of the earnings of a salaried official or the income of a land owner. Persons in need usually go to a sowcar to get their wants supplied, and mortgage and in some instances transfer their property absolutely with a view to obtain control of ready cash. The young man just come into property or the expectant heir who craves for cash, is tempted to pledge his property in anticipation. It often happens that money-lending brokers intervene, and bring such men into contact with sowcars, who are only too anxious to lend small sums and take promissory notes or bonds for much larger amounts. Less rarely money is lent out for business purposes, the building of a house, or the starting of a business, or the purchase of property which is expected to yield an income sufficient to pay interest on the money borrowed. In England and western countries generally, money is usually available for profitable enterprises at a low rate of interest. Before the War, money could be had at three per cent interest or even less; even now it should be quite easy to borrow at five or six per cent. The same class of borrower resorts in India to the professional money-lender and agrees to pay anything from

12 to 75 per cent by way of interest. Where the transaction is likely to go before a Court of Law, the percentage is camouflaged in some way or other. If Rs 100 is lent at 48 per cent, the sowcar takes a promissory note for Rs 400 and puts down the interest at 12 per cent and privately agrees to take a hundred rupees and his interest at 48 per cent. In other cases he promises to lend Rs 100 but deducts interest for the next year or two and actually lends Rs 100 *minus* Rs 24 or Rs 100 *minus* Rs 48, but when he sues, he sues to recover Rs 100 with interest at the stipulated percentage, so that he obtains interest twice over, one set when he actually lends the money by deducting from the capital, and another set when he recovers the decree amount. There are other similar methods of manipulating these bonds. When money is lent not merely on personal security but on the security of houses, the sowcar has still more effective means of collecting interest. The usual practice at the present day is for the borrower to mortgage his house with possession to the sowcar, and execute a rental agreement in his favour undertaking to pay rent regularly, in lieu of interest for his own house, and in the event of his making default of payment of rent, to quit and deliver up possession of the house. The mortgage may carry interest at anything from 12 to 48 per cent. The sowcar can always collect this interest by threatening to evict the tenant, who usually makes default in the payment of the monthly rent, believing that he is living in his own house.

There ought to be some means of restricting the rate of interest, and also limiting the remedies available to a money-lender for the collection of his dues. It will be said that if further restrictions are imposed in addition to those already laid down under the Usurious Loans Act 1928, it will be an interference with the freedom of contract and checking the free flow of capital. But such freedom can be allowed only in cases where both parties are equal in intelligence, business capacity and honesty, and are able to deal with each other at arms length. To allow freedom of contract between a

money-lender on the one hand, who does no other business from day to day, spends his whole time in working out schemes to capture the property of greenhorns, and makes use of his acquired skill in availing himself of the remedies placed at his disposal by the law to extract the last pound of flesh from his debtors, and on the other hand, young and in experienced or needy persons, usually not conversant with business and not too well able to take care of themselves, who are unacquainted with the snares laid for them and the risks to which they expose themselves, results in nothing but handing them over to their persecutors.

In the first place, in all transactions with moneylenders, I do not see why a strict limit should not be put upon the amount of interest that could be recovered. Where the transaction is for the return of money in a short period, say within three months, the interest allowed may be as much as twenty-four per cent. If the same transaction continues after the stipulated period of three months is over, the lender should not be allowed to recover more than twelve per cent. Where originally the parties contract to borrow money which is intended to be returned after the lapse of three months, the interest in no case should exceed twelve per cent. This rule gives an ample margin of profit to money-lenders, much in excess of the market rate prevalent in other countries. The rule of *Dandupat* itself may usefully be restored, so as to put it out of the power of a sowcar to recover more than twice his principal.

The second simple rule should be to insist that whenever bonds are registered by which people pledge their property to moneylenders for monies borrowed, the whole of the money mentioned in the mortgage should be deposited by the lender in the Registrar's office and taken out therefrom at his convenience by the borrower. The law as it stands at present enables a mortgagee to obtain a bond in his favour without paying a pie. He often advances money for the execution of the bond, the purchase of stamp and registration and other expenses, and perhaps a small sum in cash and promises to pay the:

balance after the bond is delivered into his possession. Then he takes advantage of the fact that the bond is already in his possession to give as much or as little as he likes and make his own terms about it. Even in cases where, to create an impression of honest dealing, he carries money to the Registration office, he takes the precaution of appearing to pay money to the mortgagor, but before he leaves the office he takes back the major portion of it and gives only a small portion to the borrower. If the money was deposited in the office and made recoverable by the mortgagor at his convenience, this could not happen. It would also become unnecessary for courts to take elaborate evidence as to how much of the consideration for a given bond was actually paid on or before the date of its execution. In a great number of cases, the defendant adduces evidence that though he executed a bond for a thousand rupees he only received Rs 200 or Rs 300 and the balance was never paid to him; if the course above mentioned is adopted, this sort of defence would become impossible.

A heavy initial deposit may also be insisted upon from any person who sets up to practise the profession of a money-lender. A stranger comes into a city with no property at all except the clothes that he wears on his person, borrows a rupee or two from a fellow sowcar and forthwith starts money-lending business by lending out these two rupees to some needy servant or cooly at twenty-four or forty-eight per cent, and taking his clothes or jewels as security. The poor man is usually unable to pay the debt; the moneylender sells the clothes or jewels deposited with him as security, and realises money many times larger than the cash originally lent by him. There are only too many instances in which the sowcar who started only with a mere piece of clothing on his loins, becomes a rich man in five or ten years, able to have his own office and gumastahs, perhaps his own carriage or car and house in addition. Fleecing of the most unmerciful description of persons who are not in the least able to protect themselves goes on openly, and there is no visible check upon the persecution, no help to the weak as against the strong.

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If deposit of some security was insisted on, there is at least some certainty that the profession is followed by men with a certain amount of means at their disposal. It is likely that if such security was imposed by law, the sowcar would transform himself into a merchant and carry on his money-lending business as an incidental part of his business, as in many cases he does at present. Where such moneylending is added to the ordinary business of buying and selling without the necessary deposit being made, a heavy penalty should be imposed with a view to discontinue the practice.

The sowcar or marwadi obtains an unconscionable advantage by maintaining books which have become a by-word for falsehood and unfair dealing. They use account books of a peculiar make into which pages can be inserted or from which they can be taken out at any time. There is no continuous writing from the top to the bottom of a page or pages; entries can always be inserted in blank spaces which are left almost on each page. Two sets of books are maintained, one for the special benefit of the income-tax officer and another for the Courts. In some instances a third set of books is said to be maintained which are entered up between twelve and two in the morning and which are really for the benefit of the sowcar and his partners, if any, in order to ascertain the actual profits made from the business. There should be a rule by which the courts can refuse to look at books unless they are maintained in the prescribed form of accounts, kept in the regular course of business and entered from day to day without blank spaces.

Moneylending of the kind above described deserves to be treated on the same footing as drinking, racing and gambling and other like evils which have come in with civilisation and are eating into the vitals of the country.

## Conclusion

A railway engine of exceptionally large size, fitted with the latest improvements, was imported for use by one of the big railway companies in India. When it arrived, it drew large crowds and was the cynosure of all eyes. It seemed to be well worth the money that was paid for it, as it pulled easily more than double the load usually moved by engines in India. After a few weeks, however, of usefulness and spectacular performance, the engine suddenly came to a standstill one fine morning. Nothing that any driver or mechanic or engineer could do seemed to be of the slightest avail to make it go. The owners passed from delight to despair, as nothing could be done with it. Then a great expert was sent for, the engineer with the biggest brains all over India. He examined every nook and corner but he too could make nothing of it for sometime. Eventually, however, he found out what was wrong and asked for a large fee to put it right. The railway company had no alternative but to pay, as otherwise the most valuable of their engines was likely to become deadstock. When the fee was paid, however, he scarcely took five minutes over his job, as all that he had to do was to loosen a nut which had been screwed on a little too tight.

India is anxious to provide herself with the latest in the way of constitutions, and is professing herself disenchanted with the one which is now in working order. But no constitution, however ingenious or cleverly contrived, could work smoothly or make for progress, if there are permanent features in Indian social arrangements which make for tyranny or oppression or injustice. Even if the British constitution or the American constitution or one better than either of these, was accepted, it is sure to prove a failure or a hindrance rather than a help, if the people of India do not take stock of the evils which contaminate society, and take prompt and decisive action to have them removed. Was



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it not John Stuart Mill who said that in the long run every nation gets the sort of government it deserves? Liberty-loving folk, who will not allow injustice to be perpetrated with impunity within their borders, will not put up for long with a tyrannous type of rule, however cleverly it might be disguised by a Mussolini or a Napoleon. On the other hand, people who tolerate injustice and oppression, or themselves exercise it over large sections of their fellow creatures, will corrupt the best form of government, and make it an engine of oppression, bribery and misrule. If the British enjoy a form of government which allows the maximum amount of liberty and fairplay to individuals, it is because through every century of their history, and especially during the last, they have set themselves to remove the oppressive features in their social structure, whether it affected capital or labour, children, women or the poor. If Japan, again, has made the most remarkable progress of any nation in the East or West during the last half century, it is because, the privileged classes, the Samurai, and the Emperor himself have voluntarily given up privileges which wrought injustice on others, with the single-minded aim of benefitting the country as a whole. People in these countries did not wait for the entire country to move. Even when the nation as a whole was unripe for reform or violently opposed to it, a Shaftesbury was able to get laws abrogated which worked oppressively on women and children: a John Howard succeeded in effecting improvements in prison life not only in his own country but in other lands as well, and a Wilberforce spent his life-time in winning freedom for slaves, when even organized religion held slavery justifiable as an institution, because it had the sanction of ages and the approval of great teachers behind it. We could not very well ask Englishmen to remove from the statute book every piece of oppressive legislation that is passed in any part of the British Empire, when within our own borders we tolerate with complacency forms of social tyranny on our own people, which are much more unjust than anything which any

foreigner ever did or devised for us. We could not, with a good face or any semblance of justice, ask the ruling race to cancel every piece of class legislation or ordinance existing for their benefit, when as a matter of fact, the very class which wants power put into its hands is employing the power that it already possesses and is likely to use further instalments of power that it may obtain for tightening the screw on others. They might well say with that great master of irony: first remove the beam that is in thine own eyes, then attempt to see the mote that is in other people's eyes. It is impossible to work a twentieth century constitution, when our social system is one that was devised in a remote age, and our women enjoy far less liberty or culture to-day than they did in the time of the Vedic Rishis. Our women are so used to the existing state of affairs, that they cannot for decades have the imagination or the hardihood necessary to face their men with a suffragette movement for the removal of their wrongs. It is up to the men, who after, all are the persons responsible for the present low estate in which women are held, to take up their cause and have their wrongs redressed: as otherwise the very chains with which they bind the weaker sex will be found clogging their progress as well. Likewise the group of problems connected with caste, untouchability and illiteracy, the beggar problem and the question of emigration and unemployment will not get solved by themselves, when the best brains of the country wilfully turn away their attention to other less fruitful directions and spend their energy in rivetting the chains already in existence. The whole world is looking at India to see whether its educated men, who have inherited the most ancient culture in the world, and want equal treatment with the best men of the most progressive nations, will have the vision to see the evils that lie before their eyes and will throb with sympathy and a sense of patriotic ardour, till the wrongs of their women, their untouchables, their oppressed classes and their aborigines are righted.

There are three things needed at the present moment—

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a progressive philosophy, a practicable programme, and a league of active workers to carry out the programme according to schedule.

Our philosophy is one of which we might well be proud, as it reached sublime heights which are even now the envy of cultured people: but its fondest and most devoted followers will not claim for it, that it has made for liberty or progress in the past, or for fruitfulness in fields material or moral. We have six systems of philosophy, and many ramifications branching out of each of them, besides eclectic theories which combine one or more of them with more or less consistency, but we still need a view of life which is free from the fatalistic tinge that colours them all, and makes men indifferent to the pulsing, palpitating world around them. In their anxiety to build up the individual soul, our Rishis have only too often been forgetful of the similar and equally valuable souls of others, which are parts of the great Divine Whole. In their concentration of all attention upon the inward self they have done their best to ignore, to belittle, and to weaken the body, the mind, the heart and the character which are equally parts of man as we know him; while those who have made a larger and more generous synthesis and have worked for a fuller or more many-sided development of man in all his multifarious aspects, and the building up of the material side by side with the spiritual world have outstripped us, leaving us panting behind, centuries in the rear. Philosophy runs in our blood and is woven into the texture of our being. Fortunately there are many thoughtful men among us to-day who are re-thinking for us the eternal questions that have always vexed the human mind. Would that there were some minds at least which can resist the tendency to return to or glorify the antique systems, or worse still to read, not over honestly, modern ideas into the ancient schemes of thought, minds which will reach out beyond the established Himalayan barriers, into the regions beyond, cultivating systems of thought that make for mastery over nature, for progress in life and the arts, for victorious struggle with the forces

that tend to humble us, for the evolution of the individual in all his aspects upward and onward.

Every leader of thought and action in this country, one had almost said every student in India, is interested in politics and has plenty of ideas and speeches to make as to what the government has done, or failed to do, might or ought to have done. But after all any government, however well it may spread its control, can touch only the fringes of life. There will always be large areas which make for human happiness or betterment or progress, which it cannot touch and in India dare not interfere with. We want a programme drawn up of the various lines along which our nation has to advance, if it is to hold its own with other modern nations or outstrip them in the race. In addition to a political programme (Home Rule, Dominion Government or Swaraj) we want social and communal programmes, industrial and commercial programmes, a schedule of work for the arts and sciences, plans and schemes for the land, the sea and the air. The social programme must first start with a clear idea as to what can be achieved or is intended to be achieved in the current generation, and the ways and means by which the said goal could be attained. We want in the first instance the removal of the clogs and the broken wheels in the existing machinery, the rectification though all too late of the age-long injustices and oppressions from which great parts of the nation have suffered. In this book a modest attempt has been made towards the formulation of some of the lines along which determined reformers can set to work. If they can soften, if not altogether remove some of these well known evils, they would have done more for their country than if they made the most eloquent of speeches from political platforms or won the applause of listening multitudes in the Councils. It cannot be said that they will be moving along the path of least resistance, as our political orators are apt and love to do. They would surely be opposed by vested interests, and established conventions, by priests, privileged classes and grandmothers: they would have to give up rather than gain wealth, serve rather than

rule or order people about, sacrifice and suffer more than they are ever likely to acquire: but the way of life and of progress has always been to give, to serve, to suffer and to sacrifice: and to the extent to which an individual does these, himself and his fellow men gain in the end and are likely to achieve things of permanent value. In the view of the present writer the largest injustice in our social system is that which is done to our women. Fortunately we have always had good and great women to whom their husbands and fathers have given a real chance in life. But what a tremendous difference it would make to our country, if all our women enjoyed equal privileges along with men as regards inheritance and succession, education and social privilege, and the multifarious opportunities of life. India is already the priceless gem of the East, when 70 per cent of its men are reckoned as untouchables, and denied the elementary rights and privileges that every man born free is entitled to. How much more glorious its destiny may be, how grandly it can hold up its head when drawn up in line with people of other races and nations, if all were given an equal chance? If we look deeply enough into the question, the root of most of the trouble is the antiquated law with which we are satisfied for the ordering of our private lives, while we crave for the most modern of constitutions where public or political life is concerned. This is a branch of the subject which was first intended to be omitted altogether, as the country can scarcely be said to be ripe for any radical reform of Hindu Law and as Hindu lawyers and judges are the people most apt to be opposed to all change. If the scheme outlined here is modest and extremely limited in its scope, it is because a scheme had to be put forward which was likely to be accepted as being within the region of practical politics and not discounted as the idle dream of a visionary.

But the most sublime of progressive philosophies and the most carefully drawn up of practical programmes would be of little use, unless there is a band of selfless men pledged to draw inspiration from the one and to work out the details of the other in practical action,

regardless of the cost to themselves in name or fame or wealth or power. There are plenty of men working to-day in the political area, because they come unto the limelight and are likely to help themselves to a career or position in life when they are working ostensibly in the public interest. But the only men who have really shaped the fortunes of their country are those who regardless of the oppression, suffering and personal loss they had to face, committed themselves to their country's cause and made it their own. We cannot make Gokhales and Gandhis to order everyday, but we can always sit at their feet and catch their spirit. It may not be possible for us to inherit their endowment of intellect, but we have hearts like theirs and surely it is open to any one of us to feel in the same way on behalf of the oppressed races and communities living within our borders, and make their cause ours, if need be at the expense of our personal profit or pleasure. We want people who will wear the badge of reform in their homes and private life as well as on public platforms, and work unflinchingly, under the banner they have set for themselves, while making arrangements for their private property, their marriages and funerals, the education of their children, and the appointments they make for their women and relations, as well as while making eloquent speeches before applauding audiences. We want the spirit and the energy, the force of character and wealth of resource, which went to the acceptance of prohibition as an article of the United States constitution, to the abolition of slavery throughout the British Empire, the establishment of free trade or the reform of religion in Europe. Vidyasagar and Pandita Ramabai made the cause of the widow their own; the founders of the Brahma Samaj, Arya Samaj and Prarthana Samaj worked for the purification of religion and return to Vedic simplicity; Buddha and Mahavira, Kabir and Ramanuja laboured for the delivery of the oppressed classes from the heavy yoke laid on them by their religious leaders; Asoka and Akbar wrought resolutely for the redemption of the poor from their poverty and the distribution of

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equal justice to all. Limited perhaps in its material resources and poor in the things of this world, India has always been rich in great minds and noble hearts. To-day we look round and see many men of brains and power who might do great things for their country, if they only resolutely set their faces towards the redemption and betterment of their race. Would that they could forget their immediate advantage and disregard the reproach or opposition that would surely be theirs for the time being in order that they may do India what the Japanese have done for Japan, or for Englishmen and Americans for their respective countries.

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