

## CHECKS TO TYRANNY IN HINDU POLITICAL THOUGHT

AN attempt will be made here to enumerate and describe the different forms of checks to tyranny, which the writers on ancient Indian politics assumed as essential adjuncts in their systems of political thought. We shall mainly concentrate our attention to the doctrines of checks and resistance ; but, shall, where possible, refer to actual facts. Moreover, when enumerating these checks, it need not be taken for granted, as a matter of course, that they had an existence in the objective world(a). In short, our main concern is with the subjective aspect.

There is an idea abroad, especially among the Europeans and the Americans, that the most important category of political thought among the ancient

(a) Dr. Pramathanath Banerjee's *Public Administration in Ancient India*—a very good account of the systems of public administration visualised by diverse writers on politics—is vitiated by the author's failure to keep this distinction in view. Referring to "some of the shortcomings which characterize a great deal of these magazine articles and books" Prof. Benoy Kumar Sarkar remarks—"the distinction between the institution of *Realpolitik* and the "pious wishes" or ideals of theorizers has virtually been neglected or ignored." See p. 7 of his *Positive Background of Hindu Sociology* Bk. II, Part I. Prof. Jadunath Sarkar neglects the "subjective" aspect entirely. See his *Studies in Mughal India* pp. 304-10.

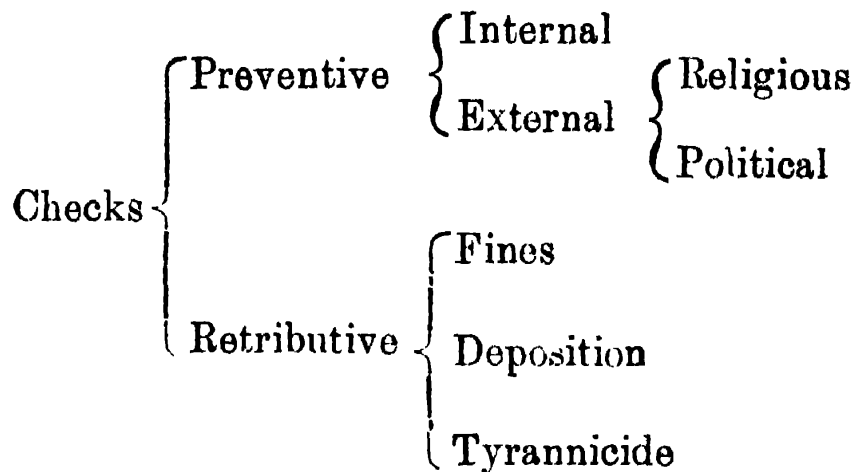
Hindus is an unfettered kingship, an undisguised tyranny. The truth is exactly the reverse. If unfettered kingship had been one of the postulates of political thought amongst the writers on Hindu politics, surely the doctrine of passive obedience<sup>(a)</sup> would have loomed large in the pages of the *Dharmasastras* and the *Arthasastras* of old. The doctrine of passive obedience implies, not only that the subjects are to implicitly obey their king, but that they must not think of resisting an impious and oppressive ruler. In fact, this doctrine, in its most obnoxious and extreme form, is scarcely to be met with in the political literature of ancient India<sup>(b)</sup>.

The checks, which are contemplated by ancient Hindu writers, and examples of which are to be found scattered in the various *Dharmasastras*, *Arthasastras*, *Puranas*, *Nitisastras* and epics, may be broadly classified under two heads, *viz.*, preventive and retributive. Preventive checks may be defined as checks which by their very nature tend to prevent a king from degenerating into a tyrant. By retributive checks kings are punished for wrongs committed by them : there is an element of retribution in the latter kind of checks. These checks are, on a final analysis, sufficiently preventive in their nature. By their examples, future incumbents in the office of kingship were prevented from perpetrating wrongs. Preventive checks

(a) - But see *Narada*, S. B. E. XVIII, 21.

(b) "As a husband, though feeble, must be constantly worshipped by his wives, in the same way, a ruler, though worthless, must be (constantly) worshipped by his subjects." S. B. E. XVIII, 22, *Narada*.

may be subdivided into internal preventive checks and external preventive checks. These external preventive checks may again be classified under two heads, *viz.*, religious and political. Retributive checks are of three kinds, *viz.*, fines, deposition and tyrannicide. Here is the classification :—



“ During the period of studentship, the prince has to live the austere life of a Brahmachari, observing celibacy and undergoing the hardships involved in the study of the different subjects(*a*)”. Kautilya(*b*) lays great stress on the restraint of the organs of sense on the part of a king by abandoning lust, anger, greed, vanity, haughtiness and overjoy. Sukracharjya considers, that ‘discipline is the chief thing to the king(*c*),’ and that ‘the king should first provide discipline to himself, then to the sons, then to ministers, then to servants, then to the subjects(*d*)’. In fact, the ancient

(*a*) *Aspects of Ancient Indian Polity*, Narendranath Law, p. 72, see ch. V.

(*b*) I, 5-6.

(*c*) *Sukraniti*, (B. K. Sarkar) I, 181-2.

(*d*) *Ibid*, 183-5.

Hindu writers on politics cannot conceive of a king who has not got this moral training. Manu is of opinion, that the king should possess knowledge of his own self. For our purposes, the importance of this moral discipline as a most effective check to tyranny is patent ; since a king who has conquered his senses is not likely to degenerate into a tyrant. A check which acts from within, is more effective than one which acts from outside ; and it is from this point of view, perhaps, that the ancient Hindus preferred the internal preventive checks to the legal and constitutional checks, so dear to the heart of a moderner. A king who has abandoned greed, is not likely to make illegal exactions and thereby become a tyrant, and need not die like 'Aila in his attempt under the influence of greed to make exactions from Brahmins, as well as Ajabindu the Sauvira (in a similar attempt)(a). To a student of politics in the 20th century familiar with all the apparatuses of democratic government, the importance, which the Hindus attached to moral discipline on the part of a king, may seem queer and well-nigh grotesque; but in ancient India when democratic government on a big scale was unknown ; when the king, both of the rajadharma and the arthasastra school, was the mainspring of the whole mechanism ; and kingship was looked upon as a sacred trust ; the importance of this moral discipline(b) to the body politic cannot be overestimated. "Yet I am inclined to believe that such

(a) *Arthasastra*, I, 6. Cupidity of Rajarshi Aila is also mentioned in *Sukraniti*, I, 287-90.

(b) Hence the Hindu ideal of kingship was a Rajarshi one for the rajadharma school.

religious and moral restraints, as self-denial, conquest of the six passions, preparation for Moksha or Nirvana by renunciation, frequently preached to the prince and poor alike, were scarcely less powerful than the constitutional and legal checks of western nations of modern times. How far the modern constitutional checks, based more on utilitarian than ethical principles, are preferable to religious or philosophical restraints, which are applicable to all, is a question yet to be decided(a)".

The second class of preventive checks which were religious in their nature was effective in as much as they took advantage of the religious beliefs and prejudices of the age. But it must be remembered, that it was the Dharmasastras, more than the Arthasastras, that utilised this class of checks,—obviously for the reason, that the standpoint of the Arthasastras was secular. Manu says, "A king who (duly) protects (his subjects) receives from each and all the sixth part of their spiritual merit; if he does not protect them, the sixth part of their demerit also (will fall on him)(b)" ; and again, "A king who does not afford protection, (yet) takes his share in kind \* \* \* \* will (after death) soon sink into hell(c)." In the Agni Purana also, we find that an oppressive king lives in hell for all time to come. Sukra ordains hell(d) or the condition of lower animals(e) for *tamasa* kings. Kautilya,

(a) Shamasastri, *Evolution of Indian Polity*, .preface, xiv.

(b) *Manu*, VIII, 304, S. B. E.

(c) *Manu*, VIII, 307.

(d) *Sukraniti*, I, 63, 171.

(e) *Ibid*, I, 64-8.

who treats politics from a secular standpoint, is not free from this religious touch, because, "the king who guides his subjects in accordance with the above rules will attain to heaven ; otherwise he will fall into the hell(a)". In the insertion of dialogues amongst the spies the kings are made answerable for the sins of their subjects, when the principle of levying just punishments and taxes has been violated(b).

The prospect of hell for a modern tyrant will not in the least dissuade him from his career of tyranny ; such a check is sure to evoke a peal of laughter from a modern audience ; but its utility in ancient times cannot for a moment be questioned, when we remember, that the mass, not excluding the king, really believed in heaven and hell.

The "political-preventive" checks are Laws and Customs, Public Opinion, Ministers and Assemblies. In ancient India, the legislative sovereignty of the kings was rather limited ; the only sovereignty which they exercised was rather executive in its nature(c). The rules of socio-religious conduct were laid down in the Srutis and Smritis, and the king only administered them. Besides these, custom was not to be neglected, even if it conflicted with the current ideas of morality.

(a) *Artha*, III, 7.

(b) *Arthasastra*, I, 13.

(c) *Calcutta Weekly Notes*, Vol. 15, pp. xxii-xxiv. See Naresh Sen Gupta, *Sources of Law and Society in Ancient India*, pp. 78-81. It might also be pointed out that Greek laws were "revealed," and that the Greek conception of sovereignty was also executive, but see Barker, *Greek Political Theory: Pluto and his Predecessors* pp. 295-6. See Benoy Sarkar, *Pol. Institutions*, etc. ch. 4, sec. 5 and ch. 9, sec. 2 (b)

The sphere of king's legislative power was still further circumscribed by the laws and customs observed by the various corporations, social and economic(a). Local customs, however objectionable, must be maintained, 'for otherwise the people get agitated(b)'. According to Kautilya(c), *Dharma*, *Vyabahara*, *Charitra* and *Rajasasana* are the four legs of law. The *Dharma-sastras* hold that the king is not above law ; but according to Kautilya(d), king's law is the most authoritative, and when in conflict with the sacred law, the king's law will be obeyed. But lest it should be thought, that this supreme law-making power of the king means, in effect, absolutism, the *Sukraniti* lays down(e), that the king should administer *nyaya* in the noon and *Smriti* in the morning. Sukra's *nyaya* is possibly the *dharma-nyaya*(f) of Kautilya, which is nothing but king-made law. The *Mahabharat*(g) also lays down, that "if the king transgresses all wholesome restraints, all people become filled with alarm.\*\* For this reason, the king should always establish rules and restraints for gladdening the hearts of his people. Rules in respect of even very trivial matters are hailed with delight by the people". The implication of all these quotations is that government by law, even if made by the king, is preferable to government by executive fiats. Kautilya's assertion, that the king-

(a) *Sukraniti*, IV-V, 89-93.

(b) For an account of these customs viz. beef-eating, sexual immorality, etc. see Sukra.

(c) *Artha*, III, 1.

(d) *Ibid*.

(e) IV-V 106.

(f) *Artha*, III, 1.

(g) *Santiparva*, sec. 133.

made law or Rajasasana is the most authoritative, points to the fact, that the Maurjya kings were law-making sovereigns; whereas the insistence of the Dharmasastrakaras(a), on kings being subordinate to dharma, points to the kings being executive sovereigns. In the first case, king-made laws and customs were the checks; in the second case, customs and Dharma-sastras as interpreted by a *Parsad*(b).

The strength of public opinion may be gauged by the dictum, which Sukra lays down, that a king 'should dismiss the officer who is accused by one hundred men(c)'. This theory of ministerial responsibility and king's irresponsibility is hinted at in the drama *Mudra-Rakshasa*(d), where it is said, "when anything wrong is done by the king, the fault is of the minister; (for) it is through the negligence of the driver, that an elephant goes mad." That the ministers and officers of the king were sensitive to public opinion may be illustrated by the story told by Hiuen Tsang about Vikramaditya, king of Sravasti. The king ordered his officers to distribute daily five lakhs of gold coins. The officer in charge of the revenues mildly protested, saying, that such indiscriminate charity would entail fresh taxation, for which the ministers would be blamed by the people(e). Sukra's dictum, about the dismissal by king of officers accused by one hundred men, is nothing but the

(a) Exception will be noted later on.

(b) *Yagnabalka Smriti* (S. B. H. Vol. 21, sutra 9).

(c) *Sukra*, I, 755. (d) Act III, quoted, *Pramatha Banerjee*.<sup>2</sup>

(e) *Beal, Buddhist Records*, Bk II, quoted *Banerjee*.

‘doctrine of recall in embryo’ as Benoy Kumar Sarkar puts it<sup>(a)</sup>. Sukra also emphasises that ‘the wise ruler should ever abide by the well-thought-out decisions of councillors, office-bearers, *subjects and members attending a meeting*—never by his own opinions<sup>(b)</sup>’. In another passage, he lays it down, that ‘the unity of opinion possessed by the many is more powerful than the king. The rope that is made by a combination of many threads is strong enough to drag the lion<sup>(c)</sup>’. In order to illustrate the strength of public opinion we may cite the story of Devapi and Santanu. Devapi, the eldest son of the king, was a leper; but the king decided to instal him as heir-apparent. The people opposed the king, who ultimately had to change his decision. Again, when Yayati decided to instal Puru, his youngest son, as his heir, the citizens objected to Puru on the ground of his being the youngest; but the king succeeded in convincing the people by saying that all his other sons are disobedient and as such are no sons. Here the king had to justify his seemingly autocratic action to the citizens.

But the real and the most effective ‘political-preventive’ checks were the ministers and assemblies. In the Vedic period, the assembly and the king were the two important elements that constituted the government, and of these two, surely the assembly possessed the greater political power, as is evident from the various hymns of the Atharva-veda con-

(a) *Positive Background of Hindu Sociology, Political*, p. 43.

(b) *Sukra*, II, 5-6. (c) *Ibid*, IV-VII, 838-9.

cerning banishment and restoration of kings. The Vedic monarchy was sometimes elective and sometimes hereditary. During the periods of interregnum due to death or banishment of kings, it was the assembly that managed the affairs of a kingdom(a). 'While during the Vedic period the assembly evidently held a permanent place in the constitution, it occupied a subordinate place in the Sutra period(b)'. With the increase of the territory of the state, the growth of the king's power and the rigidity of the caste system, the popular assembly gradually ceased to function, and it was physically impossible to gather all the citizens of a big state at a fixed time and place(c). But it must not be understood, that with the gradual decay of the Sabhas and Samitis, disappeared all wholesome checks upon king's arbitrary use of power. The place of assembly in the system of government was taken up by the ministry.

The importance of the ministry as an indispensable organ of the state has been recognized by all the writers on politics. Kautilya referring to the ministers says, "A single wheel can never move. Hence he (king) shall employ ministers and hear their opinion(d).

(a) *Evolution of Indian Polity*, p. 87.

(b) *Ibid.*

(c) So as Rome grew, democracy gave way. The difficulty in those days was that the representative system was unknown.

(d) *Artha*, I, 7. In the *Matsya Purana* the first duty of a king on ascending the throne is to "pick out worthy men for his assembly as his advisers," since the 'smallest-function cannot successfully be performed by one single man'. Ch. 215 (S. B. H.)

Speaking of the appointment of the high-priest, Kautilya says, "As a student his teacher, a son his father, and a servant his master, the king shall follow him(a)". Now this high priest had important 'spiritual and religious duties that gave him influence over the monarch, not only in domestic and religious, but also in all important secular matters, including public and political questions(b)'. That the ministers were supposed to be real checks upon the king is evident from Sukra's query, 'can there be prosperity of the kingdom, if there be ministers whom the ruler does not fear(c)?' And also 'if the king fears their control, they are good ministers(d)'. Sukra, speaking of subservient ministers, says, that they ought 'to be gratified like women with decorations, liveries of honour etc(e)'—thus showing his contempt for them. That the king must not be self-willed, must 'abide by the well-thought-out decisions of councillors' are proof positive of the fact, that the ministers played an equal, if not more important, part in the administration of the state. It has been shown also that the ministers recognised some responsibility to the people(f), and thus we see that the ministers were never taken as so many creatures of the king. In fact, such a system of government can be aptly described as *Sachivatantra*—as Pramathanath Banerjee puts it(g)—or *Minis-*

(a) *Ibid*, I, 9.

(b) Law, *Ancient Indian Polity*, pp. 38-9. "The didactic parts of the Mahabharat recommend complete dependence of the sovereign upon his Purohita," p. 49.

(c) II, 164. (d) *Ibid*, 163. (e) *Ibid*, 165.

(f) Story of Vikramaditya told by Hiuen Tsang.

(g) *Pub. Adm.* p. 51.

*trocracy* if we are allowed to say so. In *Mudra-Rakshasa* we find the term 'Sachivayatta-tantra,' that is to say, a form of government, in which real power exists in the hands of the ministers(*a*). In the ancient kingdoms of Chera, Chola and Pandya there were five assemblies associated with the king in the administration of the state. Of these five, surely the assembly of the people and the assembly of the ministers were the most important, because the former looked after the rights and privileges of the people, while the latter attended to the general administration of the state. Such a system of constitutional monarchy, not as a speculative theory, but as an objective reality, may appear unique in ancient Indian polity, but Kanaksabhai is of opinion, that this form of government was not peculiar to South India, but had its original in the Magadhan Empire of the north. Kautilya also speaks of the minister as installing the heir-apparent and also of his investing himself with the powers of sovereignty(*b*). A glimpse of the ministerial authority may also be got, when after the assassination of Rajyavardhana, the Prime Minister proposed in an assembly of ministers, that Harshavardhana should ascend the throne. Just as the assembly in the Vedic period managed the affairs

(a) Quoted, Pramatha Banerjee, *Public Adm.* In the *Jatakas* we also find religious-minded kings handing over kingly powers to the ministers. "Decision regarding succession to the throne was often left to the ministers. We also find mention of actual exercise of sovereignty by the ministers."—Fick, *Social Organisation (Eng. Trans)*, p. 140.

(b) *Artha*, V, 6.

of the kingdom during the periods of interregnum, due to death or banishment of kings, so the ministers of the kingdom of Ceylon after the death of Vijaya, took over the administration in their own hands, until they invested a new king with the powers of sovereignty(a). Thus we see, that often the right to sovereignty was granted by the ministers—a fact, whose implications ought not to be lost sight of(b). One of these implications is, that if the ministers can make a king, they can unmake also, and so we find that Lilavati who was elected Queen of Ceylon by the ministers was afterwards deposed by them(c). That the government of Queen Lilavati was a constitutional monarchy, is evident from an inscription of Lilavati where she says : ‘By creating a Council of wise, brave and faithful ministers, she has freed her own kingdom from the dangers (arising) from other kingdoms’. The doctrine enunciated in *Mudra-Rakshasa*—that when anything wrong is done by the king, the fault is of the minister—is reasonable, if the king is bound to accept the advice tendered by his ministers ; and hence we find, that ‘the king, who does not listen to the counsels of ministers about things good and bad to him, is a thief in the form of a ruler, an exploiter of the people’s wealth’ (d) and ‘soon gets estranged from his kingdom and alienated with his subjects(e).’

(a) *Mahavamsa* ; Cf. the *Rajakrits* or kingmakers in *Atharva-Veda* and *Satapath Brahman*.

(b) In England from the time of William III, the right to throne depends on Parliamentary title.

(c) *Public Adm.* p. 117. (d) *Sukraniti*, II, 515-16.

(e) *Ibid*, 7-8—on the subject of ministry, see R. G. Basak, *Ministers in Ancient India* ; *Ind. Historical Quarterly*, Vol. I, No. 3-4, 1925.

So far we have dealt with preventive checks ; now we shall consider retributive checks.

That the kings had to pay fines, when they committed offences, is evident from the following quotation from Manu,—‘where another common man would be fined one karshapana, the king shall be fined one thousand (a).’

In the Vedic period, the assembly seems to have had powers ‘to degrade a king to the rank of the common people or of the clan of nobles(b)’—evidently for some wrongs committed by kings.

The Atmamedha or Prayopavesa form of passive resistance—a vow of abstinence to death on the part of the people *en masse*, till the removal of the cause of their grievances, seems to have been a very potent weapon in the hands of the oppressed citizens against their tyrannical rulers. Shamasastri is of opinion, ‘that the Atmamedha form of passive resistance was invented by the Vedic poets to check the licentious proceedings of some of their Asura kings(c).’ This kind of check is both preventive and retributive. It is preventive, in that it is resorted to to compel a king to change his unjust attitude, and to reclaim a king from his wicked habits. ‘From Rajatarangini VI, 14, it appears, that ancient kings used to send spies to find out and report voluntary cases of prayopavesa or

(a) S. B. E. Vol. 25, 336. ‘When the king punishes an innocent man, he shall throw into water dedicating to God Varuna .a fine equal to thirty times the unjust imposition.’ *Arthasastra*, IV, 13.

(b) *Evolution of Indian Polity*, Appendix A.

(c) *Ibid*, Appendix B. Cf. Mahatma Gandhi’s conception of passive resistance.

fasting to death, and to redress such grievances as were the causes of these long fasts(a).’ Some element of retribution is also involved in this check, in as much as a tyrannical king was regarded as the indirect murderer of those citizens resorting to starvation by death; and the enormity of such a crime to a Hindu, well-versed in the ancient traditions, can very well be imagined. Perhaps, such a king gets the condition of lower animals after death. This form of check was also used to expel a tyrannical king(b).

The idea of deposition and tyrannicide is not wholly repugnant to the Hindus. In the Vedic period, when kings were regarded as mere mortals, and when monarchy was generally elective and people’s assembly had the upper hand, it is not surprising that kings were often expelled. We know that ‘Dustaritu Paumsayana had been expelled from the kingdom which had come down to him through ten generations and the Sringayas also expelled Revottaras Patava Kakra-Sthapati(c)’. In the Arthasastra of Kautilya, we do not come across any enunciation of the right or duty of deposition and tyrannicide, though Kautilya views Arthasastra wholly from a secular and utilitarian aspect. Notwithstanding this, the idea of deposition or tyrannicide is not unknown, for Kautilya lays down as a matter of common knowledge, that ‘a king of unrighteous character and of vicious habits will, though he is an emperor, fall a prey either to the fury of his own subjects or to

(a) *Ibid.*

(b) *Taittiriya Samhita* II. 3, 1—Quoted by Shamasastri. The atmamedha form of check has not been shown in the classification, because it is difficult to classify it.

(c) S. B. E. Vol. XLIV, p. 269.

that of his enemies(*a*)'. In another place(*b*) he tells us that impoverished, greedy and disaffected subjects voluntarily destroy their own master. In the chapter on Purity or Impurity in the character of ministers, one spy is made to say, "this king is unrighteous; well, let us set up in his place another king who is righteous(*c*)". Later on in the same chapter, another spy is made to say, 'the king has betaken himself to an unwise course; well, having murdered him, let us put another in his stead'. In this, though in an indirect way(*d*), we are confronted with a distinction between a good king and a tyrant(*e*). A king in Kautilya's view must not be so haughty as to despise all people, or, in other words, must not be tyrannical; for, if tyrannical, they are likely to perish like Dam-bhodhaba and Arjuna of Haihaya dynasty(*f*).

The rajadharma section of the Santiparva in Mahabharat, which is a blend of canonical and Arthasastric ideas of politics, makes a sharp distinction between a righteous king and a tyrant(*g*). This admixture is apparent in the divine and popular origin of kingship. But it is reasonable to suppose, that its secular aspect got the upper hand, in that the Mahabharat gives no quarter to an unrighteous king. The

(a) *Arthasastra*, VI, 1.

(b) VII, 5. (c) I, 10.

(d) Because Kautilya makes the spy distinguish between a good king and a tyrant.

(e) Usurpers of thrones are also tyrants and hence killed. See *Matsya-Purana*, Ch. 214 (S.B.H.).

(f) *Artha*, I, 6.

(g) It is curious that Upendra Nath Ghoshal makes Sukra the first originator of this distinction (*Hindu Political Theories*, p. 258) and again on p. 100 of his book gives the credit to another.

great rishi Vamadeva is quoted by Bhishma to have said, 'that king, who acts according to the counsels of a vicious and sinful minister, becomes a destroyer of righteousness and *deserves to be slain* by his subjects with all his family(a)', and again, 'that king who is illiberal and without affection, who afflicts his subjects by undue chastisement and who is rash in his acts, soon meets with destruction(b)'. In the Anusasanaparva, the subjects are advised to arm themselves for slaying the tyrant and again, the 'king, who tells his people that he is their protector, but who does not or is unable to protect them, should be slain by his *combined* subjects'. A perusal of these quotations will convince any one, that the king of Mahabharat is more a mortal than a *nara-devata* or that only a righteous king can claim the title of *nara-devata*(c). In the Aswamedhaparva, we read of one Khanikhetra deposed by his subjects(d). 'King Vena, a slave of wrath and malice, became unrighteous in his conduct towards all creatures. The rishis, those utterers of Brahma, slew him with *kusha* blades (as their weapon) inspired with *mantras*(e)'. After Vena has been killed, the rishis pierced his right arm whence sprang a person, who was annointed as king,

(a) *Santiparva*, sec. 92.

(b) *Ibid.*

(c) See in this connection *Manu*, V, 96-7 ; VII, 4-8 ; *Sukra*, I, 139-43 ; also footnote, p. 71, of *Public Adm. in Ancient India* ; also footnote, pp. 182-3 of *Hindu Political Theories* by Upendra Nath Ghoshal. Dr. Ghoshal's view that Sukra's theory is peculiar, is not justified in view of similar opinions being held by the author of Mahabharat.

(d) *Carmichael Lectures*, 1918, p. 136, footnote.

(e) *Santiparva*, sec. 59 ; see also *Matsya Purana*, S. B. H. part I, ch. X.

after having taken an oath that he would never act with caprice and would fearlessly maintain the duties laid down in the Vedas. This looks something like a coronation-oath—the implication being that if he acts upon his whims and caprices, he will be slain outright like his father Vena. Such a coronation-oath seems to have been employed in Aindramahaviseka ceremony when a promise was extorted from the king, that he would lose everything, *even his life*, if he attempted violation of right and truth(a). In the Agnipurana, it is laid down, that a tyrant is deposed and killed, sooner or later(b).

In the Buddhistic *Dighanikaya* we are confronted with the rudiments of social and governmental compacts(c), and the implications of the contractual origin of kingship are far-reaching. It means that the king is liable to popular control ; but it is to be regretted, that the implications were not systematized as part of a general theory of state(d). However, the loss in theory has been partly made good by instances of deposition and tyrannicide which we find in the Jatakas. In the Saccamkira Jataka(e), we find the wicked king of Benares, who owed his life

(a) *Aitareya Brahmana*, quoted by Radhakumud Mukherjee in *Fundamental Unity of India*.

(b) Ch. 225, 31-32, quoted by Madhusudhan Bhattacharjee in his *Ratnamala*, part I.

(c) The title "Mahasammata" indicates elective origin.

(d) For a short account of the Buddhistic theory see Ghoshal's *Hindu Political Theories*, pp. 117-123 and 209-212. The conception of king as *ganadasa* or servant of the people from the point of view of checks to tyranny must not be lost sight of.

(e) Vol. I, edited by Cowell.

to Bodhisatta, asking his followers to catch hold of Bodhisatta and execute him. Bodhisatta recited, how he saved the king, while he was crown-prince. "Filled with indignation at his recital, the nobles and brahmins and all classes with one accord cried out, 'This ungrateful king does not recognise even the goodness of this good man, who saved his majesty's life. How can we have any profit from this king. Seize the tyrant.' And in their anger, they rushed upon the king from every side and slew him then and there". Again in the Padakusalamanava Jataka(a), a king, who had himself stolen some treasures, employed a young man to specify the thief. Before a great audience, the young man said that their refuge proved their bane, whereupon the people thought, "\*\*\* that he may not in future go on playing the part of a thief, we will kill this wicked king." So they rose up with sticks and clubs in their hands and then and there beat the king and priest till they died. In the Mahasutasoma Jataka(b), the citizens asked the commander to have the king expelled from his kingdom, if he would not give up his cannibalistic propensities. The commander thereupon requested the king to give it up, who however expressed his inability to comply with this request; whereupon the commander said, "Then depart sire, from this city and kingdom." It will be evident from these stories that there was nothing divine, nothing sacred in the Buddhistic conception of kingship(c).

(a) Vol. III.

(b) Vol. V.

(c) Compare what the Buddhist monk Aryadeva says,

The distinction between a good king and a tyrant has been maintained by Sukra(a). According to Sukra, any and every king is not divine, or is not a *nara-devata*, because the king who is not virtuous is 'a part of the demons', and as such gets hell, or the condition of lower animals after death. But that is not enough. 'If the king be an enemy of virtue, morality and strength, people should desert (expel) him as the ruiner of the state, and in his place for the maintenance of the state, the priest with the consent of the *Prakriti*, should instal one who belongs to his family and qualified(b)'. Sukra cannot bear with a king, who does not listen to the counsels of his ministers(c), to him an autocratic king is nothing but a 'thief in the form of a ruler'. Other hints at deposition are given in some more places(d). It will be seen, that Sukra nowhere sanctions tyrannicide, though he says, that the king is justly looked upon as a dog by the poets(e), and also quotes the example of Vena being killed on account of his unrighteousness(f). It will be further observed, that Sukra observes a *via media*; any and every king is not a *nara-devata*, nor a mere mortal; that is, a virtuous king is godlike(g), the

"what superciliousness is thine, (O king!), thou who art a (mere) servant of the multitude (*ganadasa*) and who receivest the sixth part (of the produce) as thine wages".

(a) I, 63, 69-70, 139-40, 171.

(b) II, 549-52.

(c) II, 515-6.

(d) I, 277-8, 279-80; II, 5-8; IV-VII, 826-9.

(e) I, 745-6.

(f) I, 137-8.

(g) Cf. "Atri was the first to deify a king, so that Gautama called him a sycophant, but Sanatkumar upheld the deification". Quoted from Hopkins' *Epic Mythology*, p. 184.

reverse, demonlike. Further, he makes the king a creature of Brahma, but qualifies it by saying that he is a servant of the people(a). He sanctions deposition, a necessary corollary of the king being a servant of the people—but nowhere sanctions the extreme penalty which a tyrant deserves, viz., tyrannicide. With Narada, he does not say whatever a king does is right(b), nor does he support the view advocated by Aryadeva, that the king is a *mere* servant of the people and nothing more.

Yagnabalka warns the king against illegal taxation, by saying, that 'the fire, arising from the heat of the suffering of the subjects, does not cease, without fully burning the family, fortune and life of the king(c)'.

In the Mahavamsa, Vijaya is described as a Prince Regent whose maladministration led to discontent and ultimately to his own banishment(d). Again Queen Lilavati of Ceylon was deposed by her ministers(e).

After every thing has been said about these various kinds of checks to tyranny, a critic might reasonably put in, that in no Hindu political literature, has any theory about the rights of the people been systematically developed. To this, our answer is, that the ancient Hindus thought more in terms of Swadharma and duties, than in those of Swadhikara and rights.

(a) I, 375.

(b) S. B. E. XVIII, 21.

(c) Sutra 341, S. B. H. Vol. 21.

(d) Quoted by Pramathanath Banerjee, p. 89 footnote.

(e) For some historical examples of deposition see Benoy Sarkar's *Political Institutions and Theories of the Hindus*, chap. 4 sec. 7.

## THE CONCEPT OF LAW AND THE EARLY HINDU VIEW

THE Austinian conception of law, following in the footsteps of Bodin and Hobbes, brought definiteness and precision in our idea of law, no doubt, but this it did by following a policy of strenuous exclusion. This policy of exclusion, which limited the scope of laws only to those rules of conduct prescribed by the sovereign body of an independent state and enforced by the physical sanction of a well-organized state, has in effect been challenged by the Historical school of jurists, who point out that rudiments of law are to be found in the primitive stages of society, in which it cannot be described as the command of a sovereign in a political society, enforced by the physical sanction of that body politic. John Austin might have said in criticism of Savigny, that the latter, when he represented law as a product of national life, was only referring to its *historical* sources ; while he, in defining law as the command of a definite political superior, was only referring to its *juridical* source. John Austin's immediate concern was to determine the scope of a lawyer's Jurisprudence, while Savigny's point of view, like Maine's,

was to expound a philosophy of law(a). The mechanical view of law, as a fiat imposed upon the people by the sovereign body, comes in handy in the modern age, when we are confronted with the incessant activity in legislation of the modern parliaments ; but the bankruptcy of this theory is evident, when we betake ourselves to the era of customary law. But both the mechanical and the organic theories of law err, because of their extreme points of view. The correct standpoint would be to regard law as a creation of the human mind and an unconscious growth at the same time ; because inspite of growing social self-consciousness, there is always an element of spontaneity and instinctive habit lurking in the background.

The analysis of the Austinian conception of law into its constituent elements has not gone unchallenged. At present, the scope of the concept law has been very much enlarged.

It is said(b), that the notions of *sovereignty* and *command* are not essential presuppositions in the concept of law, and that all rules of conduct, imposed and enforced by society as such for the conduct of social

(a) The Historical treatment of law was first begun in Germany by Eichhorn. Savigny expounded this historical interpretation of law, because he was against the formulation of a new German Code. Maine was against any scheme of legislation based on first principles, because his historical method is only another name for the theory of Darwinian evolution in legal and social institutions.

Austin took cognizance of the fact that there were various kinds of social rules ; but he designated them as positive morality.

(b) The line of criticism here adopted is that of Vinogradoff's. See his *Commonsense in Law*.

and political relations, are to be given the appellation of law. It is to be seen, that the definite human political superior of Austin is replaced by the indefinite entity called the society, and that the notion of command is too mechanical to explain the growth of laws in the customary era. Again, the notion of physical sanction of force is too crude. We cannot say, that a good citizen does not commit murder merely because there is the penal code : his abstention from murder is not to be explained by the fact of prospective punishment like death or life-long imprisonment. It might be the result of the sting of his conscience or instinctive conformity or a negative attitude of non-resistance. At best, we may say, that there is the prospective indignant public opinion which may act as a deterrent. In all this, of course, some kind of sanction is implied : whether it be the sting of one's own conscience, or the contempt or hostility of the general public ; but this sanction may be inflicted by an indeterminate human entity (as opposed to a definite tribunal), or else by a supernatural being(a). The fundamental background of law is provided, not by the physical sanction of force, but, by recognition or agreement, because the

(a) Instances are to be found in books on primitive culture. In some of the primitive societies, adultery is looked upon with horror, not because it is immoral, but because it will rouse the anger of some supernatural being, who will inflict terrible penalties upon the whole tribe. 'Ruin to the crops, continuous drought, continuous rains, are the results of incest, according to the Dayaks, the Battas, the Galelareese (who also attribute earthquake and eruptions to the same crime) and other tribes'. See *Ency. of Religion and Ethics*, Vol. 4, p. 253.

organized force employed in enforcing laws is not likely to be very much effective, unless there be, at least, tacit agreement behind the employment of force, and also a conscious or unconscious recognition of the fact that the authority of the law ought to be upheld(a).

The habit of falling into antithesis, so characteristic of the Sophistic way of thinking, whether as an aid in constructing a philosophy or in attacking social institutions with clever dialectic, has often been condemned by some, because it takes a too mechanical view of the object of thought. The Sophists divided all phenomena into human and natural; and with this, sought to criticise the existing human institutions. Those, who condemn this way of thinking, forget, that this method, however imperfect and illogical it may seem, serves as the best starting-point of thought, because human mind always delights in contrasting A with not-A, and this method of contrast serves to bring out the essential attributes of each. Of course, we do not deny that there is a certain amount of "sophistry" in this mode of thought, and that higher philosophy ought to take a more comprehensive view of the two sharply-divided categories of phenomena by treating them as exhibiting differences in degree only; but it is to be noted that both(b) Mill and

(a) Compare Green, *Political Obligation*, chap. 'Will, not force, is the basis of the State.

(b) Mill divided actions into self-regarding and other-regarding and conceded absolute liberty in the former sphere, though he was conscious of the fact that such clear-cut division is not strictly logical. See *On Liberty* ch. 4, 5. So also in Spencer, though he seems to modify it by his theories of evolution and the nature of social organism. Rousseau and Hobbes based their *Contrat*

Spencer constructed their theories of liberty and individualism with the help of this mode of thinking, and thus served to give precision and life to the concepts of liberty and rights.

It would not be improper therefore, if we begin our classification of law from the standpoint of *origin* in the sophistic way.

The origin of law is either human or non-human; *i. e.*, law is either original and not a handiwork of man, or law is a humanly-created institution. Law of non-human origin may be of three kinds. First of all, (no chronology is implied) there is the law which is directly created and promulgated by God. The Hebrew theory of law in which Moses is depicted as receiving law from Jehovah is an instance to the point. Hammurabi of ancient Egypt is also said to have received the laws from the sun-god Shamash, and there is said to be an engraving showing Hammurabi actually receiving the code. This is what is known as the theological conception of law.

Secondly, there is the conception that there exists an original law, but that human beings are required to find out that law by the exercise of some human faculty, designated variously as reason, intuition or that peculiar faculty of knowing truths possessed by those seers of thought, the Hindu rishis. Stoicism is an aspect of this metaphysical conception of law.

*Social and Leviathan* on this method of reasoning. So the clear-cut issues of Life and Non-life have receded into the background because of Jagadish Bose's researches into plant life. The fact is that there is a continuity in all phenomena.

Here there is no deity to promulgate the law(*a*), but the law of nature is found out by man with the help of his reason, which is only a partial manifestation of the Universal Reason pervading the entire nature. Stoical conception of law is more a conception of order, harmony, simplicity and universalism, than a conception of law as a rule of conduct(*b*), though order is nothing but the result of a rule of conduct. This metaphysical conception of law as morality, of rules of conduct which we ought to follow, is either rationalistic or intuitive, is either deduced by processes of reasoning or found out *a priori* by intuition. The value of this metaphysical conception of *natural law* lies, not in framing our laws on the pattern of the *laws of nature* (for that is absurd), but rather, in furnishing us with a notion, that there is an ideal and eternal standard of justice, to which we can appeal when we suffer injustice. Much harm has been done by the confusion of law of nature as setting a standard with laws of nature meaning statements of causal connection and generalisation; and the two notions ought to be kept entirely distinct, for, an analysis of natural laws, however acute it might be, can never give us a standard. In other words, "ought" should not be confused with "is" (*c*).

(*a*) In some cases the word of the Deity is identified with the intuition and commands of the reason. For a short history of the theory of Law of Nature see Pulszky, *Theory of Law and Civil Society*.

(*b*) This is because there has been a confusion of natural law (ought) with the laws of nature (is), the latter signifying a certain order and harmony in the material universe.

(*c*) For diverse conceptions included under the cate-

The sophistry involved in making two things appear as antithetical, is apparent when we come to study the origin and nature of custom. Custom, specially in primitive times, was looked upon as uncreated, and hence followed with respect. Human society differs from an animal society in the fact, that over and above the phenomenon of physical aggregation, there is the consciousness, to a greater or lesser extent, of this aggregation; but custom has emerged as an objective rule of conduct, even before mankind has found itself grouped into what Prof. Giddings would call an Ethnogenic Association(a). It would not be wrong to say that custom exists as an objective fact even in Zoogenic and Anthropogenic Associations. When mankind is just beginning to live the lives of human beings, it already finds its conduct being guided by customs, of which the origin is lost in hoary antiquity. Again, similarity in conduct which gives rise to custom, is mostly to be explained by the two most primary psychological phenomena of impression and imitation. Now, this imitative tendency of mankind which lies at the root of customs(b) is mostly an impulse; the element of deliberation is absent, at least, in the primitive stages of society; and where a phenomenon has its origin in

gory Law of Nature, see the article 'Law of Nature' by Taylor in the *Annals of the American Academy of Pol. and Soc. Sciences*, April 1891. Taylor has concluded that the Law of Nature is relative.

(a) *Principles of Sociology*.

(b) Tarde, the French Sociologist, explains the phenomenon of Society by imitation, while Giddings puts forward the fact of consciousness of kind as the essential factor in the birth and evolution of society.

imitative instinct, we would naturally assign to it a non-human origin. It is because of this fact, that custom is looked upon as sacred or even God-given, and hence the conception of *law governing human society*, even if we reject the theological and metaphysical origins of law<sup>(a)</sup>.

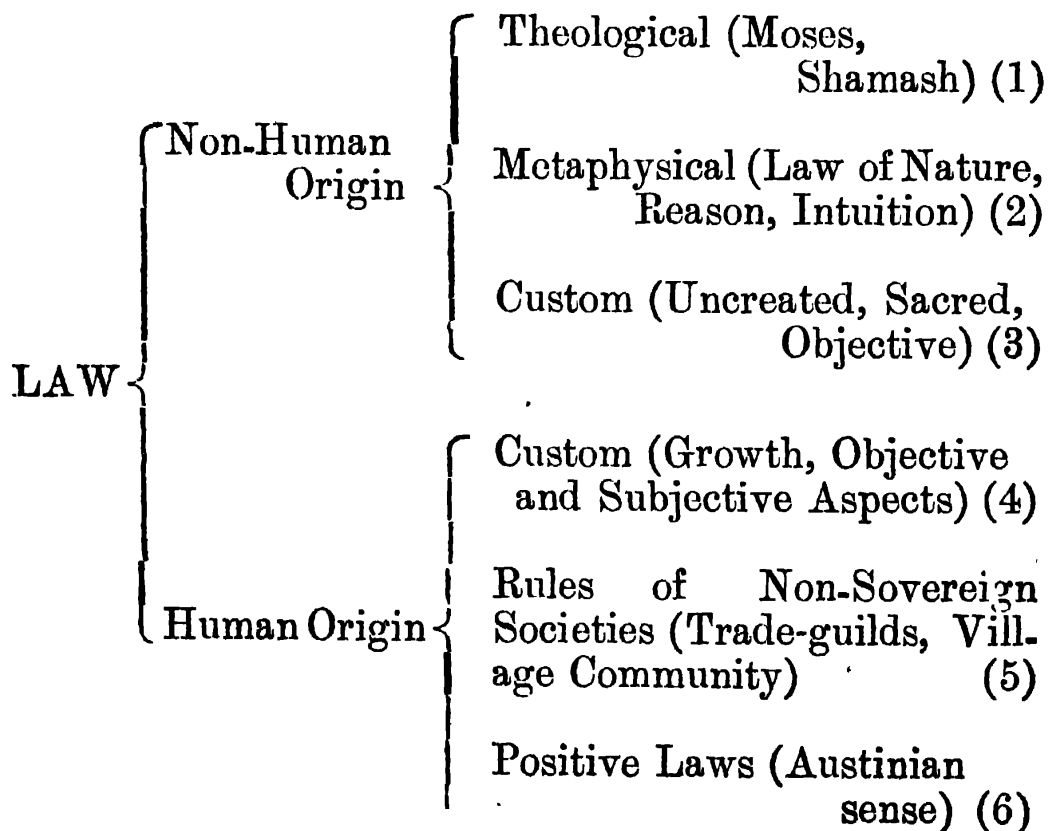
We now pass on to consider law as a phenomenon of human creation. By 'human creation' we mean, that rules of conduct have been instituted by human beings for the purpose of subserving certain ends. This perception of end is the essential feature which distinguishes the conception of law as of human origin from that of non-human origin. But really we cannot distinguish perception of end from non-perception of end; there is a gradual shading of the one into the other, there is no sudden break and consciousness of an end is a matter of slow growth. This will be evident from a further discussion about the nature of custom. In well-advanced societies, customs serve as rules of conduct, not because they are of non-human origin, but because they serve certain ends. The moment we begin to observe customs with this *consciousness* of their utility, that moment they acquire the character of human origin. The modern customs are of human origin, though it will be difficult, if not impossible, to assign them to any definite source. We view custom, not as something *uncreated* and original, as the primitive people did, but we look upon it as a *growth*, in which both instinctive imitation and

(a) All these conceptions will be seen in the various Hindu theories of law.

deliberate imitation, unconsciousness and consciousness have mingled.

There is a class of laws of human origin which can be assigned to definite sources(*a*). They are enacted by sovereign bodies, and are technically known as positive laws; or they are imposed by non-sovereign societies and are recognised as rules of conduct by the members of those societies(*b*). These societies may be formed within one state, or they may be international societies.

Here is our scheme of classification :—



(*a*) We are going to discuss whether these sources are historical and material or juridical and formal.

(*b*) Customs and rules of non-sovereign societies as such are called positive morality by Austin.

Possibly in this scheme of classification we have made ourselves liable to the charge of confusion between historical and juridical origins of law. Yet as a matter of fact, the above classification *fairly* represents the truth from both points of view (*i. e.* historical and juridical origins).

Firstly, let us examine the classification from the standpoint of *material* source. In (1) the material sources of law are due to God, as when Moses is said to have got the laws from the Jewish god. In (2) reason or intuition is said to discover the rules of law. In (3) the uncreated objective customs give us the rules of conduct. Similarly in (4); but in (5) and (6) the material sources may be had from (5) and (6) or from somewhere else (generally custom). Generally, but not in all cases(*a*), the materials for (5) and (6) are already there(*b*). Probably this is what Gierke means when he says that "law is the result of a common conviction not that a thing shall be, but that it is".

When we come to consider law from the standpoint of *juridic* origin, the question that confronts us is the question of *authority*. Of course in all these cases *a sanction of some kind* must indeed be implied, but this sanction is not always inflicted by a definite tribunal. With this qualification in view, we may say that the law given by a deity is obeyed because it represents the command of that deity and hence

(a) When this is the case, the law often remains a dead-letter, *e. g.* Juvenile Smoking Act in Bengal.<sup>5</sup>

(b) Compare the mechanical and organic views of law.

theological law is a sort of divine positive law. The authority of law implied in (2) is also in the nature of an Imperative, but it is a self-imposed command. The difference between (1) and (2) is the difference between "must" and "ought". In (3), the driving force is mainly instinct, and the authority is the mere fact that all behave in like manner; but perhaps even here, there is the vague fear of supernatural being and public opinion, or the conviction that non-observance is not desirable(*a*). In (4), (5) and (6) the fundamental feature is express or tacit agreement or recognition, and this provides the requisite authority. None the less, the psychology of average men in observing rules of conduct is highly complex: it is a mixture of imitative instinct, fear and duty in variable proportions(*b*).

With these remarks we may pass on to the interpretation of Hindu theories of law.

The first problem to which we are to address ourselves, is whether the Vedic Aryans had any conception of law, and if they had, then what was the nature of their jural conceptions. Henceforth we would frequently use the technical Hindu word *dharma* signifying law(*c*).

(*a*) See Mackenzie, *Manual of Ethics*, pp. 256-7.

(*b*) An average Bengali Hindu does not drink for 3 reasons:—(1) His fellow countrymen do not drink. (2) He is afraid of public opinion. (3) He considers drinking to be immoral.

(*c*) The term Dharma is also used in the senses of justice, duty, virtue and religion of which the last two are categories of ethics and theology. Benoy Kumar Sarkar has differentiated these five senses (*Pol. Institutions and Theories of the Hindus*, p. 206) but he should have added

Even in the Rig-Veda, the term dharma occurs, as where Varuna is referred to as the upholder of dharma(a). There are other occasions when this word has been used(b), mainly in connection with religious rites and ceremonies. Now what did the Aryans mean by this dharma? Certainly, even in the Rig-Vedic age, dharma meant some rules of conduct, but they referred to *binding habits*, 'determined by the inner-nature of the group man and according to the action upon it of the forces and necessities of his environment'. The rules as yet were not imposed by self-conscious group-mind, because the social aggregate was only possessed of a mechanical mentality of which imitation was the most important constituent. Now these binding habits were there as objective facts even before the Vedic Hindus were conscious of their existence, and it was their imitative instinct which

that the term dharma as a category of Jurisprudence (law) has got a peculiar meaning to the Sutra- and Smriti-writers at least. The law of causality was laid under contribution in setting forth the dharma rules of conduct. Some actions of men, so it is assumed, have got consequences even when men are dead. This consequence is known as *apurva*—a property which inheres in the soul. If the deeds of a man are virtuous, then through the agency of this *apurva* force the man will enjoy in the life to come eternal bliss; if not, the very opposite will happen. The significance of this philosophy of life had a great influence on Hindu theories of punishment. The term dharma was used for those rules of conduct the observance of which would lead to dharma, i.e. eternal bliss through the agency of *apurva* force in the soul.

(a) Varuna is rather the keeper of the law than its creator. In one or two places ordinances are said to be Varuna's, but then they refer to 'natural' *rita*.

(b) Rv. III, 3, 1; V, 63, 7. Av. XI, 7, 17; XII, 5, 7. (All these Vedic references are quoted from *Vedic Index* Part I by Macdonell and Keith)

really explained their adherence to dharma or law and custom. The Vedic Hindus were simply surprised at this upholding of custom, and their peculiar psychology, so full of deities, was immediately laid under contribution, and the result was, that one of the gods *e. g.* Varuna, was conceived of as upholder of custom. Where we moderners would say that imitative instinct was the upholder of the law in that stage of civilisation, the Vedic Hindus would say that it is Varuna who is really *dharmapati*.

The conception of dharma or law as something created by someone, does not seem to be familiar to the Vedic Hindus, though in the Upanishadic age we happen to come across a conception of law as a creation(*a*). Varuna is the *dharmapati*, the upholder or protector of the law and not the creator(*b*). We have seen that even in Zoogenic Association there is something akin to rules of conduct; it is clear therefore, that the Vedic Hindus were confronted with objective customs before they were even conscious of the fact. They probably did not enquire about their origin, but took them for granted as natural. To them the problem at first appeared as to who would protect the dharma or customary law, and they seem to have solved it by giving this task to Varuna.

That the Vedic Hindus had some conception of law as a standard of conduct is also evident from the

(a) • This will be explained shortly.

(b) The Teutonic theory views law not as a creation, but as something which exists as a part of the tribal life. Cf. the organic theory of law.

fact that they looked upon adultery, seduction and sorcery with disapproval(a).

There is another conception in the Vedas which is intimately connected with the concept dharma. This is *rita*, meaning the order and harmony in the universe. Varuna is also the upholder of order in the universe and in human society, and hence his surname is *ritasya gopa*, meaning the gopa or guardian of *rita* or order(b). Varuna is both *dharmapati* and *ritasya gopa* and rightly so ; for the twin conceptions of law and order, dharma and rita are intimately connected. These two conceptions are logically related to each other as cause and effect : rita being the effect of dharma, the cause. But if these two conceptions are applied to natural phenomena, dharma and rita tend to merge into each other, for law in the scientific sense of sequence and co-existence is another name for order and harmony(c).

Now if it be admitted that there existed rules of conduct, and imitative instinct, or in Vedic phraseology, a particular deity, upheld those rules, still there might be actual violations of those customs. It is probable that the wronged man was tacitly empowered to do what he liked and in cases of murder the principle of an eye for an eye was followed. The

(a) Barth, *Religions of India*, pp. 32-4. The vice of gambling is also hinted at in the cursing hymn of Vasistha ; see Ragozin, *Vedic India*, pp. 377-8.

(b) *Ibid*, p. 17.

(c) The Stoics identified the law of reason with laws of nature ( in the scientific sense). The one is concerned with laying down rules of conduct, while the other refers to statement of causal connection. It is a confusion between 'ought' and 'is'.

Vedic kings at first could not take cognizance of these crimes because they were so very busy with their military duties. The principle of unregulated revenge cannot long exist without impairing the stability of the society, and sooner or later the Vedic kings found that this anarchy within the society considerably interfered with their military duties. Hence the Vedic king was compelled, when he felt himself powerful enough, to regulate this private revenge and enforce the system of wergeld(a).

The assumption of judicial jurisdiction by the king or the tribal chief is certainly a thing of later growth and it is the criminal jurisdiction which is first taken in hand. Before his assumption of this jurisdiction there were other persons(b) who exercised this jurisdiction, though not in a systematic manner. Our point is that before the tribal chief has assumed judicial jurisdiction custom has developed. This conclusion challenges directly the contention of Maine that "however strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a custom must precede that of a judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them" (*viz.*, judicial sentence and then custom)(c).

(a) *Vedic Index* I, pp. 391-2.

(b) *Madhyamasi* stands for arbiter.

(c) *Ancient Law* ch. I. Maine's dictum that judicial sentence historically precedes a custom is not, in our opinion, tenable on the following grounds. (a) Custom,

In the early Vedic age we have got the conceptions of dharma and rita, but it is a deity and not the tribal chief who is the protector of dharma and guardian of rita. As yet there seems to be no acute dualism between god and man or nature and man, for Varuna is the upholder of order in the universe and in human society. Before the assumption of judicial jurisdiction by the tribal chief, customary modes of action have grown up ; some of which because of natural selection tend to be preserved while others go to the wall. The residuary customs serve as standards of conduct because they have got social value. In other words, biological forces in the beginning determine the nature of customary morality (if it can be called morality at all, because it means instinctive adherence to those customs which have been selected by nature)(a). The sanction for the observance of customs in an age where no tribal chief but a deity is the upholder thereof, lay in the feeling of vague uneasiness conse-

already from the very birth of human society, exists as an objective fact, and this must have struck primitive imagination. This resulted in the enunciation of the well-known theory that law is uncreated. Therefore Maine's quotation from Grote (*History of Greece*) that the human king is not a law-maker but a judge is pointless. (b) The judicial function of a king is a thing of later growth. Before that private arbitration came and it cannot be said that Themis dictated Themistes to these ordinary *madhyamasis*. (c) The conception of order in the universe may inspire a notion of custom in the human mind, for as we have seen before, *dharma* or law and *rita* or order are intimately related. (d) Savages have also their notions of customs. The fact is that the notion is instinctive. Maine finds the germ of custom in similarity of awards, whereas we think that custom has grown out of imitative instinct.

(a) Probably this is the case in connection with adultery, sorcery etc. referred to before.

quent on the violation of a settled habit of action and this feeling is likely to be intensified when coupled with the fact that Varuna, the tribal god, the dharmapati, (the conception of a tribal god also intensifies the conception of social unity)(a) may not like it.

Unlike the Sophists, to the Rig-Vedic Hindus there was no dualism between nature and man. The conception of rita or order was transplanted from the material to the spiritual world or rather there was one rita for both nature and man, and the enforcer of this rita in all cases was Varuna. Therefore when man was guilty of violating any social custom—and this custom was the manifestation of rita in the human sphere—it was Varuna, who, as the *gopa* of *rita* in the material and human worlds, inflicted punishment. And this punishment was of various kinds. Varuna might deliver the rita-breaker unto death or “to the blow of the furious” or “to the wrath of the spiteful” and in his anger might trouble the wrong-doer with disease. In all this there is a decided advance in thought, because here unlike the savage tribes, the Dayaks and the Battas (quoted before), the wrong-doer is conscious of his individual wrong. The conception of moral wrong is beginning to emerge, though it is still clouded by the fact that it is disease or death inflicted by Varuna which prevents one from

(a) Social unity suffers if there are many gods. But even in the Vedic age a struggle for existence was going on among the different gods and Varuna is generally successful in this struggle. Indra is often a very important god. See hymn IV, 42. (Quoted in Ragozin, *Vedic India*, p. 203).

breaking the custom or rita. In short, the hymns of repentance that Vasistha offers to Varuna, point us to the conclusion that the sanction was supplied by the anger of Varuna directly manifesting itself in darkness (of which all primitive men are mightily afraid) disease and death and similar punishments.

In the age when Satapatha Brahman was composed the conception of law has changed a bit and possibly this is a case of theory adjusting itself to actual facts(*a*). The tribal chief is at first a war-leader. In the fight between Devas and Asuras the Devas were defeated and they attributed their defeat to the fact that they had no kings to lead them in war. So they consented to elect a king to fight the Asuras(*b*). Apart from the fact that this implies an elective origin of kingship among the Devas (*i. e.* the Aryas), what is important from our standpoint is the fact that he is only a war-leader. But it is natural that a war-leader cannot successfully conduct war unless he can maintain order within his jurisdiction. Hence the war-leader becomes also the executive ruler, but executive rulership in order to be real, must also include judicial administration(*c*), specially on the criminal side.

(*a*) This relativity of theory to institutions can be seen in the Stoical theory of law universal and the break-up of City-States ; in 15th and 16th century European States and Renaissance Sovereignty and in the rise of modern group-organisation and Laski's conception of sovereignty, and also in the history of Northern India before the rise of the Mauryas and the Kautilyan conception of *Mandala*.

(*b*) *Aitareya Brahman* I, 14.

(*c*) This is how we can justify the *droit administratif* of France.

Now this was the state of society which was responsible for this changed conception of dharma. In the Satapatha Brahman in connection with the description of the Rajasuya-rites the following passage occurs:—"For Varuna Dharmapati (the Lord of the Law) he then prepares a Varuna pap of barley; thereby Varuna, the Lord of the Law, makes him Lord of the Law; and that truly is the supreme State, when one is Lord of the Law; for whoever attains to the supreme State, to him they come in (matters of) Law: therefore to Varuna Dharmapati(a)". We have passed the stage when sanction for custom lay in Varuna the dharmapati and have come to a stage when the king is the dharmapati, the protector of the law. Protection of law, we have seen, along with its concomitant, the judicial administration, has just been taken over by the war-leader. Thus when the war-leader has assumed executive and judicial administration of the law, the former theory of Varuna as dharmapati was replaced by the theory of king as dharmapati. But the transition was gradual, because even in the above quotation, it is Varuna who makes the king the lord of the law. The conception of law as uncreated still reigns supreme: it is still the customary epoch; only the protector or rather the enforcer of law has changed and even this change is not abrupt. In the above quotation, the two functions, *viz.* executive rulership (internal) and adjudication, are referred to.

Jayaswal is of opinion that "the old theory had

(a) *Sat. Brah.* V, 3, 3, 9 (S.B.E. Vol. 41).

been that the law of the community was administered by the community(a). His theory is likely to hold good if the Sabha of old really performed some judicial functions like the Greek Apella, but his interpretations, while he is trying to put forward the proposition that "the Sabha acted as the national judicature," are really far-fetched(b).

Thus by wielding the danda(c), the king is upholding the dharma. Of course dharma was in existence before the appearance of the king's danda (when the king was a mere war-leader), but with the growing complexities of the society and possibly because of moral depravity dharma cannot exist without the king's danda(d). Of course dharma as law is uncreated(e), but the king's danda gives dharma a concrete shape. When the king has been made dharmapati and when his danda has been so much

(a) *Hindu Polity*, part II, p. 23.

(b) *Ibid*, part I, pp. 18-20. See also part II, p. 160. As to the divergent opinions held about the nature and functions of the Sabha by Ludwig, Zimmer and Hillebrandt see Narendra Law's *Aspects of Ancient Indian Polity* pp. 24-27 and also Pramathanath Banerjee's *Public Administration in Ancient India*, p. 95 footnote. See *Vedic Index* under Sabha and Samiti.

(c) Danda means executive power or the power of sovereignty. It is one of the fundamental concepts in Hindu political thought. For a vivid picture of danda see *Santiparva* (R.P.) sec. 121.

(d) Kamandaka, *Nitisara* II, 40-2 ; *Sukraniti* IV-I, lines 92 and following ; *Manu* VII, 14, 15, 18, *Santiparva* (R. P.) sec. 69, sl. 20.

(e) Benoy Kumar Sarkar writes, 'Dharma (law) is the creation of the State (*Political Institutions*, p. 207). He ought to have put some adjective (e.g. objective) before the word 'creation.'

idealized, it is possible that the people or the king may take danda to be superior to dharma. To provide against such a contingency, the king is required to go through a highly significant ceremony. "The king comes back immediately to the throne which he again ascends while the priest recites ; 'Sit thee on the pleasant soft-seated throne'. Then follows an exceedingly queer procedure. The king's person is silently touched on the back with a rod which is the symbolic sceptre of justice, conveying by the action the view of the sacred common law that the king was not above but under the law. The interpretation given of this procedure is an amusing piece of euphemism. The commentator says that it is done to carry the king's person beyond 'judicial destruction' (danda-vadha)(a)". The commentator's explanation that henceforth the king becomes exempt from punishment (adandya) is incompatible with the theory of law as uncreated. Had law been viewed as something created by the fiat of the king, then of course the king's exemption from punishment becomes intelligible ; but as it is, the ceremony means not only that the king is under the law(b), as Jayaswal explains, but also that this danda will smite the king (mark the symbolism in the ceremony) if he does not handle this danda righteously(c). In fact, subsequent writers

(a) The whole quotation is from Jayaswal's *Hindu Polity* part II, p. 35 and his interpretation of the significance of the ceremony is correct. The ceremony is described in *Satapatha-Brahman* V, 4, 4, 7 (S.B.E. Vol. 41).

(b) In *Manu* kings are fined.

(c) This danda is a double-edged dagger. See *Manu* VII, 27-28.

have all emphasized this aspect of danda and they have raised it to the status of an abstract principle of force.

Up to this time the theory is that the law or dharma is uncreated and the king only enforces it. When customs are few and social life is simple, we meet with no difficulty in knowing the contents of law, even if the theory of law as uncreated be accepted. But with the growing complexities of society caused by the differentiation of castes(*a*) of which we get an inkling in the *Sat. Brah.* and the evolution of which perhaps began in the later Rig-Vedic age(*b*), it becomes increasingly difficult to know the law. This is one of the turning points in the history of the evolution of law. The Brahmins are beginning to assert their supremacy in the society and they are frequently coming into collision with the king representing the Khattriya caste(*c*). Another aspect of this friction is represented by the Jaina and Buddhis-

(*a*) In the *Sat. Brah.* we find references to the evolution of four castes thus indicating the complex nature of the society. The mutual relation of the Brahmins and the Khattriyas, originally the two important castes, are also referred to.

(*b*) *Purusa-sukta*,—for a brief history about castes and classes in the Rig-Vedic age, see ch. II, *Indo-Aryan Polity* by Prafulla Basu. See Ragozin, *Vedic India*, pp. 280-1.

(*c*) The story of Parasuram. The story of the rishis killing Vena proves this (See *Santiparva* sec. 59, sl. 93-4, 106-11). Jayaswal's interpretation of this story as 'Brahmanisation of the theory' and 'overstatement of Brahman claim' due to Pushyamitra having ascended the throne, does not, I am afraid, go to the root of the matter. See *Hindu Polity*, part II, pp. 47-8 footnote.

tic(a) revolts (led by Khattriya princes) against a Brahmin-ridden social system. The post-Vedic king with his danda has actually become very powerful, and he was the only upholder of dharma and as such he was the only man as yet credited with a knowledge of the dharma. But the growing power of the priestly oligarchy(b) wanted to monopolise the knowledge of the laws, and hence sought to introduce several important attributes in the concept "dharma."

The first proposition put forward was that the Brahmins were also the upholders of the dharma in conjunction with the king. But this did not advance the cause of the Brahmins very much, for as yet in theory, the law was uncreated and surely the king with his danda was the real upholder of, and in a sense the creator of, dharma. The problem that confronted the sacerdotal caste still remained unsolved. The Brahmins would not remain satisfied by being merely the upholders of the law,—and it is worse than useless without the danda, which was the monopoly of the king,—they also wanted to give the law a sacred character which would be in keeping with their sacerdotal caste and sacred functions. A theory was formulated that law was of theological origin, that it was derived from the will of the creator. But what if the king laid claim to the sole knowledge of

(a) The contempt of Buddha for the Brahmins is well-illustrated in a dialogue between Vasettha and Gotama. See *Evolution of Indian Polity* by Shamasastri p. 105.

(b) In Greece and Rome there were similar priestly oligarchies.

law direct from the creator. That path was blocked by the formulation of the theory of cosmic creation. The original creative principle created the Khattryas and the other inferior castes, but the Brahmin was the direct manifestation of the creative principle. Now let us realise the implications of these propositions.

We have seen that the Brahmins claimed to be upholders of law along with the king(*a*), and have noted the fact that by itself it means nothing. Then the theory of theological origin of law was formulated in the *Brihadaranyaka Upanishad*. It runs thus : "He (God) was not strong enough. He created still further the most excellent dharma (law). Law is the Ksattra of the Ksattra, therefore there is nothing higher than Law(*b*)". This theory of law as created by the will of the creator, coupled with the theory of the origin of castes just referred to, is highly interesting from our standpoint. The king as before is placed under the law, for law is the Khattra of the Khattra, and law is derived from the will of the creator, but Brahmin is the direct manifestation of the creator, and therefore it follows that the will of the Brahmin, the creative principle incarnate on the earth, is the law. It also follows that law is sacred in a more intensive sense.

The law which now boasts of a theological origin, is not of the same nature as the Mosaic Decalogue, though the latter has got a theological origin. The

(a) *Sat. Brah.* V, 4,4,5 (S.B.E. Vol. 41).

(b) *Brih. Up.* I,4,14 (S.B.E. Vol. 15).

Jewish law is of divine origin in this respect that Moses got it wholesale from Jehovah. Nor can we compare it with the new customs of Mahomed, dictated(*a*) to the prophet by Allah, while the former happened to be in states of mind which we call *samadhi*. With a certain end in view, the author of the Brihadaranyaka merely formulated the theory of the origin of law : it was an empty theory without any contents. As we shall see just now, the theory was rather metaphysical than theological.

The metaphysical aspect of law is seen in the Brihadaranyaka Upanishad from which we have just quoted. After declaring that law is created by God, the author proceeds : "Thus the law is what is called the true. And if a man declares what is true, they say he declares the law ; and if he declares the law, they say he declares what is true. Thus both are the same(*b*)."

This metaphysical aspect is also hinted at when we find the following passage in the Sat. Brah.: "The first libation of ghee is the sacred law, and the second the truth ; and verily he secures for himself law and truth, and whatsoever is to be gained by law and truth, all that he now gains(*c*)."

In another passage, the king, though the upholder of the law, is asked to speak and do what is right.

The significance of the quotation from the Brihadaranyaka lies in the fact that in the very same passage law is described as the *creation of God*

(*a*) Compare the Delphic Oracle.

(*b*) S.B.E. Vol. 15.

(*c*) S.B.E. Vol. 44.

and also equivalent to a declaration of what is *true*. This is viewing law as having both a theological and a metaphysical origin. But this is not contradictory as it seems at first. Hinduism as depicted in the Upanishads knows no prophet like Moses or Mahomed. Hence the difference in theological origin between the Hindu view on one side and the Hebraic conception on the other. But the rishis of the Upanishads are seers of truth; therefore the truths which they come to know by intuitive processes are identical with the commands of the creator. Hence there is no inherent contradiction between these two conceptions of the origin of law, *viz.* theological and metaphysical. Another point to be noted in this connection is that the Upanishadic age generally represents a period of metaphysical thinking (though Philosophy began even in the Rig-Veda, e.g. the famous cosmogonic hymn beginning with "nor aught nor naught existed then").

A parallel(*a*) to this Hindu conception can be found in a speech of Demosthenes against Aristogeiton. The latter is charged by the former as a typical law-breaker, and in a speech the former unfolds the nature of the law. It is said that "the law is sacred in its origin being a gift of the Gods; that it is instituted by wise men(*b*)". The former portion of this quotation stands for theological origin in theory only, while the metaphysical aspect is supplied by

(*a*) See Vinogradoff, *Historical Jurisprudence*, Vol. II p. 18.

(*b*) Of course there are some other points in Demosthenes' speech which have no parallel in our quotation.

the "wise men", the rishis. The Stoic conception is similar, though not identical. We have seen that the Stoics confused between law in the scientific sense and law in the ethical or legal sense. Still the Stoic conception of law of reason has its parallel in our quotation, the only difference being that the Stoics depended on reason and logic for discovering law, while our rishis depended on "intuition"(a). Aristotle also conceived law as the rule of reason and hence of God.

The concept of law as depicted in the Upanishad from which we have quoted, implies that dharma is the will of the creator and also is equivalent to truth. It is a fine combination of objectivism and subjectivism. It is not correct to equate law and morality(b) on the strength of this quotation, nor is it true to say that this represents an ethical conception of law(c). All that is implied is simply that truth is law and law is truth. Here we are concerned with the ideal of truth and not directly with the ideal of good. It is better therefore to view it as a metaphysical conception of law rather than as an ethical one.

A conception of law whose origin is either divine or is to be found in the common reason of mankind or again where it is discovered by the peculiar "intuitive" faculty of our rishis and equated with truth

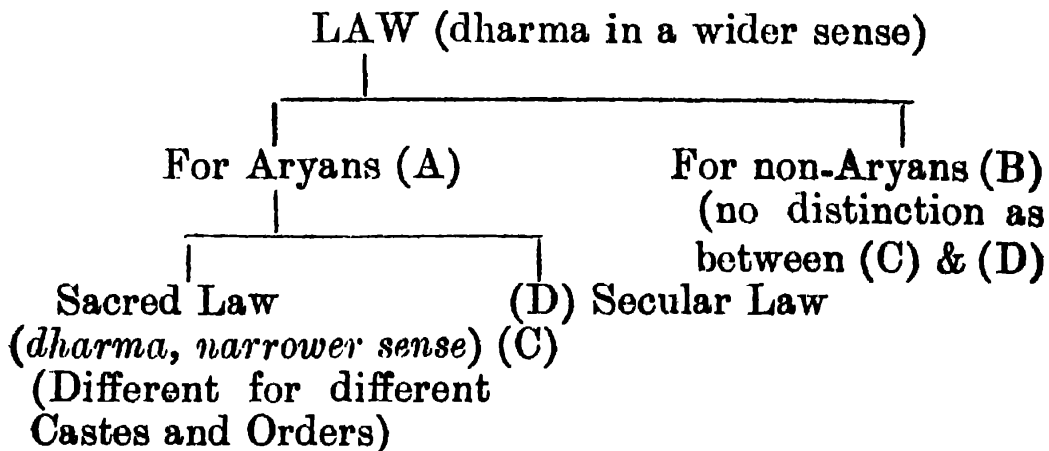
(a) Cicero's ethical teaching based on Stoic principles is intuitionist. He appeals to conscience. See Ritchie, *Natural Rights* pp. 35-36. Cicero's intuitionism is rather tinged with emotion and equity (Pulszky, *Theory of Law and Civil Society*).

(b) Ghoshal, *Hindu Political Theories* p. 55.

(c) Benoy Sarkar, *Political Institutions* etc. p. 208.

cannot *a priori* but be regarded as universal and immutable. Whether the Hindus had any such conception or not will be clear as we proceed.

At this stage (when we are entering the Sutra period) it would be better to sharply differentiate *sacred law* from *non-sacred law*. Strictly speaking, sacred law regulates only those actions of the Aryans which would lead to the *apurva* quality of the soul. Thus there is a two-fold qualification attached to the term "sacred". On the one hand, it excludes the non-Aryans, as such from the dominion of sacred law(a), and on the other, all sorts of conduct of the Aryans are not sought to be regulated by the sacred law. Theoretically the province of law may be divided thus :—



Much harm has been done by failing to distinguish between these departments of law. The scope of the Dharmasutras and the Dharmasastras generally(b) is confined to (C). This (C) department

(a) The Romans at first excluded the barbarians from the pale of Civil Law. *Jus Gentium* was the result of this policy of exclusion.

(b) Manu in his work (I, 118) often deals with (B) and (D). Compare Baudhayana I, 1, 2 (S. B. E. Vol. 14) and

of law comprises duties for the various varnas and asraṁs.

Now we are in a position to answer the query as to whether law is universal and immutable. The idea of law (whether of theological or metaphysical origin) being held in equal authority without reference to any particular class is discredited by the Sutra- and Smṛiti-writers who would formulate sacred law only for the Aryans. Then again within sacred law itself the idea of universality is absent because of the caste-system. The idea of immutability holds good, in theory at least, in the cases of laws for different castes, though in abnormal times the doctrine of swadharma is held in abeyance; but this idea is entirely absent in (B) and (D)(a). The fact is that the conception of law as found in the Brihadaranyaka is merely a metaphysical one. It is a fit conception for a forest-treatise without any realistic setting. The Stoic conception of law had a brilliant history(b),

Vasistha XIX, 7 (S. B. E. Vol. 14). Gautama XI, 20-21 (S. B. E. Vol. II). The *sreni*, *puga*, *gana*, *samgha dharma* etc., referred to by Manu, Yagnabalka and others illustrate (B) and (D) departments of law or dharma in the wider sense. See Ramesh Chandra Majumdar's *Corporate Life in Ancient India*.

(a) For a contrary view see Radhakamal Mukerjee's *Democracies in the East*, p. 127. The author has not distinguished the different departments of law and hence his error. Nevertheless he modifies his principles of universality and immutability by the opposite principle of relativity.

(b) The Stoic conception wielded tremendous influence over Roman Law, French Law, Grotian system of International Law and Rousseau's Politics culminating in French Revolution. See Maine, *Ancient Law* ch. IV and Bryce, *Studies in History and Jurisprudence* Vol. II pp. 120-171.

but this Hindu metaphysical conception wielded effective influence in the province of sacred law only.

Now let us pass on to the study of dharma *par excellence*, the subject matter of the Dharmasutras. All the Dharmasutras presuppose a divinely-ordained social structure known as varnasram(a), governed in many matters by the eternal law or dharma (in the restricted sense). But these twin concepts of dharma and varnasram, so closely related to each other that we cannot conceive of the one without the other, are mere empty concepts, so long as the danda of the king does not help them to manifest themselves in this world of senses.

All the authors of the Dharmasutras pay lip-homages to Veda as the real source of sacred law. To the Hindus the Veda stands for the word of God, it is the eternal embodiment of truth. But in reality the Vedic origin is of a juridical nature. Here we should be on our guard against confusing historical or material with formal or juridical origin. When the authors of the Dharmasutras refer to Veda as the sole source of law, they mean formal source. Ultimately, no doubt, the formal source is to be traced to the Being who willed the law, but proximately the juridical authority is the Veda.

When Apastamba(b) says : "And (the authority for the latter) the Vedas alone", he means juridical source. Again the same thing is implied by Gautama(c),

(a) The *Chandogya Upanishad* (II, 23, 1 and 2 ; S. B. E. Vol. 1) recounts three branches of asram law.

(b) I. 1, 1, 3 (S. B. E. Vol. II).

(c) I, 1 (S. B. E. Vol. II).

when he lays down that "the Veda is the source of the sacred law". Vasistha's(a) authority for sacred law is also juridical when he says that "the sacred law has been settled by the revealed texts". Similar is the case with Baudhayan(b).

But the material sources of the sacred law are to be found in the traditions(c) and practices(d) of men learned in the Vedas and also in the decisions(e) of a body of learned men formed to settle the law. The traditions of the learned and the practices of the *sistas* are only authoritative, because they are supposed to be based on the Veda. Just as Austin would not call any and every rule of conduct a positive law, unless it derives its authority from the legal sovereign—the juridical source of law, so the practices of the *sistas* and the traditions of the learned would not be included in the category of sacred law unless they get their formal imprimatur from the Veda. But the Vedas are not the material sources as well, so how to know whether the traditions and practices are in accordance with the Veda. The theory says that the rules of conduct laid down or followed by men, "who have been properly obedient (to their teachers), who are aged, of subdued senses, neither given to avarice, nor hypocrites", or who are free

(a) I, 4 (S. B. E. Vol. 14).

(b) I, 1, 1, 1 (S. B. E. Vol. 14). Pramathanath Banerjee has failed to distinguish the formal from the material sources. See *Pub. Adm. in Ancient India* pp. 132-4.

(c) Gaut. I, 2; Vasistha I, 4; Baud, I, 1, 1, 3.

(d) Gaut. I, 2; Vasistha I, 5; Baud, I, 1, 1, 4.

(e) Apas. I, 1, 1, 1; Gaut. XVIII, 48; Vasistha III, 7; Baud. I, 1, 1, 7.

from pride, envy, arrogance, anger, know the Vedas and also how to draw inferences, are sacred laws. Here we have got a parallel case. As the metaphysical conception of the law of nature acquired a local habitation and name when Cicero sought to equate it with the rules of conduct deduced by the conscience of men not yet morally depraved, so the barren source of the Veda was fertilized by the authors of the Dharmasutras, when they in their turn laid down that the traditions and rules of conduct followed by the sistas or sages were *ipso facto* the *vidhis* of the Vedas. Just as the lost code of nature was supposed to have been found in *Jus Gentium*, so we might say that the lost *vidhis* of the Vedas (really they were not lost: they never existed) were re-incarnate in the *silas* (practices) of the sistas. From the metaphysical conception of law as truth (Brih. Up.) we have come to the ethical conception of law as morality. The ideal of truth has at last given birth to the ideal of goodness in conduct.

It is all right so far as the theory goes. But what would happen if the recollections of the sages be faint and if the practices and recollections of these men differ from one another, as is extremely natural. It was a dangerous principle which the authors of the Dharmasutras enunciated when they bestowed this authority of declaring the sacred law (*i.e.*, the practices of the sages formed the material sources of sacred law) upon any and every Brahmin who was a *sista*(*a*). Any emphasis on individual reason,

(a) For the definition of *sista* see Baud. I, 1, 1, 5-6.

or for the matter of that, individual "intuition", is bound to put a premium on anarchy in realms of thought and action. Law as the result of eternal will implies at the same time a conception of order and unity, but when individual reason attempts to find out the eternal rules of sacred law, the result will surely be all chaos and confusion, unless there is something else to hold in check the atomistic tendencies of individual reason.

Now the question is, what is this 'something else' which will bring order out of chaos and unity out of diversity. The solution lay in the Hindu institution of *Parishad*. These Parishads(*a*) were assemblies of three, five or ten men versed in the Veda, who were constituted to settle what is sacred law and what is not. Gautama, Vasistha and Baudhayan, all speak of Parishad, and Apastamba means the same thing when he says that 'the authority (for these duties) is the agreement of those who know the law'. Thus we come back to the intensely modern conception of law being founded on agreement and recognition. The sacred law was agreed to by the sages of the Parishad and recognised as such by the people, and the danda of the king was there to enforce it, so far as the king's danda can enforce it. The Parishad was, so to say, the hyphen that joined and co-ordinated the material and the juridical sources of sacred law.

The conception of sacred law as founded on agreement is one of the many peculiarities of the

(a) For a short account of these Parishads, see Naresh Sen Gupta's *Sources of Law and Society in Ancient India*, pp. 44-48.

pluralistic or multicellular polity of the Hindus. This pluralism in Hindu polity, so long as this pluralism was real, was mainly responsible for the absence of any mechanical conception of law as a fiat imposed by the king. (Exceptions will be noted later on)

In Greece, "in regard to sacral institutions and in all cases where religion was concerned, the influence of traditional usage asserted itself emphatically." And this traditional usage was authoritatively interpreted for popular benefit by professional representatives of legal lore, of which inscriptions record three classes. Of these one was a consultative board for matters connected with Eleusinian Mysteries. Mention is also made in Greece of a college of magistrates who declared or stated the law to the people(a). Again, the theory of law being founded on agreement as enunciated by Apastamba has its counterpart in that of Demosthenes, when the latter in his speech(b) against Aristogeiton says that law is sacred in its origin, being a gift of the gods; that it is instituted by wise men; \* \* \* \* and finally that it is a compact entered into by the members of the City(c).

The concept of law as developed in the Dharma-sutras also implies the connected concept of justice.

(a) Vinogradoff, *Historical Jurisprudence* Vol. II, pp. 74-76.

(b) Ibid. p. 18.

(c) Here the conception of agreement is posited of a monistic State. But it should be remembered that the Greek monistic State is a City-State and not a Country-State.

The doctrine of varnasram or the division of the people into castes and orders represents a conception of social justice—eternally ordained no doubt—but organized by the danda of the king. The sacred law in fixing the duties of the various classes and asking each individual to fulfil his swadharma is only attacking the problem of justice from the standpoint of what is known to us as distributive justice. Considering the fact that the concept varnasram must have preceded the Sutra works which were composed in about 5th or 6th century B. C. (Jolly quoted in Majumdar's Intro. to 'Corporate Life'), we may be permitted to question the originality of the identical Platonic<sup>(a)</sup> conception of distributive justice. The conception of corrective justice has its Hindu analogue in penances, in the apurva theory and in the administration of sacred law by the king with the help of learned Brahmin judges. The State of the Sutra-period was thus the organizer of distributive and the administrator of corrective justice<sup>(b)</sup>.

The *theory* of Parishad and the *fact* of pluralism point to the conclusion, that in the Sutra-period the fundamental background on which sacred law rested, was agreement ; nevertheless, various kinds of sanctions<sup>(c)</sup> were attached to the rules of sacred law.

(a) The three elements according to Plato are the appetitive, spirited and rational, corresponding roughly to our Vaisya, Khattriya and Brahmin.

(b) See Muirhead and Hetherington, *Social Purpose*, p. 230.

(c) This subject requires separate treatment. Here a bare outline is given.

Ultimately, sacred law is the will of God, and hence a certain sanction attaches to the sacred law. This may be called the theological sanction. Again, the theory of *apurva*, which lies at the root of dharma *par excellence*, supplies the second kind of sanction. This sanction, so to say, is inherent in the action itself and is automatic, and is connected with the doctrine of *karma*. Since it is intimately related to metaphysical theories, it is better to designate it as metaphysical sanction. Finally, there is the sanction of the king's danda, even in cases of sacred law. This we may call as the positive sanction. What Bentham(a) calls political sanction has its prototype in the king's danda; his religious sanction is equivalent to our theological and metaphysical sanctions, and his moral sanction has its counterpart in Apastamba, when the latter, a pronounced believer in the relativity of virtue and sin, lays down in a remarkable passage, that "virtue and sin do not go about and say, 'Here we are', nor do gods, Gandharvas or Manes say (to men), 'This is virtue, this is sin'. But that is virtue, the practice of which wise men of the three twice-born castes praise; what they blame is sin(b)". What we have termed metaphysical sanction will

(a) Bentham, *Principles of Morals and Legislation*, ch. III.

(b) I. 7. 20, 6-7. Sukra has got a parallel passage (*Sacred Books of the Hindus*, Vol. XIII, V, 70-72) where he says that 'sins become virtues by a change of circumstances. That is virtue which is applauded by the many, that is vice which is cried down by all'. Public opinion as the standard; according to Sukra, is the opinion of "compact majority", as opposed to that of the 'cultured minority' of Apastamba. These are rudiments of evolutionary ethics no doubt.

probably be characterised by Mill(a) as a kind of external sanction; but still the germ of what Mill calls the internal sanction of conscience may be found in our metaphysical sanction. The complex apparatus of human motives is nowhere better illustrated than when we come to examine the nature of sanctions.

We have so far directed our attention to the concept of sacred law; but in the preceding classification it has been shown that sacred law by itself does not exhaust the whole province of law. There are two other provinces of law which we have designated as (B) and (D) departments of law. Of the two, the former is concerned with the customs of the non-Aryans, while (D) represents those rules of social conduct (for the Aryans) which do not properly fall within the scope of the Dharmasutras. From the standpoint of legal theory these two departments seem to be identical.

Custom was the material source of this law and agreement or recognition was, so to say, the juridical source. The Sutra period clearly gives us to understand that the Aryan polity visualized by the Sutra-writers was not monistic: in fact, every individual, because of his many-sidedness, was bound to come into relation with several groups. Thus, as a money-lender, he may be a member of an economic corporation; as a man interested in observing rules of marriage and diet, he is a member of a social corporation *viz.* caste, and again, as a villager, is a member of a small territorial corporation like the

(a) Mill, *Utilitarianism*, ch. III.

village community. Unlike the idealized Greek City-State, which penetrated every citizen in all his interests, the Hindu Country-State was pluralistic, and hence almost all the social relations of the individuals were absorbed by these corporations(*a*). The Hindu polity in the Sutra period was rather an association of individuals, already united in diverse groups, each with its own common life, in a more comprehensive group with the king at the head of the co-ordinating group. The monistic conception of the Greek State was realistic, because it was a City-State; and the pluralistic conception of the Hindu State was also realistic, because it was a Country-State.

It is therefore evident that in a pluralistic polity as that conceived in the Dharmasutras, the cultivators, traders, herdsman, money-lenders and artisans have authority to lay down rules for their respective classes (*b*). It is not clear whether non-Aryans are included in this enumeration by Gautama; but if they are not, surely the customs of the non-Aryans are referred to when Vasistha(*c*) speaks of laws opposed to those of Aryavarta. Kautilya(*d*) at least declares artisanship to be the profession of the Sudras and it may be presumed that custom was the source of law among the non-Aryans(*e*).

(*a*) Compare Gierke and Maitland's ideas about Group-persons. For functional Groups and Guild Socialism, see Cole's *Social Theory*; for the rights of ecclesiastical Groups see Figgis, *Churches in the Modern State*. The ablest exponent of the Group-theory of sovereignty is Laski.

(*b*) Gautama, XI, 21 (S.B.E. Vol. II).

(*c*) I, 11. (*d*) *Arthasastra* I, 3. (*e*) In later ages this is expressly recognized. Manu mentions Pashanda dharma.

A polity such as has been conceived by the authors of the Dharmasutras leaves almost no room for a king as legislator : he is mainly an executive sovereign ; so much so that he is sometimes depicted as the executor of decisions arrived at by the above-mentioned corporations.

Thus in the Sutra period the king is not the originator(*a*) of any law, (C), (D) or (B). The juridical source of (C) or *dharma par excellence* is ultimately theological but proximately metaphysical ; metaphysical in this sense, that sacred law as such must have a formal Vedic origin. The material source of (C) was the customs of the *sistas*, while the fundamental features of the sacred law were the theory of *Parishad* and the fact of agreement. The material source of the (D) department of law was the customs and ordinances made by the corporate bodies(*b*), and the juridical source *seems* to be the corporations themselves. In the (B) department, custom is obviously the material source, while the juridical source is not clear. One thing is common to all these three departments of law : the king's *danda* is ever ready to enforce law whether it belongs to B, C, or D. The

I,118. *Pashandas* are for all practical purposes non-Aryans.

(*a*) Duguit maintains (*Law in the Modern State*) that the State is not the creator but the enforcing agent of law. (For the Buddhist-Sangha Buddha was the only law-maker even after his death ; others might expound the laws, but could not make new laws. It reminds us of the sacred law of the Hindus).

(*b*) The guilds had also in the Sutra period some executive and judicial authority. See Ramesh Majumdar, *Corporate Life* etc. pp. 24-25 (2nd edition).

institution of kingship was *sui generis* and the sacred dharma of the king was to enforce even the non-sacred rules comprised under (B) and (D)(a).

A query is eminently reasonable here as to why the king of the Dharmasutras is not a law-maker. Apart from the difficulties imposed by the structure of society, the very conception of dharma was such as to preclude the idea of king being a dharma-enacter. Law, if sacred, was eternal, and, if secular, (B, D) was a thing rather of organic growth ; it was expressive of the social culture in its widest sense. Therefore dharma cannot be formulated by the king for the whole society, because then it would be too much mechanical. Law-making by a constituted sovereign can be mechanical and organic at the same time when the form of government is a democracy, and when legislation embraces the whole social life. Therefore, the criticism, that the old codes "mingled up religious, civil and merely moral ordinances"(b), is really pointless, because dharma was in olden times co-extensive with the entire life of society. So it is now when the State is every day assuming all sorts of functions. In both these cases, law is a thing of organic growth, a product of national life ; the only difference being that in the one case it is a thing of conscious regulation, in the other it is characterised by a half-conscious process.

The transition from the Sutra period in which law is above the king, to the period represented by the

(a) Naresh Sen Gupta, *Sources of Law and Society in Ancient India* p. 92.

(b) Maine, *Ancient Law* ch. I.

Arthasastra of Kautilya where the king is the juridical source of all law, is well illustrated by the story heard by Hiuen Tsang about Bimbisara. It is said that in order to prevent fires which had become rather common, Bimbisara passed a law to the effect, that any man in whose house a fire would break out, would be banished. Now it so happened, that one day a fire actually broke out in the palace itself. Bimbisara told his ministers that he would banish himself, because he meant to observe the laws of the country(a). This conception of law is transitional in the sense that from the Dharmasutras it borrows the idea that law is above the king, while from the Arthasastra is taken the conception of the king being the juridical source of law.

The Kautilyan description of dharma, vyabahara, charitra and rajasasana as constituting the "four legs of Law" can only be interpreted as illustrating the material sources of law, because in a conflict between rajasasana and the three other sources, the former is to prevail(b). Dharmanyaya or nyaya(c) in this connection evidently means the equitable reason or simply the reason of the king; and this reason of the king which manifests itself in rajasasana is the juridical source. The Kautilyan conception of law cannot be sacred in its juridical origin because of his

(a) Beal, *Buddhist Records of the Western World* Vol. II, Bk. IX pp.165-6; see another story in the same Vol. p.87.

(b) *Arthasastra*, III, 1.

(c) Sukra also uses *nyaya* in the same sense. See *Sukraniti* (S. B. H. Vol. 13) IV-V, 106. See *Calcutta Weekly Notes*, Vol. 15 pp. cclxxiv-cclxxvii; ccxci-ccxciv.

political ethics which does not scruple to prostitute religious institutions for purposes of statecraft. Apart from this, there were other factors, external in their nature, which exercised their influence on the Kautilyan conception of law. The agnosticism of the Buddhists did much to destroy the theory of sacred law and its origin, while the *samayas* or resolutions passed by the republican ganas served to bring before Kautilya the real juridical origin of law. Again, the description of some positive laws in the Arthasastra, which have their parallel in Megasthenes, points to the fact that Maurjya kings were law-making sovereigns(*a*). The municipality of Pataliputra was a law-making and a law-enforcing institution(*b*). This realistic environment certainly encouraged Kautilya in the formulation of his theory, wherein *rajasasana* is depicted as the real juridical source. And of course Kautilya is ever ready with the king's *danda* to enforce the law for which the sanctions are fines and imprisonment(*c*).

The Kautilyan conception of law as *rajasasana* or the equitable reason of the king has influenced to a great extent the Manava conception of law. The Manusamhita has been placed by Buhler in the period between the 2nd century B. C. and the 2nd century A. D., while the Arthasastra is a product of the 4th century B. C. Taking into account the fact

(a) Some of Asoka's Edicts are clearly of the nature of positive laws (e. g. laws preventing animal slaughter).

(b) *Indian Antiquary*, 1905 pp. 51-2.

(c) See for example, *Artha* IV, 9. But Willoughby would say that "the ultimate sanction of all law was supposed to be found in the sacred writings". *Nature of the State* p. 12.

that Manusamhita represents an attempt 'to graft a more or less considerable Arthasastra stock upon a slender canonical stem derived from the Dharmasutras,' it will be clear that the Manava conception of law oscillates between the Arthasastric and the Dharmasutraic ones. Or rather it would be truer to say that Manu, following the traditions of the authors of the Dharmasutras conceived law either as sacred or as secular, and ascribed to the latter an origin wholly distinct from that of the former.

After emphasising the divine origin of kingship(a) and the need of obedience on the part of the subject, our author immediately(b) makes a remarkable contribution to the theory of law, which invests the king with the power of law-making. It says: "Let no man therefore transgress *that law which the king decrees* with respect to his favourites, nor his orders which inflict pain on those in disfavour." This conception of law is typical of the school of Arthasastra, and in a book on Dharmasastra it is remarkable. Probably three factors combined to produce such a conception of law. Of these factors two are realistic, while the third is theoretical, though it is possible that the theory has been largely influenced by, or rather deliberately put forward to explain, certain vital changes in the body politic. The conception of king as law-maker is not unpalatable when the king is a deity in

(a) *Manu* VII, 4-8; see also V, 96-97. For a parallel passage see *Sukraniti*, I, 141-3. Sukra mentions the name of Manu in several places of which that at the end of ch. IV is significant.

(b) VII, 13 (S.B.E. Vol. 25).

human form and hence should not be despised(a). In Manu's time, kingship seems to have been gaining much ground at the expense of the various corporations, and this is why the judicial functions of the king have become so varied and complex. The corporate bodies *viz.* *srenis*, *gramas* etc., which got a new lease of life owing to their contact with the Buddhistic *samghas*, were losing their vitality and the king was gradually usurping more and more functions. In such a state of society, to speak of law as being made by the king is not at variance with realities. Again, the Manusamhita represents a stage of Hindu revival against Buddhistic onslaught. Whether it was composed in the time of Pushyamitra or codified at the instance of Samudragupta, the fact is, that the theistic origin of kingship was an anti-Buddhistic doctrine(b), and deliberately propounded to arm the Hindu kings with law-making functions and thus to carry on a crusade against the Buddhistic renovations. As the great Asoka had before interfered with Hindu social and religious customs (prohibition of animal sacrifice) by means of *rajasasanas*, so it would not be wrong if we presume that Manu deliberately made the king a law-making sovereign in order to root out the un-Hindu customs introduced by the Buddhists, with the aid of royal decrees. It was a remarkable innovation, justified no doubt by the exigencies of the times.

But probably Manu was himself taken aback at

(a) In England the theory of divine right was developed in its extreme form by Robert Filmer in his *Patriarcha*.

(b) In the *Jatakas* kings are held responsible to the people and when occasion demands put to death.

the great demon he has helped to create. He immediately sought to modify his theory, not as Jayaswal has explained, by bringing the king under law(*a*),—this is not modification but nullification—but by conceiving law as composed of sacred and secular law. And herein we see another example of the skilful blending of Arthasastric and Dharmasutraic thought.

In VII, 13, Manu invests the king with law-making functions, but in the immediately following sloka(*b*), dharma is said to be the son and creation of the Lord. This dharma is the sacred law of the Dharmasutras as opposed to the non-sacred law, of which the king is the juridical source(*c*). Thus we get at the conclusion that *dharma par excellence* is attributed to the Lord, while the king is the source of residuary laws(*d*). This is how we can reconcile the two slokas one following the other, and not by taking the latter sloka as superseding and negating the former one as Jayaswal does. Even in the sphere of sacred law, the origin of which has been attributed to the Lord, it is not clear that the law is supreme, though according to Manu kings are liable to be

(*a*) *Hindu Polity* part II, p. 58.

(*b*) VII, 14 (compare the translations of S. B. E. and Jayaswal, *ibid*, p. 57).

(*c*) Manu enumerates various sources of law. Obviously they are material sources. I, 118 ; II, 6-18.

(*d*) For a contrary view see Jayaswal, *Hindu Polity* part II, p. 152 where the author says that according to Manu the king could not make new laws. But see Medhātithi's explanation of Manu VII, 13, quoted in footnote S.B.E. Vol. 25, which substantially supports our contention.

defined(a). Both dharma (sacred law) and danda(b) (power) according to Manu have a divine origin and it has been said that danda in *abstract* is the real king and is also the trustee (prativu) of dharma(c). Therefore kingship, looked at from the standpoint of the abstract principle of power, is not subordinate to sacred law, even in the sphere of sacred law, as Jayaswal wants to make out. It is co-ordinate with dharma. In other words, *kings* are subordinate to dharma, but *kingship* i.e. danda, is co-ordinate with and even trustee of *dharma par excellence*.

The origin of Manu's code has a certain resemblance to that of Jewish law; the whole code in its complete form was handed by the Divine Being to Manu, who in his turn asks Bhrigu to recite the code. Thus, in a sense, the whole code has a theological origin.

But there is a popular tradition in India which ascribes all law to an original legislator, a Manu. The interpretation which has been given of this legendary tradition of India by Arabindo Ghose(d), is extremely ingenious, and it is difficult to resist the temptation of quoting the relevant passage. The author says that 'Manu is more a symbol than anything else. His name means man, the mental being. He is the divine legislator, the mental demi-God in

(a) VIII, 336.

(b) Something like Bodin's *majestas*.

(c) VII, 17.

(d) *Ideal of Human Unity* p. 227. (This book is extremely suggestive and requires to be more widely known, but the printing, paper and general get-up stand in the way)

humanity who fixes the lines upon which the race or people has to govern its evolution. In the *Purana*(*a*), he or his sons are said to reign in subtle earths or worlds, or as we may say, they reign in the larger mentality which to us is subconscious and from there have power to determine the lines of development of the conscious life of man. His law is the *Manava-dharmasastra*, the science of the law of conduct of the mental or human being, and we may think of the law of any human society as being the conscious evolution of the type and lines which its *Manu* has fixed for it'. Expressed in Stoic terminology, it involves the assumption of an eternal standard of conduct fixed by *Brahma*, the Universal Reason. To mankind, is declared this law by a *Manu*, typifying the highest expression of individual reason: the bridge between the ordinary human reason and the Universal Reason being supplied by the proverbial *Manu*.

From the standpoint of the conception of law, the *Rajadharmanusasana* section of the *Santiparva* of the *Mahabharat*(*b*) probably represents an earlier stratum of thought over which the *Arthasastric* influence is very negligible. The author first(*c*) gives a vivid and striking description of the nature of *danda* and speaks about the intimate connection which exists

(a) In the *Mahabharat*, *Santi* (R. P.) sec. 67, we find *Manu* as the first king appointed by *Brahma*. See also *Kaut. Artha* I, 13.

(b) It is placed by some between 4th century B. C. and 4th century A. D.

(c) *Santiparva* (R. P.) sec. 121, sl. 8 and after (tr. by P. C. Roy).

between danda and vyabahara and ultimately equates the two. The relation between vyabahara and morality, or in other words, between law and morality, is identical to that of Narayan and his wife Laksmi, for Narayan is danda and hence vyabahara and Laksmi is dharma or morality. In the same chapter, Brahmaic i. e. divine origin is attributed to danda.

In this chapter, we get a three-fold classification of vyabahara or law, of which the ultimate origin is divine. The first class deals with ordinary civil and criminal law. Evidence plays a very important part in this class of law where justice is administered and punishment meted out by the king who believes in either of the two litigant parties. This class of law is really Vedic and Brahmaic in origin, though it is the king who enforces these rules. The second class of law is sacred law *par excellence* of which the 'Veda is the soul and the cause'. It includes the rules of morality and the various duties, and these rules of conduct are as binding upon the virtuous people as the ordinary civil and criminal law administered by the dandadhara(a). There is a sanction in each of these two kinds of law: a sanction which is relative to the ends in view. The third class of law is connected with family customs, but these customs must be consistent with the sacred Scriptures. All these rules of conduct are productive of good(b). It is evident that we again come upon the old classification of law into secular and 'sacred :

(a) *Ibid*, sl. 54.

(b) Sls. 50, 54, 55.

the former being equated with the first class and the latter embracing the two other classes. But ultimately there is no distinction between these classes, since the first and last classes converge towards the second(a). When we have realised this, we can draw a logical nexus between danda, vyabahara, Veda, rules of morality and lastly righteousness(b). The chain of reasoning runs thus : without *danda* there is no *vyabahara* ; without *vyabahara* no *Veda* ; without *Veda* no rules of *morality* and where morality is absent *righteousness* is not possible and consequently the idea of *Brahman* disappears(c). The cycle is complete when it is said that Brahman himself, for the protection of the world and for establishing the duties of different individuals, created danda(d).

In this rapid survey of early(e) Hindu speculations about the nature of law, it must have been noticed that those speculations had been much affected by the theory of *varnasram* on the one hand and by the fact of *pluralism* (viz. economic, social and territorial corporations) coupled with the predominance of *custom and achara* on the other.

(a) In one place Bhisma is made to observe that usage or *achara* is the root of all dharma (Quoted by Mandlik in his *Mayukha*, etc. Introduction p. iii) Compare *Yagnabalka* I, 156, *Sacred Books of the Hindus* Vol. 21.

(b) Sl. 57.

(c) *Ibid.*

(d) Sl. 49.

(e) We exclude Yagnabalka, Narada and Sukra, For Narada and Sukra, see my first and last articles.