Art. VIII.—*Hindû Law at Madras.* By J. H. Nelson, M.A., Madras Civil Service.

Several books lately published at Madras show that in the opinion of their authors there is something very wrong in the mode in which suits between so-called Hindûs, involving questions of so-called Hindû law, are now dealt with by the High Court of Judicature at Madras and the courts subordinate thereto. And a perusal of some of the reports of High Courts in other parts of India will lead many to suppose that a not inconsiderable part of the law made by those courts, not by the legislature, for the benefit of so-called Hindûs, is not less open to objection than are many of the doctrines promulgated in Madras. The purpose of this paper is to attempt to show that, whereas the High Court of Judicature at Madras professes, and doubtless desires to keep up, as required by the Civil Courts Act, the laws and customs of the tribes and castes subjected to its jurisdiction, it in fact imposes on them laws of its own making, and which until quite recently have not had force in any part of India. To this end I shall endeavour to prove, as fully as may be possible in the little space at my command, (1) that in ancient times law, in any ordinary acceptation of the term, never was administered to Hindûs by Hindûs or others; (2) that if law was administered to Hindûs in ancient times, at all events it never was administered in the kingdoms lying south of the Vindhya mountains; and (3) that if it was, it was not the law contained in the *Mitâxarâ*, and other books of the kind.

With regard to the first of these propositions, it will not be necessary here to define the term '*law*,' or to consider the various opinions according to which '*law*' is the command of a Sovereign, or the expression of a nation's consciousness of what is expedient, or something else; it will be sufficient for my purpose to state that I mean by law no more than an aggregate of rules of conduct that courts of justice, of what-

ever kind, habitually recognize and enforce. And here at the threshold of the inquiry I will venture to ask if any one of the numerous Sanskrit words given in dictionaries as meaning '*law*' can be said to be equivalent to such an aggregate? Can any Sanskrit word be held to convey, even approximately, this idea so familiar to Western minds? What we render into English the '*Institutes*' or '*Law*' or '*Code*' of Manu is the *dharma-śâstra*, but *dharma*, whatever else it may mean, certainly appears not to mean anything like 'law' in the sense in which I am using it. Thus, according to Haradatta, quoted by Professor Max Müller, "*dharma* (virtue) is the quality of the individual self, which arises from action, leads to happiness and final beatitude, and is called *apûrva* (supernatural)." And the latter authority tells us that *dharma-śâstras* consist mainly of *âchâras*, laws, manners, and customs, which he explains thus: "All the duties which are to be performed by the individual on his own behalf. These duties refer to the different castes, and to the respective occupations of each." And Professor Weber suggests that these *śâstras* may have been committed to writing in order to give caste distinctions which were rejected by Buddhism, and generally in order to protect Brahmanism. Then if we turn to the book ascribed to *Yâjnavalkya*, we find that a gift, properly made, gives the idea of law. And that "the *śruti*, the *smṛiti*, the practice of good men, what seems good to one's self, and a desire maturely considered—these are declared to be the root of Law." Again, it tells us that "whatever is declared by a person who has in an eminent degree knowledge of the soul in its relations, the same should be [held as] Law." Also that "if two texts of the Law be opposed to each other, one argument founded on usage is of force; but the *dharma-śâstra* is of greater force than the *artha-śâstra*. This is a settled rule." Now, what is *artha?* Dr. Roer says it is 'ethics.' Weber makes it to be 'technical arts.' And in Julien's Buddhist Pilgrims the word is declared to be a technical term meaning 'the distinct knowledge of sense.' Yet *artha* is Law inferior in authority only to *dharma!*

So much for the name and idea. Let us next look at the works that are commonly supposed to contain the Law of the Hindûs. The first thing to be remarked about them is, that from the time of Megasthenes to that of Sir William Jones, few persons, if any, appear to have noticed their existence. The observant Greek envoy, who lived for years at the Court of Chandragupta, and wrote the earliest and most valuable description of the Indians that has come down to us from ancient times, cannot have seen or heard of the "Laws of Manu." Not only does he expressly say that the Indians "use unwritten laws," he also describes a state of things wholly inconsistent with the idea that justice was administered to the people by judges in accordance with the provisions of written laws like those attributed to Manu, or indeed with the idea that the people principally guided themselves by any such laws. For he tells us, amongst other things, that the life of the Indians is very frugal, simple, and orderly, marked by abstention from fraud. "They do not know official writings, but manage all their affairs from memory. . . . . And in the matter of laws and pecuniary transactions, their simplicity is proved by the fact that they have not many forms of action; for they have not actions of pledge or of deposit. Nor do they feel the want of attesting witnesses or seals, but they give credit at their own proper risk." In another fragment he says: "The Indians neither lend money at interest nor so borrow it. But it is not customary for an Indian either to wrong or to be wronged. And hence it is, they are not in the habit of making written agreements or deposits." In yet another fragment he says: "Amongst the Indians, if any man is defrauded of money lent upon interest or deposit, there is no remedy by suit; but he who trusted blames himself." With regard to criminal justice, he tells us that: "He who maims another, not only suffers a like maiming himself, he also has his hand cut off;" and "he who has injured an artisan in the hand or eye is punished with death. And the King orders the worst criminal to be shaved, deeming this to be the deepest disgrace of all." He also states that no Indian

is or keeps a slave, it being an ancient law that all persons should be on an equality in all things; that a woman who kills a king when found drunk, is rewarded by having intercourse with his successor, his son; and that men buy a number of wives from their wives' parents, giving a yoke of oxen for each.

When we consider these matters, and what Megasthenes tells us of the people's habits in respect to eating and drinking, and of the King's body-guard of Amazons, and particularly the fact that the writer divides the people, not into the four classes of Manu, but into seven classes quite different from those four, it becomes very difficult, it seems to me, to believe that the Code of Manu gives a picture even approximately correct of the state of Indian society in the fourth century before Christ. Still less can we believe that it contains the laws then observed by that society.

Nearchus confirms Megasthenes' statement to the effect that the Indians had no written laws, whilst he knew that they possessed the art of writing. Next we come to the Chinese pilgrims, Fah Hian and Hiouen Thsang, of the fifth and seventh centuries of our era respectively. The former of these affirms that in the happy *Madhya-dêśa*, the headquarters of Hindûism, the people "know neither registers of the population, nor magistrates, nor laws. . . . . To govern them the King requires not the apparatus of punishments. If any one be guilty of a crime, he is simply mulcted in money, and in this they are guided by the lightness or the gravity of his offence. Even when by relapse a malefactor commits a crime, they restrict themselves to cutting off his right hand, without doing him any further harm." Hiouen Thsang, though he tells us much about the life and customs of the Indians of his time, appears to know nothing of the existence amongst them of written laws. On the contrary, his description of their extraordinary simplicity of life, and his remarks on the mildness of the administration of the *Madhya-dêśa*, make it highly probable that in his time the *Śramaṇas* and Brahmans studied only religious and philosophical works, and that the only justice administered was

criminal justice of a most fantastic and arbitrary character. When we come to the European travellers, Bernier, Tavernier, etc., we find that they say nothing of laws, written or unwritten. And Anquetil Duperron, who did his utmost to discover evidence of the fact that law was known to and observed by Hindûs, was fain to admit that the production of Halhed's Gentoo Code was a boon to India, however unphilosophically and imperfectly it might have been put together. On the other hand, as will presently appear, there is good direct evidence going to show that before the establishment of British courts of justice the Hindûs did not make use of laws, written or unwritten.

Next we must remember that the *dharma-śâstras*, as we now have them, appear to be metrical treatises based, mediately or immediately, on *Gṛihya-sûtras* possessed and handed down from father to son by different families. Max Müller tells us that the earlier Âryan families had each its own *śâkhâ* or recension of the *Veda*, each its own *smṛiti* or tradition, and probably each its own heroes, and perhaps even its own deities. And in some cases it has become possible to know to what family or group of families, or to what *charaṇa* or sect, a particular *sûtra* belonged. Thus, for example, it seems to be clear that what we call the "Code of Manu" is nothing more than a fragment of a comparatively modern and perhaps often recast metrical redaction of the *dharma-sûtra* adopted by the *Mânavas*, who constituted a division of a school professing the *Taittirîya* or "Black Yajus"; whilst the work attributed to Yâjnavalkya is to be traced back to the possession of followers of the schismatic "White Yajus." And as appears from a *Vârttika* to Pân. iv. 3, 120, *Kâṭhaka* may be used, not only for the sacred traditions, but also for the laws of the *Kaṭhas*. Now, not only was it right and proper for each family to follow its own *śâkhâ* or recension of the Veda, but in the commentary to *Pâraskara's Gṛihya-sûtra* "Vasistha declares that it is wrong to follow the rules of another *śâkhâ*. . . . . Whosoever leaves the law of his *śâkhâ*, and adopts that of another, he sinks into blind darkness, having degraded a sacred Ṛishi."

This being so, the question naturally arises, whence comes the general belief now obtaining in India, that Hindûs, of whatever family or sect, all join in observing a particular body of laws?

In the next place, it is to be remembered that when—perhaps in the fourth century before Christ—the Brahmans had finally achieved supremacy over the other classes, and established their peculiar system on a firm basis, their actual dominion extended over but a very small part of India. On the banks of the Indus, and to the east of it, were the *Vrâtyas*, the conservative Âryans who had declined to leave their old home and follow their brethren to the banks of the Ganges. This large aggregate of tribes was essentially non-Brahmanic, had its own *yaudhas* or warriors, its own *arhants* or teachers, and was despised as heretic. On the north were various barbarous tribes inhabiting the bases of the Himalayas. Towards the east the Brahmans were kept back by the Ganges. And in the south were the invincible Mahrattas, and the Vindhya mountains, then a practically insurmountable barrier. Even within these comparatively narrow limits the Brahmans were not all-powerful; the *Madhya-dêśa*, or country between the Jumna, and probably the Ganges, was the only part of India in which they exercised unbounded influence. Max Müller observes that: "As to the customs of countries and villages, there can be no doubt that in many cases they were not only not founded upon Brahmanic authority, but frequently decidedly against it. The Brahmanic law, however, is obliged to recognize and allow these customs, with the general reservation that they must not be in open opposition to the law." Manu's Code, however, goes further than this, and says in unqualified terms that the conqueror "must respect the deities and their virtuous priests . . . . and establish the laws of the conquered nation as declared." And similarly Yâjnavalkya's Code says: "Of a newly subjugated territory, the monarch shall preserve the social and religious usages, also the judicial system and the state of classes as they already obtain." It cannot be doubted, therefore, that as the Âryans pushed their way eastwards, and

extended their establishments north and south, they permitted the conquered tribes to retain each its own usages and system, and did not attempt to thrust upon them the Brahmanic institutions, which indeed were intended for, and suited to, the Âryan twice-born classes alone.

Hardly had Brahmanism reached its full proportions when Jainism and Buddhism sprang into ascendancy, and forthwith Jainist and Buddhist *śâstras* supplanted those of the ancient faith, and may have guided the magistrate in some measure in deciding causes. But the edicts of Aśoka seem to show that under the Buddhists the encouragement of devotion and morality was held to be of incomparably greater importance than the administration of justice, civil or criminal, and it is difficult to believe that that enthusiast found time for the consideration of this latter. It is difficult to say when Brahmanism began to revive in India proper. Apparently Buddhism was vigorous in Fah Hian's time. And when Hiouen Thsang travelled through India in the first half of the seventh century, he seems to have found Buddhism still the dominant religion of the majority of the people, though he everywhere saw reason to bewail the decay of his beloved faith; and he gives an account of the manners and customs of the people, from which we must infer, it seems to me, that what justice there was, was administered in accordance with Buddhistic ideas. In later times, successive invasions and conquests of India must have made it impossible for the Brahmans to turn their attention to legislation and jurisprudence, even if they were inclined seriously to study subjects in their eyes so devoid of importance. Indeed, the miserable state of India under the later Mahomedan rulers must have been such as to shut out the possibility of the Brahmans reviving an ancient body of laws, if such had ever existed, or establishing a new body of laws. Thus Bernier has given us an interesting account of Benares as he knew it in 1670, and from what he says of the mode in which pupils were instructed in "the Athens of India, whither resort the brahmins and religionists,—who are the only persons who apply their minds to study," it is abund-

antly clear that nothing like a revival of learning could have taken place there or elsewhere in India proper at or shortly before that time. For, amongst other things, he says that the most eminent teacher did not attract more than twelve or fifteen pupils, who usually studied ten or twelve years, "during which time the work of instruction proceeded very slowly." They learnt Sanskrit, the *Purâṇas*, and some a little philosophy. They were very idle, and had no spirit of emulation, because for them there was no hope of honour or reward. It is true that Prince Dara Shekoh, the eldest son of Shah Jehan, took some interest in the mysteries of the Hindû faith, and got some *Upanishads* rendered into Persian for his own private information; and a few other Mahomedans may have patronized Hindû learning and literature to a certain limited extent; but such men were exceptional, and Bernier expressly declares that the Hindûs hid their books for fear lest their rulers should burn them. And so things went on, from bad to worse, till Warren Hastings, unable to find any existing Code or Digest of Hindû Law, ordered the compilation of the "Code of Gentoo Laws."

The eleven Pandits of Bengal, Bahar, and Oudh, who were hired to compile this amazing work, are stated by Mr. Halhed to have "picked it out sentence by sentence from various originals in the Sanskrit language, neither adding to nor diminishing any part of the ancient text," and it is possible that they did this; but if they did, they certainly contrived to produce a work very different in form, arrangement, and matter, from any Sanskrit treatise known to our law courts, and it is almost impossible to avoid suspecting, with Anquetil Duperron, the good faith of those who prepared it. The "Gentoo Code" purports to be taken from twenty several works, ten of which are "general treatises" ascribed to Manu, Yâjnavalkya, and others, whilst no less than twenty-two authors are stated to have been quoted in the compilation, but which of these numerous authorities were considered by the compilers to be entitled to the most weight it is impossible to know. It is observable,

however, that Vijnânêśwara's name does not appear in the lists of authors quoted and used, but the *Mitâxarâ* is ascribed to one Mirtekherà-Kar. And no reference is made to Kullûka Bhaṭṭa, who, according to Sir William Jones, is to be deemed the greatest of legal commentators, whilst the works of commentators on Manu, such as Medhâtithi and Govinda Râja, are merely quoted occasionally. Further, it is noticeable that "the Pandits of Mithilâ" are constantly cited as authorities opposed to certain writers, whilst here and there the opinion of a single author is given as authoritative, though at variance with that generally received. On the whole, it seems to be clear that the compilers of the "Gentoo Code" were by no means certain of the absolute validity or propriety of many of their more important doctrines.

Shortly after this abortive work was published, Sir William Jones produced his celebrated "Laws of Manu," a translation which has been allowed by all to be a work of some merit, and which gave rise to the study of Sanskrit in Europe, and to the administration of a very extraordinary kind of law in India. When a writer of so vast a reputation took upon himself to declare that the *Mânava-dharma-śâstra* contained a "system of duties, religious and civil, and of law in all its branches, which the Hindûs firmly believe to have been promulgated in the beginning of time by Manu, son or grandson of *Brahmâ*, or, in plain language, the first of created beings,—and not the oldest only, but the holiest of legislators," and to declare further that it might be the "Institutes of Hindû Law" preparatory to the copious Digest lately compiled, and introductory perhaps to a Code of Hindû Law, it followed almost as of course that the Government and officials of India, unable to judge for themselves, should at once accept the declaration as absolutely and unquestionably true. The mistake was made, and three generations have not sufficed to remove its evil consequences. I have already shown that the "Laws of Manu," as we have them, are merely the remains of a treatise adopted by the sect called *Mânavas*, of which, by the way, little trace at present is known to exist, and I will now go on to give a brief

sketch of its contents and manifest scope, for the purpose of suggesting that the so-called Code was not intended to be a body of laws, and by its very nature was precluded from ever being accepted as such. Sir William Jones has admitted in his preface that the Code "is a system of despotism and priest-craft, both indeed limited by law, but artfully conspiring to give mutual support, though with mutual checks;" but this admission appears to me to be altogether inadequate. It would be far more correct, I think, to say that the main object of the work is to establish the fact that the Brahmans, at all events those of them who study the *Vêdas*, are simply gods upon earth, and by right the possessors of all things valuable; that the *Kshattriyas* were created for the purpose of keeping the peace amongst men; the *Vaisyas*, for the purpose of amassing wealth for the use of *Brahmans;* the *Sûdras*, to be the very humble slaves of Brahmans; and the mixed castes generally to do all kinds of hard and unpleasant work, without grumbling. Since it could hardly be expected that Brahmans would sit down and read the *Vêdas* during every hour of every day, the Code contains detailed instructions as to the mode in which they should spend their lives, from the cradle to the grave, so as at last "to attain a superior state above." And since it was not unlikely that some Brahmans at least would err occasionally from the path of strict duty, punishment is provided, of equal severity for crimes the most enormous and transgressions the most trivial, but with the express proviso that every crime, of whatever enormity—as, for example, the deliberate murder of a priest—may be completely expiated by the criminal undergoing a slight penance at his discretion. Although Brahmans were well able to protect themselves from evil-doers by mere speech, that is, by the use of appropriate curses, it was advisable that the King should be directed to interfere in their behalf, and therefore certain chapters are devoted to the duties of Kings or *Kshattriyas*, the principal of which are to give presents to learned Brahmans, and protect them from all evil. Thus, stealing gold from a priest is made a crime of the first degree, whilst killing a woman is one of the

third; and a cheating goldsmith is to be cut to pieces with razors. The *Vaisyas* and *Sûdras* are to occupy themselves with their respective labours; and whilst the former may read the *Vêdas*, if they can, for their own information and guidance, the latter may neither read them nor hear them read. Nor may they amass wealth, lest they should cause pain even to Brahmans. In other words, the most numerous class must remain for ever in ignorance of the sacred writings which contain the only rules of conduct prescribed for the Âryan, lest he should attain bliss hereafter; and in poverty, lest he should be happy in this world. Is it possible that the most debased of human creatures could have submitted, or have been expected to submit, to a system so iniquitous and so absurd? I believe it to be impossible. But if the oppressive and repressive regulations of this system were never accepted as laws by the Âryan settlers in the *Madhya-dêśa* or Central India, and by the existing occupants of the land who were called *Sûdras*, it does not follow that the *Mânava-dharma-śâstra*, when composed, was without meaning and without validity. Had it been so, it could hardly have survived in any form till now. Parts of it no doubt represent with some fullness and accuracy a state of religious belief and feeling that once obtained very commonly amongst the inhabitants of the *Madhya-dêśa*, and we may find in it plain marks of the spread of the grand idea that the mere religion of rites should be set aside in favour of moral obligation, of tenderness towards animal life, of respect towards parents and children and teachers, in short of duty towards others as well as towards ourself. Much of the doctrine of this Code appears to be inconsistent with the precepts contained in the inscriptions of Aśoka, and with the principles stated by Fah Hian and Hiouen Thsang to characterize the mild administration of Central India in their respective times. Indeed some of the usages described by the Code of Manu exist at this very moment. But they pertain to religion and morals, not to the law of courts.

I must now move on to my second proposition, namely, that whatever may have been the case elsewhere, law never

was administered in the kingdoms lying south of the Vindhya mountains. In the first place, it is to be observed that there appears to be no reason to suppose that any considerable body of Âryans at any time invaded the South of India. A long struggle between the immigrant Âryans and the occupant *Sûdras* and *Kshattriyas* resulted in the complete victory of the former, and their permanent establishment in and around the *Madhya-dêśa;* but probably they were content with their acquisitions in the parts indicated, and made no effort to work down through the inhospitable passes of the Vindhyas and the wild countries lying beyond them. Or, if they made the effort, it was unsuccessful. The Âryans never conquered the South of India, and therefore never imposed laws on its inhabitants; but they must have had abundant and constant intercourse with powerful and more or less civilized tribes on their borders, and it is an unquestionable fact that by some means a leaven of Âryan faith and practice was introduced even into the southernmost parts of India, where in the course of centuries Jainism, Buddhism, Saivism, and a vast variety of sects took root and flourished. Of the defeated tribes that resisted the Âryans with the greatest pertinacity, some appear to have been beaten back towards the South, and thus we find the *Drâviḍas*, who are said by Manu to have been *Kshattriyas* who sank to the lowest class by the omission of rites and seeing no Brahmans, founding powerful kingdoms in the South of India, and supplanting everywhere the ruder tribes with which they came in contact. It seems to be clear that these *Drâviḍas*, and the kindred *Âṇḍhras*, and some other great tribes of the South, reached a considerable degree of civilization by their own unassisted efforts, and independently of the Brahmans. And thus Burnell states in his Palæography, that when Âryan civilization began to extend to the Tamil country in the ninth century, "it found there a people already in possession of the art of writing, and apparently a cultivated language. Thus Sanskrit . . . . remained almost exclusively in the knowledge of the Brahmans." In other words, the people at large remained

non-Brahmanic. With regard to this, I observe that Hiouen Thsang describes the character of the writing of the *Andhra* country as much the same as that of Central India, and that of the *Drâviḍa* as differing from the same a little. Now, that these Southern tribes should subsequently—that is, after the ninth century—have thrown aside their own usages and customs in favour of those recommended by Brahmanic books, is of itself highly improbable, particularly when it is remembered that Jainism and Buddhism prevailed so widely and during so long a space of time in this part of India. Even in the fourteenth century, as appears from an inscription given in Bengal A. R., vol. ix. p. 270, the Jains were so numerous in Bucca Râyar's dominions, that he thought fit to publish everywhere the decision of a great assembly, to the effect that "there was no distinction or contradiction between the religion of the *Jains* and Vaishnavites."

It is highly improbable that the Tamils and Telugus should have given up their own usages and customs, and to my mind there is ample and convincing evidence that they did not. First, let us see what Marco Polo say of them. He declares that: "Man and woman, they are all black and go naked, all save a fine cloth worn about the middle. They look not on any sin of the flesh as a sin. They marry their cousins german, and a man takes his brother's wife after the brother's death; and all the people of India have this custom." More than this, he tells us that the King, having five hundred wives of his own, forcibly took to himself the wife of his brother, who discreetly made no opposition to his will. He also tells us of the curious custom of a creditor drawing a circle round his debtor, and thereby effectually arresting him. Marco Polo saw the King himself so arrested, and compelled to pay a debt. Another custom described by him was that of permitting criminals condemned to death to slay themselves with several knives at the place of execution. Again, he mentions as something uncommon the Queen of *Mutfili* abstaining from a second marriage "for the great love she bore" her dead husband. Surely Marco Polo did

not find the people of Ma'abar following the law of the *Mitâxarâ* or the "Code of Manu"? Coming to more modern times, we find in Renneville's Voyages that P. Van den Broeck, who lived for several years on the Coromandel coast, declared in 1624: "I could not discover that they had any written law, nor any tribunal for criminal matters, although sometimes, when they catch some robbers, they impale them or cut off their heads, which they put on the end of a pole." About the same time Abraham Roger, a Dutch clergyman, who lived during many years on the same coast, described with some minuteness the peculiar customs of the people, and, amongst other things, he has stated that the Brahmans married girls of all the four classes, though their marriage with *Sûdras* was disapproved of,—and as many as they pleased. One of them might marry two or three sisters, or his father's sister's daughter, or his own sister's daughter. And a *Sûdra* might marry his brother's daughter; the Governor of Paliacotta did so. But two brothers might not marry two sisters. Fornication was disapproved of, but not punished, nor was adultery. *Satî* was extensively practised by all classes. But all except Pariahs took care to have their children taught to read, write, and cipher. Of laws, written or unwritten, this writer appears to know nothing. Next we come to a most important witness, the Jesuit missionary Father Bouchet, who lived for many years in the Tamil countries. In 1714 he wrote a long letter from Pondicherry to a magistrate of high rank in France, for the purpose of informing him as to the law and administration of justice in the countries in which he was serving. In that letter, which will be found in the "Lettres curieuses et édifiantes," vol. xiv., occurs the following passage: "Ils ont ni Code ni Digeste, ni aucun Livre où soient écrites les Loix ausquelles ils doivent se conformer pour terminer les differences qui naissent dans les familles." The writer then goes on to say that the natives have the *Veda* in four parts, which they call "the divine laws," but it is not from the *Veda* that they "draw the maxims that serve as rules for their judgments"; and that

they have another book which they call *Vicnachuram*, *i.e.* I suppose, *Vijnânêswara*, and in which we find plenty of beautiful sentences, and some rules for the different castes, that might guide a judge, and narratives of divers ancient judges of repute, but they do not think of following the method of these sages, however much they may admire them. Also the natives have their ancient poets, who professed to teach morals, but they do not base the principles of their decisions on what their poets have written. What they rely on, what "all the equity of their judgments is founded on," is certain inviolable customs and usages handed down from father to son, and regarded as "regles certaines et infallibles pour entretenir la paix des familles, et pour terminer les procez qui s'élevent, non seulement entre les particuliers, mais encore entre les Princes." Custom, he says, was everything, and argument was used in vain to those who in all disputes had but one thing to say,—"it is the custom." Father Bouchet had asked sometimes why the natives had not collected their customs in books, that could be referred to at need, and the answer had been that, if they had done so, it would be only the learned that would be able to read the books, whereas all the world was perfectly well acquainted with their customs, that had been handed down from generation to generation. But it was only their general laws and universal customs that were thus preserved; the particular rules affecting the different castes were inscribed on copper plates, said to have been kept at Conjeveram, before the Moors ruined that famous town. And the writer appears to have thought this to be not improbable, since he had known of a copper grant of land being fetched from Conjeveram, and was aware that the Brahmans of that place were still consulted about the customs in question. With regard to the 'maxims' alluded to above, he observes that it was wonderful how well boys of ten or twelve knew them by heart, and that the practice of so learning them was beneficial.

Father Bouchet has written down some of these maxims, and briefly referred to certain others, and his observations

as a whole are a very profitable study. The first maxim is that: When there are several children in a family, the males alone inherit; the girls have no claim to the inheritance. Upon Father Bouchet objecting to this as most unjust, he was told that "the nation had agreed to it," and it was not unjust because fathers, mothers, and brothers were obliged to marry girls into families as good as their own, and so provide for them. But the maxim did not apply in the case of various petty kingdoms, in which the right of succession to the crown descended always from the side of the mother, and so that females were preferred to males. The Princess might marry whom she pleased, and, whatever her spouse's caste might be, her children would always be Kings, her blood being royal and his counting for nothing. Unfortunately the names of those kingdoms are not given. The second maxim is that: The eldest son of a King, or Prince, or *Pâleiyakkâran*, or Head of a Village, does not necessarily succeed to the estates or government of his father. If the elder son be capable, it is customary for him to succeed. If he be not, the King appoints the younger son to succeed, or in default of such appointment the relatives assemble, "upon the King's death, and elect the younger." With *Pâleiyakkârans* and Heads of Villages, the younger son is always preferred to the elder if more competent to perform the duties of the office. Father Bouchet admired the sight of two nephews of the famous Sivaji dividing between them the government of Tanjore, upon the death of their uncle, a brother of Sivaji. They lived together in the Tanjore Palace in perfect union, but for convenience sake governed each half of the kingdom. The third maxim is that: If the property is not divided upon the death of the father, whatever wealth has been gained by one of the sons must be thrown into the common stock, and equally divided. This is said to have prevented endless disputes, inasmuch as if any one tried to break the custom, his relatives always stepped in and insisted upon his observing it. Father Bouchet observes that where one of a family of brothers was stupid and the others clever, he usually got a much larger share than the rest, upon the

principle that he would not be able to add to his wealth by his own exertions, whereas his brothers would be able to add to theirs. Division of families was everywhere rare: in many families it was a thing unknown. In such all lived together in harmony, under the management of an able member, who was treated with the utmost deference and veneration. Such families were greatly respected. In one case a woman was managing the entire affairs of no less than eighty persons. The fourth maxim is that: Adopted children take their shares of wealth, upon its partition, equally with the natural children of the fathers and mothers who adopted them. Adoptions are made by childless men, apparently for the sake of preserving the family property. The act is performed in the presence of assembled relatives, who assent to it, and sign a deed, but without religious ceremonies. If after adopting a son two persons have children born to them, those children will be subordinate to the adopted son, as being junior to him: for "the laws make no difference between the adopted child and natural children." Besides the regular mode of adoption there is a mode by which parents, who lose a child, adopt one who resembles the lost one in appearance: they beg him to regard them as his parents, and he in all cases consents so to do. A *Súdra* may thus adopt a Brahman, who will treat him with respect, though the two may not eat together. This mode of adoption is not confined to persons who have lost children, but many adopt by it brothers and sisters. It is determined in all respects by the death of the adopter, and its effects never pass to his children. The fifth maxim is that: Orphans must be treated like the children of those to whom they are entrusted. Thus uncles and aunts are considered at law to be the fathers and mothers of their brothers' and sisters' children. And hence a widower does his best to marry his deceased wife's sister, that she may properly look after his children. In default of an elder brother, uncle or aunt, the relatives of the orphan assemble and elect a guardian for him, and having done so hand over to the guardian the orphan and his inherited goods, lists of which are duly taken,

in order that upon the orphan attaining his majority his goods may be made over to him entire. As soon as possible he is made to work for his living; and if he shows signs of intelligence, he is taught to read, write, and cipher. The sixth maxim is that: Whatever crime a son may have committed against his father, he cannot be disinherited. Even if one's life be attempted by one's son, one must forgive him. And in like manner the son can in no case disinherit his father, who in default of sons is his natural heir. The seventh maxim is that: The father is obliged to pay all the debts that the children have contracted; and the children are equally obliged to pay all the debts of their father. Father Bouchet remarks that this is a general rule, and serves to determine all suits that involve the question of liability for debt, as between father and son and others. However profligate may be the son, the father must pay his debts; and similarly the son must pay all his father's debts, although contracted for the gratification of culpable self-indulgence, and even though the son expressly renounces the inheritance. And so where there is a family of undivided brothers, the eldest brother must pay the debts of a spend-thrift younger brother, and afterwards permit him to take an equal share of the inheritance with the others: for the elder brother becomes the father of the family, and "in fact the other brothers come and throw themselves at his feet, and as for him he regards them as his children."

"Such," says Father Bouchet at the end of his letter, "are the general maxims which serve the Indians for laws, and which are followed in the administration of justice. There are other particular laws which regard each caste." With regard to the tribunals that administered justice in conformity with these maxims, he states that each Head of a Village was judge of all causes arising within the territorial limits of his jurisdiction, and tried them with the help of three or four experienced villagers sitting as assessors. From the judgment of this court a dissatisfied party might appeal to the *Manyakkâran*, or Chief of a group of villages, who would hear the appeal sitting with assessors: and from his judg-

ment an appeal lay to "the immediate officers of the King, who judge in the last resort." Affairs of caste were settled by the heads of castes, or by an assembly of relatives. And disputes between disciples by their *Guru* or Priest. In some cases parties referred their differences to arbitrators. The *Manyakkârans* alone took a fee for deciding a suit: some of them as much as ten per centum on the value of the suit. Ordinarily the winner paid the costs, being able, it was supposed, to afford to pay them out of the amount recovered. *Gurus*, it is observed, took much greater fees. At the hearing of the cause the parties appeared in person, or by a friend, with their witnesses; the cause was heard in public, but considered in private, by the judge and assessors; and in due course came the judgment. There was no delay in adjudication, and little expense, but the honesty of the judges was very questionable. The greater part of the suits brought were for the recovery of debts. It was customary for borrowers to give a written obligation to pay, duly dated, signed, and attested by at least three witnesses. Interest was charged at three rates, namely, twelve, forty-eight, and twenty-four per centum, esteemed to be virtuous, sinful, and indifferent, respectively. The writer then goes on to explain that obstinate debtors were arrested by their creditors in the name of the Prince, under pain of being declared rebels, and compelled to remain within-doors until they gave satisfaction for their debts. In the mean time passers-by would intercede, and the creditor would give some months' more time. The default being continued, a second arrest would be made, and the debtor taken before the Prince, who would give still further time. At last the debtor's goods, his oxen, and furniture, would be sold, and the debt satisfied. It was rarely, however, the case that part of the debt was not struck off in favour of the debtor.

So much for the administration of civil, we now come to that of criminal justice. In cases of theft and other crimes, where evidence was not forthcoming, the ordeal of plunging the arm into boiling oil was undergone by the suspected person. Or he was made to pull a ring from out of an

earthen vessel in which a serpent had been put. But before the ordeal an ample opportunity of escape was given by enabling the thief to restore the stolen article, in such wise that it should not be known who had restored it. 'S'il s'agit d'un meurtre, et que la Loy du Talion ait lieu dans la Caste, cette Loy s'observe dans toute la rigueur." But this law was observed only amongst the robber-castes that dwelt between Madura and 'Marava,' by which latter term I understand the town of Ramnad. Murders were very rare, and perhaps this was the reason why the demands of justice were so seldom satisfied in respect of this crime. A fine of one hundred pagodas was usually paid to the prince by a murderer; sometimes only one hundred *écus*, and that even where the victim was an officer of the Prince. A husband was allowed to kill his wife and her paramour together, if caught in actual adultery, but not one at one time and another at another. Queen Mangammâl had abolished capital punishment, without producing any appreciable increase in the number of murders. Banishment was a nominal punishment, meaning no more than leaving the city by one gate and re-entering it by another. Brahmans were never put to death for their crimes. Their eyes were put out in some cases; and occasionally they were slowly starved to death in iron cages.

I will not stop here to remark on the differences, some of them very remarkable, between the usages described in this letter and the laws administered in the Madras courts; but I think I should make a few remarks upon some of the writer's statements, which appear to me to show that in all probability he was misled to some extent by loose and inadequate information. Taking together his somewhat inconsistent statements touching the procedure followed in recovering debts, I am disposed to believe that, as a fact, very few disputes of a civil nature were disposed of by a Head of a Village, and that where such authority did adjudicate upon a matter, with assessors, he would never venture to execute judgment as against a respectable man. The arrest by the creditor himself is spoken of by Marco Polo as the ordinary

procedure, and would be consistent with the provisions of the *Mânava-dharma-śâstra.* Also it would be consistent with the custom of *dharna* described by Sir W. Jones in the "Supplemental Papers," and which was not sanctioned by the *śâstras.* Probably the *Gurus,* as will be shown hereafter, decided many more causes than did the Heads of Villages, or the *Manyakkârans;* and probably their administration of justice was far more rough and ready than that described by Father Bouchet, no doubt from hearsay. In the next place, I imagine that the writer was wrong in supposing that the *lex talionis* applied in cases of murder. In Recueil x. of the "Lettres curieuses et édifiantes," Father Martin gives an account of the horrible practice that obtained in 1709, in the *Marava* country, of killing or maiming oneself or one's child or near relative, in order to compel one's enemy to do a similar act to his own prejudice. This was the true *lex talionis* of that country, based upon the prevailing superstitious idea, that the guilt of an act attaches not to the doer of the act, but to him who by his conduct caused it to be done; and can be expiated only by the latter doing a corresponding act to his own hurt. Much the same principle appears to underlie the practice of *dharna* above alluded to, where the Brahman employed to enforce payment, goes with a poignard, and threatens to kill himself unless the debt be paid. And compare the account given in the "Supplemental Papers" of Sir W. Jones of two Brahmans near Benares cutting off their mother's hand to spite a foe, and being outcasted for the offence, and subsequently, to their great astonishment, punished in accordance with the new English ideas; also the account given in the same paper of a Brahman poisoning himself before the house of some Rajpoots in the Benares District. As regards an appeal lying in due course from the judgment of the Head of a Village to the *Manyakkâran,* and from the judgment of the latter to "the immediate officers of the King, who judge in the last resort," I can only say that, after referring to many native authorities, and the collection of letters of Jesuit missionaries, in four volumes, called the "Mission du Maduré," I cannot believe that any right of

the kind existed, even in theory, in the seventeenth and eighteenth centuries. I am not aware that the Tamils have any Tamil or Sanskrit word for our '*appeal*,' which they have taken into general use. No doubt some dissatisfied disputants in Father Bouchet's time may have preferred their complaints successively before every authority that would hear them, but there were no appeals 'regular,' or 'special,' or 'further.' Moreover, *Manyakkârans* were not necessarily superior in rank and authority to Heads of Villages. And the "immediate officers of the King" included, at the time when Father Bouchet wrote, ministers, generals, and executive officers of various kinds, but no judges; as I have shown in the "Madura Manual."

The important evidence afforded by this letter is amply corroborated by the following passage at p. 25 of Orme's History of the Military Transactions in Indostan, ed. 1763: "Intelligent inquirers assert that there are no written laws amongst the Indians, but that a few maxims transmitted by tradition supply the place of such a code in the discussion of civil causes, and that the ancient practice, corrected on particular occasions by the good sense of the judge, decides absolutely in criminal ones. In all cases derived from the relations of blood, the Indian is worthy to be trusted with the greatest confidence; but in cases of property, in which this relation does not exist, as a cunning subtil people they are continually in disputes; and for the want of a written code the justice or injustice of the decision depends on the integrity or venality of the judge. Hence the parties prefer to submit their cause to the decision of arbitrators chosen by themselves, rather than to that of the officers appointed by the Government." This goes to show that the '*maxims*' of Father Bouchet probably were not imaginary, though we may be permitted to doubt whether his apparent belief that every schoolboy knew them by heart was warranted by the fact.

The next witness I shall cite is Buchanan, the well-known author of the "Journey from Madras," who appears to have been most indefatigable in his researches in the Mysore and

adjoining countries, at the beginning of this century. Numerous passages in his work show that every caste had its own peculiar usages and customs, and that offences against them were punished in the caste by the hereditary chief with assessors, or by the *Guru* or priest, or by an assembly of elders, not by officers of the Government; that codes, digests and law-books were utterly unknown, even to the Brahmans; that many castes had their own religious books, in which the Brahmans had no concern; and lastly that a very considerable part of the population was actually heretical, whilst but a very inconsiderable part of it attempted to follow the rules of the Brahmans. Of the *Nambûris*, the arrogant Brahmans of the West Coast, Buchanan especially says, at vol. ii. p. 425, that they were subject to the jurisdiction of the *Alvanghiri*, who was always assisted by a council of learned men, and guided by the Hindû law, that is to say, by a work known as the *Asoca Prayaschitta*, by *Veda Vyâsa*. "The Laws of Manu," he adds, "seem to be probably unknown to the *Nambûris*, who all pretend to be *Vaidikas*."

The Abbé Dubois, writing nearly about the same time, observes that in India "there is no public system of law; and custom, as various as the tribes, regulates everything." Elsewhere he observes that: "Every caste has its ancient customs, agreeably to which, like the patriarchs of old, it can inflict the severest punishment upon the guilty. Thus, in several tribes, adultery is punished with death." And that, since the Princes are too indolent to do their duty, "there are no other means of attaining this end," viz. justice and good morals, "and of preserving good order, but by the authority and customs of the castes." In noticing the practice of adoption, and the mode in which estates descend, this author states that he is guided in his remarks by the "Directory or Ritual of the *Purohitas*," and it seems to be probable that he never so much as heard of the *Mitâxarâ* and other treatises on law now alleged to be of paramount authority amongst Hindûs. With regard to adoption he tells us, amongst other curious things, "that the

adoption of girls is rare, though not without example." And the few rules of succession he gives are quite opposed to the rules of the law-books. Thus, he affirms that where the second of three divided brothers dies, leaving widows, but no male issue, the younger brother has the right to take his assets and support the widows. The mother gets no share of property, nor does the widow of a divided brother get any, nor does a daughter. Industrious men are obliged to pay the debts of their prodigal brothers, and poor relations are always troubling the managers of thriving families. The following passage is most instructive: "The book from which I have quoted does not enter more deeply into the division of property in difficult cases. The relatives assembled decide any dispute according to the rules of the country or the caste, and more frequently still according to the wealth and generosity of him who best rewards them for a favourable decision." Considering how many years this writer passed in daily intercourse of the closest kind with Hindûs of every class, these words appear to me to be almost conclusive upon the point in question.

A generation later the Bombay Government set on foot an inquiry into the customs of the various castes living within its jurisdiction, and as to the nature of the Hindû law obtaining amongst them. Unhappily the inquiry then actually made was quite inadequate, and nothing appears to have been done since to complete or extend it: but its main result, namely, Steele's "Hindû Castes," nevertheless is of the utmost value to inquirers. We learn from it that questions were put to numerous castes assembled for the purpose at Poona and Sattara, and the answers given by them show that in that part of India, at all events, the Hindû castes have no written documents or books to refer to as authority in points of disputed custom, but "Ancient usage, as determined by the caste on creditable evidence, is the general guide." And since there are no written rules but the *śâstra*, "Cases unprovided for are determined by an assembly of the caste, whose decision becomes in future a precedent equal to law. Custom has sanctioned many things

in opposition to the Sastru." Brahmans, it appears, "are obliged to act up to the letter of the Sastrus, but in other castes the rules of the Sastrus are modified by local usages and the custom of the country." Thus, "a virtuous wife will not quit her husband even on his losing caste; she is, however, allowed in this case to marry another man by Pat." And amongst the lower castes generally widows and even wives may remarry. And "a person does not, by exclusion from caste, forfeit property and right of inheritance." The Lingayat castes obey the orders of their *Guru*. And whilst the written laws by which the *Goswâmis* profess to be guided are the *Dharma* and *Mânava śâstras*, they have peculiar customs of their own. Not to multiply instances, the book as a whole shows clearly that law was a thing unknown to the people living near Poona and Sattara at the beginning of this century; but the following passage is too suggestive to be missed: "Should a Brahman lose caste, those of his caste, who from their intelligence are worthy of giving their opinion, repel him altogether from caste privileges, in the event of his having murdered a Brahman or killed a cow, or committed other *Maha Patuk*, first informing the Sirkar thereof, should it be a matter of which the Sirkar takes cognizance."

Enough has now been said touching the non-existence of law in South India before the British Government took possession of it. I will now deal, very briefly, with the third proposition above stated, namely, that if any law was administered in ancient times to the inhabitants of South India, it was not the law contained in the *Mitâxarâ* and other books of the kind. The burden of proving that such books were once regarded by Hindûs as containing actual laws by which they were personally obliged, rests of course on those who affirm that such was the case. But I have never yet been so fortunate as to find an atom of evidence advanced in support of such affirmation. So far as I can see, Sir William Jones, Colebrooke, and the early Sanskritists, generally took for granted the existence of "Hindu Law," and the courts of India have adopted their teaching without making the least

inquiry as to its probable correctness. The one great authority in Madras in the first quarter of this century was Ellis, who unfortunately died before his researches were complete, and without leaving behind him more than a few notes of observations. What has been preserved of these in the Transactions of the Madras Literary Society and Strange's "Hindoo Law," shows clearly that Ellis accepted as true far too much of Sir W. Jones' and Colebrooke's teaching, but nevertheless was not absolutely blind to what he saw going on around him. In noticing the peculiar customs of South India, he remarks that the Brahmans never fully introduced there the law of the *Smṛti*, though they succeeded in abolishing the Jaina faith, and they were compelled to wink at many inveterate practices. Again he says: "There are legal institutions in Southern India, more ancient than those which have been introduced from the North; and it is in these chiefly that the difference between the two divisions consists." In speaking of the books supposed to contain these "legal institutions," he says: "There are four which far exceed the rest in authority in Southern India, namely, the *Mitâxarâ* of Vijnânêswara, the *Mâdhavîyam*, the *Smṛti Chandrikâ* and the *Saraswati-Vilâsam*." And after discussing the supposed rival claims of these works, he decides that upon the whole the first of them, *i.e.* the *Mitâxarâ*, should be held to be the paramount authority. But for this decision no sufficient reason, indeed it may be said no reason, is given: and, unless I am greatly mistaken, Ellis decided as he did simply and solely because he relied too much on Colebrooke's dicta. For amongst other things it appears that Ellis's native adviser upon law, a *śâstri* named Pattabhi Râma, merely "admitted that the *Mitâxarâ* is the most generally prevailing authority;" but said that in the *Drâviḍa* and other countries of the South the *Smṛti Chandrikâ* and other books were chiefly esteemed. Now, no one who understands natives can doubt, it seems to me, that Ellis's adviser politely and deferentially '*admitted*' the "general prevalence" of the *Mitâxarâ*, only because he perceived that Ellis's mind had been unduly influenced by what Colebrooke had said about

it: but nevertheless was honest enough to state what he verily believed to be the real authorities for South India. But however honest that opinion may have been, there is no reason for adopting it, unless and until it is corroborated by similar opinions of competent natives of all castes, from all parts of the Madras Province. And such opinions, I am confident, will never be obtained. I have already shown that Father Bouchet appears to have known of the existence of the *Mitâxarâ*, and to have expressly stated that its authority for any practical purpose was nil. Anquetil Duperron knows the Telugu form of the name of the compiler of this work, but was informed that that name was once borne by a Telugu King who collected the *Vignâna* or laws of his country! In the list of authors given in the Gentoo Code the *Mirtekherâ*, which I take to be the *Mitâxarâ*, is ascribed not to *Vijnânêśwara* but to "*Mirtekherâ Kâr*," and judging from the mode in which the names of most of the authors are misspelt, I cannot help thinking that we have here a clerical error.

If the *Mitâxarâ* really is not an authority upon law, and, as I have already abundantly shown, there appears to be no reason for supposing it to be such, what shall we think of the other treatises approved by Ellis? According to that inquirer's own showing the *Smṛti Candrikâ* belongs to the Vijayanagara kingdom, but apparently was not under the sanction of the Government; whilst the *Mâdhavîyam* was compiled by the minister of the first two *Râyars* of that country, and therefore must have been law, and the *Saraswatî Vilâsam* was the standard work of the *Orugallu* capital, and is remarkable principally because it proclaims in explicit terms the absolute nature of the Prince's power, and the constitution of several kinds of judicial tribunals in South India. Beyond this meagre and uncertain information nothing appears to be known about these works, except, of course, that the *Śâstri* above mentioned thought fit to recommend them as authoritative for certain supposed ancient kingdoms.

In opposition to what Sir William Jones, Colebrooke, Ellis

and other early authorities have said about the so-called laws of the Hindûs, let me now cite two of the latest authorities, Bühler and Burnell. The former of these says: "The older *Smṛitis*, and the originals of the rest, are not codes, but simply manuals for the instruction of the students of the charaṇas or schools . . . Such strictures would only be justified if they were really 'codes' intended from the first to settle the law between man and man." The latter says: "The digests were never intended to be actual codes of law; they were written in a language understood by a very few, and because of the Vedic quotations in them, they must have remained almost exclusively in the hands of the Brahmans. Again, they refer for the most part to the Brahmans only, and utterly ignore the numerous un-Âryan peoples scattered about India, and which form the greater part of the population of the south, whose usages (whatever they may call themselves) can in no wise be referred to the *Dharma-Çâstra*. There is not a particle of evidence to show that these works were ever even used by the Judges of ancient India as authoritative guides; they were, it is certain, considered merely as speculative treatises."

If then, as I have endeavoured to prove, there has been no administration of law in any ordinary sense of the term in South India, by and amongst the Hindûs, how, it may be asked, has society been kept together? And I would make answer as thus. It has been kept together, in a loose and very unsatisfactory manner, partly by the purely arbitrary power of Kings and Chiefs of every degree, partly by the almost equally arbitrary power of the individual castes, partly by the power of the *Gurus* or priests, and partly by the power of the assembled relatives. I must defer to a future occasion an inquiry into the nature of these several powers, and the extent to which they may have been exercised in conformity with known usages and customs. For the present I must content myself with giving a single significant instance of the mode in which the castes exercised jurisdiction in the last century. In the second volume of Talboys Wheeler's "Madras in the Olden Time" will be

found an account of a serious case of abduction of a Râjput woman, which occupied the time and attention of the Madras Council for several days, and ended by the Council handing over the culprit to the Heads of the Caste, who fined him in the sum of 400 Pagodas.

In conclusion, I must not omit to notice the fact that Hindû law-books have no place in Ceylon. The enterprising Tamils of that island have succeeded in preserving until now their rude 'maxims' for the law-courts, in the form of the written and well-known '*Thessa-waleme*,' which agrees but in very few particulars with "Manu's Code" and the *Mitâxarâ*, whilst in many, and those the most important, it is wholly opposed both to the letter and the spirit of those works. As successive Governments have preserved the customs of the Tamils of Ceylon, so the High Court of Judicature at Madras has preserved the customs of the dwellers on the Malabar coast. In the course of time the non-Muhammadan castes of the Madras Province generally may obtain judicial recognition of their customs.