A treatise on Hindu law and usage

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A TREATISE
ON
HINDU LAW AND USAGE

BY
JOHN D. MAYNE,
OF THE INNER TEMPLE, ESQ., BARRISTER-AT-LAW,
FORMERLY OFFICIATING ADVOCATE GENERAL OF MADRAS,
AUTHOR OF "A TREATISE ON DAMAGES;" "COMMENTARIES ON THE INDIAN PENAL CODE," ETC.

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PREFACE TO THE FIFTH EDITION.

In preparing this edition the whole of the text has been carefully reconsidered, with reference to later decisions. The most important of these is the ruling of the Privy Council, which establishes that under the Mitakshara law the holder of an impartible Zemindary possesses absolute powers of alienation, which cannot be controlled by his sons. The same tribunal has also enlarged and explained its former decisions in reference to the liability of sons for the debts of their father.

I have again to thank my publishers, Messrs. Higginbotham & Co., for the great care with which they have passed the sheets through the press. To save trouble to those who consult the work I have added a list of cases bearing on the subjects discussed; which have appeared while the edition was passing through the press.

JOHN D. MAYNE.

October, 1892.
PREFACE TO THE THIRD EDITION.

Since the publication of the last edition of this work, many new materials for the study of Hindu Law have been placed within the reach of those, who, like myself, are unable to examine the authorities in their original Sanskrit. Professor Max Müller's Series of the Sacred Books of the East has given us translations of the entire texts of Apastamba, Gautama, and Vishnu, by Dr. Bühler and Dr. Jolly. Mr. Narayen Mandlik has supplied us with a translation of the whole of Yajnavalkya, and a new rendering of the Mayukha; while the Sarasvati Vilasa and the Viramitrodaya have been rendered accessible by the labours of Mr. Foulkes and of Golapchandra Sarkar.

Judging from an examination of these works, I doubt whether we need expect to receive much more light upon the existing Hindu Law from the works of the purely legal writers. They seem to me merely to reproduce with slavish fidelity the same texts of the ancient writers, and then to criticise them, as if they were algebraic formulas, without any attempt to show what relation, if any, they have to the actual facts of life. When, for instance, so modern a work as the Viramitrodaya gravely discusses marriages between persons of different castes, or the twelve species of sons, it is impossible to imagine that the author is talking of anything which really existed in his time. Yet he dilates upon all these distinctions with as much apparent faith in their value, as would be exhibited by an English Lawyer in expounding the peculiarities of a bill of exchange. From the extracts given by Mr. Narayen Mandlik, I imagine that the modern writers of Western India are more
willing to recognise realities than those of Bengal and Benares. Probably, much that is useful and interesting might be found (amid an infinity of rubbish) in the works on ceremonial law. But what we really want is that well informed Natives of India should take a law book in their hands, and tell us frankly, under each head, how much of the written text is actually recognised and practised as the rule of every-day life. The great value of Mr. Narayen Mandlik's work consists in the extent to which he has adopted this course. His forthcoming work will be looked for with the greatest interest by every student of Hindu Law.

I feel a natural timidity in entering upon the region of volcanic controversy which has sprung up around the works of Mr. J. H. Nelson. It seems a pity that amid so much with which every one must agree, there should be so much more with which no one can agree. When he denies that Manu, Yajnavalkya, and the Mitakshara form the recognised guides of Dravidian, or even of Sudra life, one is willing to accept the statement. But when he goes on to assert that Manu, Yajnavalkya, and the Mitakshara are themselves without authority among Sanskrit lawyers, or have authority only among obscure and limited sects, one is tempted to ask what possible amount of evidence he would consider sufficient to establish the contrary? Can Mr. Nelson put his finger upon any single law book subsequent to the probable dates of Manu and Yajnavalkya in which those sages are not referred to, not only with respect and reverence, but with absolute submission? If the Mitakshara is a work of no authority, how does it happen that every pundit in every part of India except Bengal invariably cites Vijnanesvara in support of his opinion? Mr. Nelson's grotesque suggestion that the Mitakshara dates from the 17th or 18th century is dismissed by *M. Barth,* one of the greatest of living Sanskrit scholars, with the summary remark;—"Every Orientalist who has read Colebrooke will answer, that if that admirable inquirer had found nothing better to write about

* Revue Critique, 1882, p. 165; the article contains a thorough examination of Mr. Nelson's views, and seems to me to be a model of acute, candid, and courteous criticism.
the Mitakshara, he would not have written a line upon the subject." His proposal that every law suit should commence with an exhaustive enquiry as to the legal usages, if any, by which the respective parties considered they were bound, is a sly stroke of humour which cannot be too much admired. Coming from an opponent it might have been considered malicious. I fancy that Mr. Nelson, as a Judge, would be the first to resist the application of his own proposal.

An unusual number of important decisions have been recorded since the publication of the last edition, and it will be seen that several portions of this work have been re-written in consequence. The law as to the liability of a son for his father's debts, and as to the father's power of dealing with family property to liquidate such debts, seems at last to be settling down into an intelligible, if not a very satisfactory, shape. The controversies arising out of the text of the Mitakshara defining stridhanum appear also to be quieted by direct decision, and the conflicting view of woman's rights taken by the Bombay High Court has at last been restricted and defined, and made to rest upon inveterate usage, rather than upon written law. A single decision of the Privy Council has established the heritable right of female Sapindas in Bombay, and recognised the all-important principle, that succession under the Mitakshara law is based upon propinquity, and not upon degrees of religious merit.

JOHN D. MAYNE.

Inner Temple,

January, 1883.
PREFACE.

I have endeavoured in this Work to show, not only what the Hindu Law is, but how it came to be what it is. Probably many of my professional readers may think that the latter part of the enquiry is only a waste of time and trouble, and that in pursuing it I have added to the bulk of the volume without increasing its utility. It might be sufficient to say, that I have aimed at writing a book which should be something different from a mere practitioner's manual.

Hindu Law has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude. At this day it governs races of men, extending from Cashmere to Cape Comorin, who agree in nothing else except their submission to it. No time or trouble can be wasted, which is spent in investigating the origin and development of such a system, and the causes of its influence. I cannot but indulge a hope, that the very parts of this Work which seem of least value to a practising lawyer, may be read with interest by some who never intend to enter a Court. I also hope that the same discussions which appear to have only an antiquarian and theoretical interest, may be found of real service, if not to the counsel who has to win a case, at all events to the judge who has to decide it.

The great difficulty which meets a judge is to choose between the conflicting texts which can be presented to him on almost
every question. This difficulty is constantly increased by the labours of those scholars who are yearly opening up fresh sources of information. The works which they have made accessible are, naturally, the works of the very early writers, who have passed into oblivion because the substance of their teaching was embodied in more modern treatises. Many of these earlier texts are in conflict with each other, and still more are in conflict with the general body of law as it has been administered in our Courts.

An opinion seems to be growing up that we have been going all wrong; that we have been mistaken in taking the law from its more recent interpreters, and that our only safe course is to revert to antiquity, and, wherever it may be necessary, to correct the Mitakshara or the Daya Bhaga by Manu, Gautama or Vasishtha. Such a view omits to notice that some of the authors are perhaps two thousand years old, and that even the East does change, though slowly. The real task of the law is to reconcile these contradictions, which is impossible, but to account for them. He will best help a Judge who is pressed for instance, by a text which forbids a partition, or which makes a father the absolute despot of his family, by showing him that these texts were once literally true, but that the state of society in which they were true has long since passed away. This has been done to a considerable extent by Dr. Mayr in his invaluable work, Das Indische Erbrecht. He seems, however, not to have been acquainted with the writers of the Bengal school, and of course had no knowledge of the developments which the law has received through nearly a century of Judicial decisions. I have tried to follow in the course marked out for him, and by Sir H. S. Maine in his well-known writings, would be presumption to hope that I have done so with complete, or even with any considerable success. But I hope that attempt may lead the way to criticism, which will end in the discovery of truth.

Another, and completely different current of opinion, is that of those who think that Hindu Law, as represented in t
Sanskrit writings, has little application to any but Brahmans, or those who accept the ministrations of Brahmans, and that it has no bearing upon the life of the inferior castes, and of the non-Aryan races. This view has been put forward by Mr. Nelson in his "View of the Hindu Law as administered by the Madras High Court." In much that he says I thoroughly agree with him. I quite agree with him in thinking that rules, founded on the religious doctrines of Brahmanism, cannot be properly applied to tribes who have never received those doctrines, merely upon evidence that they are contained in a Sanskrit law-book. But it seems to me that the influence of Brahmanism upon even the Sanskrit writers has been greatly exaggerated, and that those parts of the Sanskrit law which are of any practical importance are mainly based upon usage, which in substance, though not in detail, is common both to Aryan and non-Aryan tribes. Much of the present Work is devoted to the elucidation of this view. I also think that he has under-estimated the influence which the Sanskrit law has exercised, in moulding to its own model the somewhat similar usages even of non-Aryan races. This influence has been exercised throughout the whole of Southern India during the present century by means of our Courts and Pandits, by Vakils, and officials, both judicial and revenue, almost all of whom till very lately were Brahmans.

That the Dravidian races have any conscious belief that they are following the Mitakshara, I do not at all suppose. Nor has an Englishman any conscious belief that his life is guided by Lord Coke and Lord Mansfield. But it is quite possible that these races may be trying unconsciously to follow the course of life which is adopted by the most respectable, the most intellectual, and the best educated among their neighbours. The result would be exactly the same as if they studied the Mitakshara for themselves. That this really is the case is an opinion which I arrived at, after fifteen years' acquaintance with the litigation of every part of the Madras Presidency. Even in Malabar I have witnessed continued efforts on the part of the natives to cast off their own customs
and to deal with their property by partition, alienation, and devise, as if it were governed by the ordinary Hindu Law. These efforts were constantly successful in the provincial Courts, but were invariably foiled on appeal to the Sudder Court at Madras, the objection being frequently taken for the first time by an English barrister. It so happened that during the whole time of this silent revolt the Sudder Court possessed one or more Judges, who were thoroughly acquainted with Malabar customs, and by whom cases from that district were invariably heard. Had the Court been without such special experience, the process would probably have gone on with such rapidity, that by this time every Malabar tara would have been broken up. The revolt would have been revolution.

A third class of opinion is that of the common-sense Englishman, whose views are very ably represented by Mr. Cuningham—now a Judge of the Bengal High Court—in the preface to his recent "Digest of Hindu Law." He appears to be amused at the absurdity of the rule which forbids an orphan to be adopted. He is shocked at finding that a man's grandchild is his immediate heir, while the son of that grandchild is a very remote heir, and his own sister is hardly heir at all. He thinks everything would be set right by a simple and perfect code, which would please everybody, and upon which the Judges are not expected to differ. The fact is, of course, that the questions for the legislator, not for the lawyer, have attempted to offer materials for the discussion by showing how the rules in question originated, and how much would have to be removed if they were altered. The age of miracles passed, and I hardly expect to see a code of Hindu Law which shall satisfy the trader and the agriculturist, the Punjabi, the Bengali, the pandits of Benares and Ramaiswaram, Umritsur and of Poona. But I can easily imagine a very beautiful and specious code, which should produce much more dissatisfaction and expense than the law as at present administered.