

"Nowhere", then, as Gooroodas Banerjee<sup>1</sup> remarks, "were the proprietary rights of women recognized so early as in India; and in very few ancient systems of law have these rights been so largely conceded as in our own. In certain cases \*\*\* a woman's dominion over her *strīdhana* is absolute".

The Code Napoleon and the Continental laws based on it give the wife an absolute right to only a part of her property, the *parapherna*. But the rest has to be added to the common household as *dot*. This law of *dot*, which, again, is really a continuation of the law of *dos* in the *Institutes* of Justinian, is thus less developed than the Hindu law of *strīdhana*.

The Married Women's Property Act (1886) of England is, according to Boutmy in his *Essai d'une psychologie politique du peuple anglais au XIX<sup>e</sup> siècle*, essentially distinct from the Napoleonic and continental codes in so far as it gives independence to women proprietors. But even this Act falls short of the Hindu. Because, as Maine<sup>2</sup> explains it, not only has the Hindu woman "singularly full power of dealing with the *strīdhana*, — not only is the husband debarred from intermeddling with it save in extreme distress, — but when the proprietress dies, there is a special order of succession<sup>3</sup> to her property, which is manifestly intended to give a preference, wherever it is possible, to female relations over males".

One need not read into all this a conscious anticipation in India of the theory adumbrated by Mill in his *Subjection of Women*. We are not confronting here the feminism of today, i. e. the economic independence and political enfranchisement of women such as are advocated by Bebel the German socialist in his classic on *Woman*. Rather, on the whole, the mind of the Hindu in regard to Private Law was, to all intents and purposes, not much distinct from that of the European.

But first, it should be realized, however, that so far as the *paterfamilias* of the patriarchal family is concerned, the spirit of Hindu jurisprudence was not more servile than that of the early Roman Twelve Tables (B. C. 452). Secondly, the ecclesiastical law of Europe provides that the first charge of a man's property is the purchase of "masses" for his soul. And here the Roman Catholic meets on a common platform

<sup>1</sup> *Hindu Law of Marriage and Strīdhana*, p. 312; cf. Gibelin's *Etudes sur le Droit Civil des Hindous*, Vol. I, p. 111.

<sup>2</sup> *Early History*, Lect XI, p. 334. cf. Coomaraswamy's *Mediaeval Sinhalese Art*, p. 35 for the corresponding position of the Ceylonese woman. Vide Boutmy's *English People* pp. 215—216.

<sup>3</sup> *Mit*, Ch II, sec XI, 9, 12, 13; Ch I, sec III, 8, 9, 10. But the *Dāya* law (Ch IV, sec II) is different.

the Hindu with his doctrine of "spiritual benefit",<sup>1</sup> according to which property is generally held to be intended for the discharge of sacrificial duties (*pinda*) for the manes of the dead.

Culturally speaking, besides, the mentality of the Hindu woman will be found to be identical with that of the Latin (French and Italian) as described in Joseph-Barthélemy's *Le Vote des Femmes*. Nay, it will be not much different from the female *psyche* of the United States in the early nineteenth century as analyzed by Calhoun in his *Social History of the American Family*.

## Section 2.

### Institutional *Viriya* (Energism).

Now that during the epoch of the "white man's burthen" the Hindu has been deprived of the chances for displaying an aggressive secularism except, if at all, only as a "second fiddle" to the "natural master", there has grown up a general scepticism among Eur-American scholars even as to the capacity of Hindus for organized activity and institutional achievements.<sup>2</sup> This occidental suspicion about the Orient has absolutely no foundation in facts. The Hindu *virīya* (i. e. energy or genius) for organization and cooperative endeavor has exhibited itself as much in the political as in the non-political spheres of social life.

#### (a) *Samgha* ("group-person").

One Hindu institution at least is known to orientalists. This is the *samgha* or church of Buddhist Asia. Necessarily it is as old as Śākya the Buddha (B. C. 623—543). It has really had a longer history, since in Pāṇini<sup>3</sup> the philologist's time (B. C. 650) *samgha* was the "generic" term for any public body, incorporated association or corporation. Its social significance was equivalent to that of the Greek *polis* (lit. city)

<sup>1</sup> G. C. Sarkar, Ch IX, pp. 311—317. For the resemblances between Hindu, Greek, Roman and Germanic laws see Gibelin, Vol. I, pp. 52—55, 85, 114, 292, 302.

<sup>2</sup> Smith's *Early Hist.*, pp. 357, 477; Akbar, 385; *Ox. Hist.*, pp. XI, XII. Majumdar's *Corporate Life in Ancient India* is a reply to the sweeping statements of Smith, as Mookerji's *History of Indian Shipping* is to the conventional theory regarding the alleged "splendid isolation" of Hindu culture.

<sup>3</sup> III, 3, 42; V, 3, 112—114; Majumdar, p. 90; Mookerji's *Local*, 32, 33; Bhandarkar's *Anc. His. Ind.*, pp. 141—153. For the date of Pāṇini see R. G. Bhandarkar's discussion in the *Bombay Gazetteer*, 1896, Vol. I, pt. II, p. 141, *The Pos. Back. Hind. Soc.*, Vol. I, p. 69, and Jayaswal's note in the *Ind. Ant.*, May, 1918. For *polis* cf. Gilbert Murray's *Rise of the Greek Epic*, pp. 31, 79, Schömann's *Antiquities of Greece*, 91, 92, 95, 96, 121, 122, and Dunning's *Political Theories*, Vol. I, 51, 55, 56.

as popularized by the political philosophers of Hellas. The different organized bodies of the seventh century B. C. were known as *saṃghas* of different species.

Thus there was the *pūga* characterized as *saṃgha* of a special denomination. It was a corporation of men I) belonging to different social groups (*nānā-jāṭiyāh*) and (II) practising diverse (no regular or fixed) professions (*aniyata-vrittayah*), but (III) distinguished from other *saṃghas* by having a preponderance of economic or secular interests (*artha-kāma-pradhānāh*). Such an association was either a rural commune or a *municipium*.

A second *saṃgha* of the day was the *vrāta*. It was similar to the *pūga* in having the first two "properties"; but its *differentium* was indicated by the concept of *utsedha-jīvinah*, i. e., the profession of blackmailing, brigandage or hooliganism as a regular means of livelihood. The European counterpart of the Hindu *vrāta* was the order of *Ritter* or "Knights" whose exploits have received a romantic treatment in Goethe's *Götz* and Schiller's *Räuber*. The modern Bengali novelist Bankim Chandra Chatterji's *Ānanda Matha* (The Abbey of Bliss) is likewise an idealization of a similar corporation.

The *āyūdhā-jīvi saṃgha* was a third organized body of Pāṇini's days. As the name implies, it was an association of men who "lived by the profession of arms". Men proficient in military tactics used evidently to incorporate themselves into bands, and were available most probably for mercenary service. This *saṃgha* was therefore distinct from the *vrāta*.

The world into which Śākya was born was thus familiar with several incorporated associations.<sup>1</sup> It was only a commonplace floating term of the period that Buddhist *Vinaya* (discipline, organization, government) literature of the fourth century B. C. adopted as the name of an ecclesiastical polity.

But the secular significance of the term continued to prevail as current as ever. For, about the same time the school of politics associated with the name of Kautilya<sup>2</sup> described all corporate bodies by Pāṇini's term. In the Kautilyan category there were at least two classes of *saṃgha*. One class consisted of those who "lived by the science of economics" (*vārtā-śāstropa-jīvinah*) i. e., were engaged in farming, industry, commerce or banking. To the other class belonged those with whom the

<sup>1</sup> Fick's *Die Soziale Gliederung im nordöstlichen Indien zu Buddha's Zeit*, pp. 172—183 (chapter on *Die Gilden der Kaufleute und Handwerker*).

<sup>2</sup> *Artha-śāstra*, Bk XI, ch. I.

"epithet of *rājā* or King was a source of social existence", i. e., who were rulers by profession. In Kautilya's days, therefore, the ordinary *śreṇī* or gild was as good a *saṃgha* as the republic or non-monarchical body of people among whom "every person is a *rājā*".

Thus during the period that closed with Alexander's failure in India and Chandragupta Maurya's expulsion of Hellenistic Greeks from Afghanistan Hindus were used to at least six classes of public association, viz. the *pūga*, the *vrāta*, the *āyūḍha-jīvi*, the *śreṇī*, the *rājā*, and the *vihāra* (monastery or church). While the first four would have been usually known by their special names, the common term *saṃgha* would have denoted the republics of the Lichchhavis, Vrijjikas and others as well as the ecclesiastical organization of Buddhist monks.

#### (b) *Samūha* ("group-person").

In the later literature of political institutions the term *saṃgha* seems to have dropped out of general use. The most "generic" term for *polis* with the authors of the *smṛiti-śāstras*, at any rate, is *saṃūha*. In the fourth century A. C. Yājñavalkya<sup>1</sup> used it generically for any corporation. *Samūhas* were known to be divided into various classes differing from one another according to the nature of objects for which the association was instituted or the kind of persons organizing themselves into a *polis*. One of these was the *śreṇī*, i. e. gild, a second was the *naigama* (also *nigama*) or body of traders (the "gild merchant"), and a third was the *pāṣaṇḍi*, or group of socio-religious heretics and dissenters, e. g., Buddhists, Jains and other denominations; and *gaṇa* (town) was the fourth.

The use of *saṃūha* as a "genus" is to be noticed in Mitra Miśra's *Vīra-mitrodaya*,<sup>2</sup> a commentary on Yājñavalkya. For according to him the *pūga* is a particular class of *saṃūha*. It was made up of those who "lived at the same place", but belonged to different social orders, the so-called castes, and followed different professions. It was thus a territorial concept, the term for a village or town, having the same connotation as in the grammar of Pāṇini. In Vijnāneśvara,<sup>3</sup> also, another commentator of Yājñavalkya, *saṃūha* is generic, for he defines *gaṇa* to be a division of *saṃūha* and considers *grāma* (village) and other settled areas as belonging to this species. The same use of *saṃūha* is to be seen in Kātyāyana,<sup>4</sup> a jurist cited by Mitra Miśra.

The milieu that produced the *dharma* or *smṛiti śāstras* (law-books) was therefore one in which at least four or five institutions, the *śreṇī*,

<sup>1</sup> II, 192.

<sup>2</sup> <sup>3</sup> <sup>4</sup> Majumdar, 17, 58; Mookerji's *Local*, 31.



the *naigama*, the *pāṣaṇḍi*, the *gaṇa* or the *pūga* were centres of public life.<sup>1</sup> The common name for all of these bodies was *samūha*.

(c) *Gaṇa* (*municipium* and republic).

But it would appear that people were using some of these terms interchangeably. The same institution was being described by different names, and the same name was being given to different institutions. We have just noticed that Vijnāneśvara uses *gaṇa* where Mitra Miśra employs *pūga* to denote the identical "group-person". Both commentators were right because their common authority Yājñavalkya<sup>2</sup> himself was responsible for the confusion, as he had used *gaṇa* in the sense of a town-corporation. Nārada<sup>3</sup> (450 A. C.), another jurist who preceded these scholiasts had also done the same. Indeed the same confusion is to be noticed in all writings on *smṛiti* (tradition) and *dharma* (law).<sup>4</sup> Kātyāyana similarly identifies *gaṇa*<sup>5</sup> with *pūga* when he defines it as a *samūha* of *kulas* or families.

During the early centuries of the Christian era, the term *gaṇa* appears to have been elevated one flight up in the series of "communities". From its status as the name of a *grāma* and *pura*, the *domus* and *civitas* of mediæval European jurisdictions, it came to imply also the *regnum* of a whole people, thus giving rise to another confusion in language. In the eulogies on military triumphs or other meritorious deeds inscribed by poets of the period we find the term being used to describe the association of "self-rulers", i. e., of "poly-archal" peoples organized on the principle of *sva-rāj*. Republican nationalities of the Yaudheyas, Mālavas and others are thus known as *gaṇas* in the coins<sup>6</sup> and inscriptions<sup>7</sup> of the Āndhra-Kuṣāṇ and Gupta times. The poets of the *Mahābhārata*<sup>8</sup> also described the states in which all were "equal" by the same epithet.

Neither *samūha* nor *gaṇa*<sup>9</sup> seems ever to have acquired the comprehensive connotation of *saṃgha*. But the diversity of Gierke's "group

<sup>1</sup> Jolly's *Recht*, p. 136.

<sup>2</sup> II, 8, 187—192, 361.

<sup>3</sup> Introduction, I, 7, X, 2.

<sup>4</sup> Manu III, 164, IV, 209; cf. also Śukra, IV, v, 59—62.

<sup>5</sup> *Vīramītrodaya*, p. 426; Majumdar's interpretation (p. 94) of Kātyāyana's passage is untenable; cf. Mookerji's *Local*, 30.

<sup>6</sup> Cunningham's *Coins of Ancient India*, pp. 76—79; Rapson's *Indian Coins*, p. 15; Banerji's *Prācīna Mudrā* (Ancient Coins), Ch. VI.

<sup>7</sup> Fleet's *Gupta Inscriptions*, pp. 14, 152. *Ep. Ind.* 1905—06, pp. 44—47.

<sup>8</sup> *Sānti*, Ch. CVII, 31—32.

<sup>9</sup> Note the use of *gaṇa* in Jaina literature. cf. Jacobi's *Jaina Sutras*, 113, 273, 286, 306.

Sarkar, *Political Institutions*.

persons" in Hindu public life through the ages is self-evident. The attempt on the part of grammarians, logicians, political theorists and lawyers to analyze the concept of a public body and differentiate its various species is also significant. The story of Hindu public life has therefore partially to be sought in the development of *samghas*, *samâhas* and *gaṇas*,<sup>1</sup> the different categories of what may be called the Asian *polis*.

### Section 3.

#### Organized Charities and Utilities.

As specimens of Hindu energism in group-activity let us begin with organization in social service or welfare work. In Europe the hospital was unknown until Emperor Constantine (306—337) founded it for the first time in the fourth century A. C. But in India the first hospitals both for animals and human beings were founded at least as early as the third century B. C. by Asoka the Great.<sup>2</sup> And about 400 A. C. among the institutions that drew the notice of Fa Hien,<sup>3</sup> the Chinese scholar-saint, at Pâtali-putra, the capital of the Gupta Empire, we are told of the free hospitals "founded by the respectable nobles and landowners of the country". These were resorted to by "the poor of all countries, the destitute, cripples and the diseased", and every kind of requisite help was offered gratuitously.

Similarly Hindu public life can count in its manifold experience the founding and maintenance of *pariṣats* (academies) for the prosecution of research in the arts and sciences, as well as of educational institutions of ambitious scope and encyclopaedic character. It was in the hands of scholars who graduated from such centres of learning that the administration of government was entrusted.<sup>4</sup> One such institution was the University at Nālandā in Eastern India (Bihar), founded by Emperor Narasimha-gupta Bālāditya (c 469—473). Itsing, the Chinese scholar, was an alumnus of this university for ten years (675—685) in the departments of medicine and logic. The number of residents at Nālandā exceeded 3000, was between 3500 and 5000, at that time. The lands possessed by the University comprised more than 200 villages, the gifts

<sup>1</sup> A brochure given over to the analysis of these and other new terms in indology from the constitutional and economic viewpoints is a desideratum for comparative politics.

<sup>2</sup> Rock Edict II.

<sup>3</sup> Beal's *Travels of Fa Hien and Sung Yung*, p. 107. For the political "immunities" of a village belonging to a hospital in Ceylon vide p. 75.

<sup>4</sup> Takakusu's *Itsing: Record of the Buddhist Religion*, Ch. XXXIV, p. 177.

of kings for several generations.<sup>1</sup> Itsing mentions eight halls and three hundred apartments among the buildings of the institution.<sup>2</sup>

The Nālandā corporation was a residential-teaching university like the *El Azhar* at Cairo and gave instruction, room, board, and medicine free of any cost whatsoever. Hiuen Tshang was very much impressed by its architectural magnificence. "The richly adorned towers", as we read in his Chinese biography, "and the fairy-like turrets, like pointed hill-tops are congregated together. The observatories seem to be lost in the vapors of the morning and the upper rooms tower above the clouds".<sup>3</sup> This was the institution that inspired in subsequent years the monastery-college at Horiyuji near Nara in Japan. And it is on record that the Afghan scholar Vīra-deva was elected Chancellor here in the ninth century then enjoying the patronage of Deva-pāla,<sup>4</sup> the Bengali *sārva-bhauma* of Eastern India. It is obvious that for several centuries after their establishment the Universities of Bologna, Paris and Oxford<sup>5</sup> would certainly have envied the material endowments and international reputation enjoyed by the presidents and faculties of Nālandā for about seven hundred years (c 500—1200). The long story of this university bears undoubted testimony to the continuous and cumulative organizing ability of the race in which it flourished.

A very interesting *sāhitya pariṣat* (literary academy) of southern India was the *Sangam* of the Tamils<sup>6</sup> at Madura. Early in the Christian era in this Pandyan city a body of censors formed themselves into an institution to correct the abuses of literature. The third of these *Sangams* was in existence in the second century. Forty nine critics and poets were members of this association, which thus anticipated by about fifteen hundred years the French Academy founded by Richelieu (1637) in its aim at checking the growth of literary weeds. The *Sangam* enjoyed the patronage of the state for several generations. Its influence on the people may be gathered from the fact that the celebrated Tamil classic, the *Kural* of Tiru-valluvar, received the imprimatur of the academy before king Ugra-Peruvalludhi. It is interesting to note that the author himself was not a member of the association. Similarly the two other master-pieces of the Augustan age of Tamil literature, viz., the *Epic of the Anklet*

<sup>1</sup> *Ibid*, Ch. X, p. 65.

<sup>2</sup> *Ibid*, Ch. XXXII, 154.

<sup>3</sup> Beal's *Life of Hiuen Tshang*, pp. 110—112.

<sup>4</sup> *Ind. Ant.*, 1888, pp. 308—309, 311.

<sup>5</sup> Leach's *Educational Charters and Documents* (A. C. 598—1909), pp. xxii—xxvii, 276.

<sup>6</sup> Aiyangar's *Anc. Ind.*, pp. 70, 337, 359, 360, 379—382.

and the *Jewel-Belt*, were submitted to the examination of this body of connoisseurs.

*Parišats* or academies, whether stationary or peripatetic, have indeed existed in India since time immemorial. Medicine, grammar, logic, chemistry, mathematics, political science, jurisprudence, almost every branch of learning has grown up in India through the clubbing of intellects. Cooperative researches have been the tradition of intellectual life among Hindus. As a result of these corporate investigations we know today only of "schools" or "systems" of thought, very rarely of the individuals who built them up through the ages. Most of the names in the annals of science and philosophy in India are those of masters or pioneers, and these again, are but pseudonyms associated with the patronymic saints or gods, the Prometheuses and Apollos of Hindu culture.

It is this collective or *pariśadic* origin that explains why the treatises on arts and sciences in Sanskrit literature have in general the title of *Samhitā* i. e., compilation. Mostly encyclopaedic works, as these are, they bear internal evidence of the collaboration and cumulative experience of many minds.

Individualistic ideals and ends are as a rule associated with moral, religious, and spiritual affairs in India. Yet even in this field the capacity for cooperation has been equally evident as in other spheres. Every twelve years Hindus have had a Council of Trent, so to speak, since the earliest times. These congresses of spiritual leaders, the *sanyāsins*, monks and hermits, are called *Kumbha-Melā* after the planetary conjunction (of Kumbha) which recurs periodically. The present-day survivals of these institutions are tremendous vitalizing forces; their delegates number about 75,000, and the audience millions.

Some of the inscriptions of the ancient Gujaratis throw an interesting sidelight on the Hindu legal sense and institutionalism. India's appreciation of corporate energism will be evident from the measures that General Uṣavadāta adopted to perpetuate the benefits from his charities.<sup>1</sup> This great philanthropist of the Āndhra Deccan had the terms of his endowments registered by the *nigama-sabhā* (town-corporation) of Govarahana (Nasik). And these were then inscribed on the door of the monastery. Gifts for public purposes used thus to be looked after by public bodies.

<sup>1</sup> *Early Hist. Dek.*, sec. IV.

## Section 4.

**The Politics of Ecclesiastical Bodies (*Samghas*).**

As embodiments of Hindu institutional life we have to mention also the *vihāras* or monasteries of ancient and mediæval India. These were *samūhas* i. e., public bodies and were bound by definite rules and regulations as to election, quorum, voting, and business procedure. Students of European polity are aware that on various occasions in the West the church and the state have borrowed from each other the methods of internal administration. It would appear that in the Orient also common principles of organization have been followed by religious associations and secular institutions alike. The ecclesiastical bodies of Buddhist Asia should have thus to be treated as quasi-political corporations, even independently of the fact that in certain regions, e. g. in Tibet and Mongolia, as in Catholic Europe the spiritual head has claimed also temporal dominion over his flock.

The origins of all this institutionalism are of course to be sought in the publicity work and propaganda methods of Śākya the Buddha himself (B. C. 623—543). Śākya's father and brother were *rājās* or archons i. e. presidents of the Sakiya Republic in Eastern India. It was natural, therefore, that when he fled the world and founded a *Samgha* (Order) of monks, the only constitution that he could conceive for it was that with which he had been familiar at home and in his own state. And as a matter of course he made no distinction between his own ecclesiastical order, the *Samgha*, and the contemporary republican Confederacy of the Vajjian States, when called upon to enunciate the "seven conditions of the welfare for a community".

Of these seven conditions three may be regarded as directly constitutional or political. "So long, O medicants", said Śākya, "as the brethren meet together in full and frequent assemblies, — so long as they meet together in concord and rise in concord, and carry out in concord the duties of the Order, \*\*\* so long as the brethren honor and esteem and revere and support the elders of experience and long standing, and hold it a point of duty to hearken to their words, — so long may the brethren be expected not to decline but to prosper."<sup>1</sup>

In this Śākyan constitution, defining, as it did, the type as much of an ecclesiastical society as of a secular state, e. g. a clan-republic, there are emphasized, as we see, the importance of the assembly, the

<sup>1</sup> *Mahā-parinibbāna-sutta*, Ch. I, 6, in Rhys Davids' *Buddhist Suttas*, Vol. II, pp. 6—7. The subject was discussed for the first time by Jayaswal in the *Mod. Rev.* 1913.

need of unity, and the authority of age and experience. This last feature is such as was embodied in the primitive Indo-Aryan, Teutonic and Hellenic polities or is in evidence today in the Japanese *Genro* ("elder statesmen"). These and other principles of Śākya's politics have all been codified in the *Chulla-vagga* and the *Mahā-vagga*, both of which treatises may be regarded as statute-books laying down the fundamental laws and constitutions (*Vinaya*) of Asian ecclesiastical bodies.

The following is a typical picture of the method of deliberations generally observed in the Buddhist monasteries and conferences of ancient India: "Then the venerable Mahā Kassapa laid the resolution before the *Samgha*: 'Let the venerable *Samgha* hear me. If the time seems meet to the *Samgha*, let the *Samgha* appoint that these five hundred *bhikkhus* (monks) take up their residence during the rainy season at Rājagaha. \*\* This is the resolution. Let the *Samgha* hear. The *Samgha* appoints accordingly. Whosoever of the venerable ones approves thereof, let him keep silence. Whosoever approves not thereof, let him speak. The *Samgha* has appointed accordingly. Therefore is it silent. Thus do I understand.'"<sup>1</sup>

An important feature of these monastic institutions was that no business was held valid without quorum. "If an official act, O *bhikkhus*," as we read Śākya saying in the *Mahāvagga*,<sup>2</sup> "is performed unlawfully by an incomplete congregation, it is no real act and ought not be performed." Along with this caution against incomplete congregations went the injunction against "unlawful acts." In the following extract the *Mahāvagga*<sup>3</sup> mentions some of those acts that have to be ruled out as unconstitutional: "They performed unlawful acts before an incomplete congregation; they performed unlawful acts before a complete congregation; they performed seemingly lawful acts before an incomplete congregation; they performed seemingly lawful acts before a complete congregation; a single *bhikkhu* pronounced expulsion against a single one; a single *bhikkhu* pronounced expulsion against two; a single *bhikkhu* pronounced expulsion against a number of *bhikkhus*; a single *bhikkhu* pronounced expulsion against a *Samgha*". As no unlawful acts were to be permitted within the church or among the church members, Śākya definitely laid down the rule: "Therefore, O *bhikkhus*, you ought to train yourself thus: Lawful acts which are performed by complete congregations—such acts we will perform."<sup>4</sup>

<sup>1</sup> *Chulla-vagga*, XI, i, 4.

<sup>2</sup> IX, iii, 2.

<sup>3</sup> IX, ii, 1.

<sup>4</sup> *Mahāvagga*, IX, ii, 4.



A breach of this ruling appears to have been committed by the monks at Vesali in 443 B. C., about a century after the death of Śākya. They ordained, for instance, that it is permitted to a *Samgha* which is not sufficiently numerous to accomplish an ecclesiastical act by saying 'we will make the other *bhikkhus* consent when they come.' This ruling called *anumati-kappa* was challenged as illegal by the *bhikkhus* of other centres, and the case was submitted to a jury for trial. The jury decided against it.<sup>1</sup>

In order to ascertain the opinions of the members in regard to the topics discussed the ecclesiastical organizations made use of coloured *salākās* (or pins) of wood. These were the voting tickets. A *salākā-gāhaka* ("taker" or collector of pins) or teller was appointed by the association to explain the significance of the colours to the voters and then take the votes. In the *Chulla-vagga*<sup>2</sup> we find Śākya describing the ballot and other kinds of voting. "I enjoin upon you, *bhikkhus*", says he, "three ways of taking votes, \*\* the secret method, the whispering method, and the open method." The secret method of taking votes is then described. "The *bhikkhu* who is the teller of the votes is to take the voting tickets of different colors and as each *bhikkhu* comes up to him he is to say to him thus, 'This is the ticket for the man of such an opinion, this the ticket for the man of such an opinion. Take which ever you like'. When he has chosen (he is to add), 'Do not show it to anybody.'" The *Chulla-vagga* enumerates also ten cases of "invalid" voting.<sup>3</sup>

As conflict of opinions is inevitable in democratic deliberations, the rule of the majority was accepted by the *Samgha* as the regular procedure. "By that *bhikkhu*, the taker of the voting tickets", we read in the *Chulla-vagga*,<sup>4</sup> "are the votes to be collected. And according as the larger number of the *bhikkhus* shall speak, so shall the case be decided".

All this points to the highly developed institutional sense and corporate consciousness among Hindus. And these principles of *samūha* (or public associations and corporations) were not the patents of Buddhist, Jaina or any other religious bodies but were held in solution in the general socio-economic and civic life of ancient and mediæval India. These quasi-political institutions were only drawing upon and

<sup>1</sup> Poussin's "Buddhist Councils" in the *Ind. Ant.*, 1908, p. 89.

<sup>2</sup> IV, xiv, 26.

<sup>3</sup> IV, x.

<sup>4</sup> IV, xiv, 24. *Re* the principle of majority *vide infra*, p. 82.

contributing to the same stream of national experience as did the economic *śrenīs* (gilds) and the political *gaṇas* (republics) or constitutional *sabhās* and *samitis* (assemblies).<sup>1</sup>

## Section 5.

### *Śrenīs* (Gilds) of Peasants, Artisans and Merchants.

It is well known that the "chartered liberties" enjoyed by the mediæval towns, e. g., those of the Hanseatic League, have been great formative forces in the evolution of modern states in Europe. An analysis of the municipal privileges, the *liber burgus* as they were called, brings us invariably down to the basic economic factors, viz. the gild merchant and the craft organization. Probably these units were not identical with the boroughs. Nor do they seem to have exclusively represented the vital principle of borough life. But there are no grounds for doubting that these industrial and commercial nuclei were some of the chief "characteristic elements of the municipal constitution".<sup>2</sup> It was these economic fraternities that had the lion's share in the government of the greatest cities like London, Paris, Cologne, Ghent and Florence.<sup>3</sup>

The Orient was not poor in such economic centres of civic vitality in ancient and mediæval times. Students of commercial history are generally familiar with Chinese gilds.<sup>4</sup> But it is not so well known that in India as in China almost every economic function from agriculture to money-lending and banking was organized into a gild.

### 1. Archaeological Data.

Epigraphic evidences in regard to the gild of peasants are practically *nil* for the time being. Cultivators' unions have only to be inferred from the general laws on the subject of "companies". Gautama<sup>5</sup> (c 550 B. C.),

<sup>1</sup> For analogies and interactions between civil and religious societies in the West see Guizot's *History of Civilization in Europe*, Lectures V, VI, XII. Vide Möller's *History of the Christian Church*, pp. 235—242, 328, 337.

<sup>2</sup> Gross' *Gild Merchant*, Vol. I, pp. 92, 105; Article on "Gilds" in Palgrave's *Dictionary of Political Economy*, Sidgwick's *Development of European Polity*, 238, 251.

<sup>3</sup> Unwin's *Gilds and Companies of London*, p. 61.

<sup>4</sup> Macgowan's article on "Chinese Guilds, or Chambers of Commerce and Trades Unions" in the *Journal of the North China Branch of the Royal Asiatic Society*, 1886, New Series, Vol. XXI, pp. 133—192.

<sup>5</sup> XI, 21.

Manu<sup>1</sup> (c 150 A. C.), Brihaspati<sup>2</sup> (c 650), Śukra,<sup>3</sup> all writers mention the association of agriculturists in their schedule of *śreṇīs*. The association of shepherds, however, is not unknown in the inscriptions. In the eleventh century, under Rājendra Chola, the shepherds of a village in Southern India agreed to become security for one Eran Sattan, a fellow-shepherd "who had received 90 ewes of this temple in order to supply *ghī* (clarified butter) for burning one perpetual lamp". If he died, absconded, or got into prison, fetters, or chains, the fraternity bound themselves to discharge his duties.<sup>4</sup> The responsibility was thus considered to be a joint one by the members.

In regard to the gild merchant more inscriptions may be drawn upon. In Madras of the twelfth century under Vikrama Chola (1118), the hero of an historical Tamil poem, there was a traders' gild<sup>5</sup> with a membership of 500. Its activities and interests were coextensive with the South Indian Empire. In Gupta India during the fourth and fifth centuries bankers (*śreṣṭhins*), traders (*sārthavāhas*) and merchants (*kulikas*) used to close their business correspondence with clay seals. The *nigama* or corporation of these commercial interests, with headquarters probably at Pātali-putra, was "something like a modern chamber of commerce".<sup>6</sup> Such bodies working, as they did, in concert (*sambhāya*) were notorious in the fourth century B. C. owing to their attempts to "corner" the market. The problem of "profiteering" had to be tackled by the Maurya Empire especially because the union of merchants tried to raise prices so high as to yield a cent per cent profit.<sup>7</sup>

The gild merchant must have been in existence in the sixth century B. C. as Gautama's *Dharma-Sūtra* mentions it as one of the law-"making" or law-"declaring" bodies.<sup>8</sup> Still earlier, as the *Valahassa*, *Chullaka setthi*, *Supparaka* and other *Jātakas*<sup>9</sup> or Buddhist "Birth Stories" narrate, maritime and land commerce used to be undertaken on the joint stock principle by companies of "five hundred trading folk", "seven hundred

<sup>1</sup> VIII, 40.

<sup>2</sup> I, Constitution of a Court of Justice, 26.

<sup>3</sup> IV, v, lines 35—36.

<sup>4</sup> Hultzsch's *South Indian Inscriptions*, Vol. II, Pt. III, cited in Coomaraswamy's *Indian Craftsman*, p. 17.

<sup>5</sup> *Government Epigraphist's Report*, 1916, p. 121, cited in Majumdar p. 35.

<sup>6</sup> *Ann. Rep. of the Arch. Sur.*, 1903—04, p. 104.

<sup>7</sup> *Artha*, p. 403.

<sup>8</sup> *loc. cit.*

<sup>9</sup> Majumdar, pp. 32—33; Mookerji's *Local*, pp. 45—47, 76, 77.

merchants", etc. India's experience in commercial unions is therefore at least as old as China's.<sup>1</sup>

The story of Hindu craft guilds may be told with more details and greater confidence. Unions of industrial experts or workingmen's guilds were conspicuous institutions of the Gupta Empire. In 465, under Skandagupta, a guild of oil-men<sup>2</sup> at the city of Indra-pura presided over by Jivanta was entrusted with an endowment out of the interest of which a temple lamp was to be maintained. The terms of the deed stipulated that the removal of the corporation from its present headquarters would not invalidate its jurisdiction over the property. Nullification of the trust might ensue only from the dissolution of the guild (or secession of some of its members). In Kumâra-gupta's time (413—455) a guild of silk weavers<sup>3</sup> was formed at the city of Daśa-pura. They had migrated from Central Gujarat, but part of their comrades took up other pursuits, e. g. archery and fighting, astronomical studies, and asceticism, at their new place of domicile. Incidentally it appears that the change of hereditary or caste occupations was not rare in Gupta India.

Among Gujarâtis of the early Christian era under Ândhra Emperors, there were guilds of weavers, druggists (*gândhikas*), corn-dealers (*dhânyaka-śreṇīs*), and oil-manufacturers.<sup>4</sup> Like the guilds of the Gupta Empire the Ândhra guilds also discharged the functions of banks. Moneys and real estates were received by them in perpetuity as a deposit or trust fund.<sup>5</sup> For the use of this property they paid to the beneficiary named in the grants interest varying from 9 to 12 per cent. In 120 A. C. two guilds of weavers<sup>6</sup> at Govardhana (Nasik) were entrusted by General Uṣava-dâta with 2,000 and 1,000 *kârṣâpaṇas*. In the third century several other guilds of the same city,<sup>7</sup> viz. those of potters, *odayântrikas* (workers fabricating hydraulic engines or water-clocks), and oil-millers, became trustees of a permanent endowment to provide medicines for the monks of a *Samgha*. The planting of wayside trees was one of the

<sup>1</sup> Werner's *Chinese Sociology*, Table II; see the Vedic references to guilds in Mookerji's *Local*, p. 41—43.

<sup>2</sup> *Gup. Insc.*, p. 71; for the Gwalior guilds of the tenth Century *vide* p. 63.

<sup>3</sup> *Ibid*, p. 80.

<sup>4</sup> R. G. Bhandarkar's *Early Hist.*, secs. IV and VII.

<sup>5</sup> "Nasik Inscriptions" in the *Arch. Sur.*, Vol. IV, p. 102 (cited in Hopkins' *India Old and New*, p. 175).

<sup>6</sup> *Ep. Ind.*, 1905—06, pp. 82, 83.

<sup>7</sup> *Ibid*, p. 88.

objects for which a gild was similarly endowed with the income of two fields.<sup>1</sup>

Like the gild merchant the craft gild also must have been prominent in Maurya times. Kautilya's scheme of fleecing the "gold-lords" for the public treasury has reference most probably to the gild of goldsmiths.<sup>2</sup> His *Artha-sâstra* suggests, besides, that certain wards of the city should be set apart for the corporations of artisans.<sup>3</sup> And one of the functions of the Imperial superintendent of accounts was to record all about the customs, professions and transactions of the associations, whether of traders or workmen, rural or urban.<sup>4</sup>

Kautilya's idea about the establishment of gilds in the different wards of a city was but a reflex of the actual civic life of his own and previous times. For in the *Silavanaga* and other *Jâtakas*<sup>5</sup> streets (*vîthis*) are sometimes named from a particular class of artisans living in them. Even an entire village of 1,000 families was often monopolized by a single industry, e. g. smithery or timber-work.

Gilds were then prominent institutions among Hindus as early as the sixth and seventh centuries B. C.; and epigraphy traces them down to the Chola Empire. The Buddhist story books open up to us an economic India in which the various orders of manual and skilled workers were organized on the corporate basis. There were gilds of sailors, muslin-weavers, leather-workers, painters, goldsmiths, workers in war-implements, stone-carvers, and so forth.<sup>6</sup> In addition to the conventional "eighteen gilds" there must be mentioned also the unions or companies of traders and commercial men. For all subsequent periods since then, therefore, the law books could not but devote special attention to the gilds as economic institutions of the land. Gautama's *Dharma-sûtra*<sup>7</sup> was composed or compiled in the *milieu* of gilds of peasants, herdsmen, traders, moneylenders, and artisans. Gilds held a high place in the Kautilyan theory of finance as important sources of public income.<sup>8</sup> Authors of the third century A. C. e. g. those responsible for the com-

<sup>1</sup> See details of the five inscriptions in Majumdar, pp. 8—10. *Vide* the south Indian inscriptions in Mookerji's *Local*, pp. 89—99.

<sup>2</sup> p. 305. A "house of the gild" belonging to the Maurya period is described by Marshall in his article on "Excavations at Bhita" in the *Arch. Sur. Ann. Rep.* 1911—12, pp. 30, 31.

<sup>3</sup> p. 61.

<sup>4</sup> p. 69.

<sup>5</sup> Fick's *Soziale Gliederung*, 179—181; Mookerji's *Local*, 74.

<sup>6</sup> Majumdar, 4; cf. also *Râmâyana Ayodhyâ-kânda*, Ch. XIX.

<sup>7</sup> *Loc. cit.*

<sup>8</sup> p. 66.

pilation of Viṣṇu's law-book<sup>1</sup> were living in an age when the guilds of metal workers, especially goldsmiths and silversmiths, were well in evidence in social life. Not only Manu<sup>2</sup> (c 150) and Yājñavalkya<sup>3</sup> (c 350) but all jurists down to Nārada<sup>4</sup> (c 500) and Brihaspati<sup>5</sup> (c 650) had consequently to reckon guilds among the subjects of "private law". These public bodies were expressly mentioned in connection with crimes and punishments to which all individuals were liable according to the laws of the state. The violation (*vyatikrama*) of *sambids* (gild compacts or agreements) was accordingly important enough to demand special treatment along with the general law of contract.

## 2. *Samûhas* as "Group-Persons".

But not all unions, companies or associations are "corporations". How far, therefore, it may be asked, were these *śreṇis* (often identified with *gaṇas* and *pūgas*) of the Indian socio-economic system real guilds? To what extent did these *samûha* organizations come to be conceived and recognized by Hindus themselves as "artificial civic bodies", i. e. "aggregate individuals" with "natural corporate existence"? The book of Brihaspati (Ch. XVII) furnishes an answer to these queries. The juridical concept of a corporate person or one-in-the-many as pertaining to *śreṇis* is quite manifest in the particulars he lays down regarding the constitution and rights and duties of *samûhas*. The older Yājña-vaikya and his mediæval commentators also leave no doubt on the point.

Guilds were governed by boards of two, three, or five persons.<sup>6</sup> They conducted their business in a *sabhā*, i. e. soviet or public assembly. As corporate bodies they could make *samaya*<sup>7</sup> or compact with private individuals as well as among themselves, and the state had to see to it that gild compacts were enforced like all other compacts in the land.

The "power of attorney" could be conferred by them on some of their members, and these agents represented the associations in law courts or other public offices. Accordingly the funds donated by the government to a single member had to be deposited with the joint stock

<sup>1</sup> Hopkins' *India*, p. 170.

<sup>2</sup> VI, 1, 5, 219.

<sup>3</sup> II, 15, 187, 192.

<sup>4</sup> X, 5; Vide Gibelin's *Etudes sur le droit civil des Hindous*, Vol. I, pp. 299—310 (*Des Sociétés*).

<sup>5</sup> XVII, 19. Some of the guilds of Ceylon in later times are described in Coomaraswamy's *Mediæval*, pp. 55—56.

<sup>6</sup> Brihaspati, XVII, 10.

<sup>7</sup> Nārada, X, 1—2; Brihaspati, VIII, 9; XVII, 5.



of the *samûha*.<sup>1</sup> In Yājñavalkya's code anything acquired by a member of the gild while on gild business was to become common property. Eleven times the value of the acquisition was the penalty for wilful violation of this ruling.<sup>2</sup> According to Brihaspati any member who injured the joint stock might be punished with deportation.<sup>3</sup>

The agreement entered into by a gild was binding on each and all of the members. Anybody failing to perform the duties implied thereby was liable to be banished and have his property confiscated.<sup>4</sup> All expenditures were treated as common charges.<sup>5</sup> Responsibility for loans contracted by a member on behalf of the association was also common. Lastly, *śreṇis* had the "right of joint action" in relation to the state, as we have noticed in the agreement of the south Indian shepherds,<sup>6</sup> one of the privileges for which the European craft used to fight.

According to Kātyāyana, an authority later than Brihaspati, cited in Mitra Miśra's *Vīra-mitrodaya*<sup>7</sup> and Chandeśvara's *Vivāda-ratnākara*,<sup>8</sup> two commentaries on Yājñavalkya and on other jurists new members were entitled to share equally with the old the properties of the established gild. Debts of the *samûha* were likewise to be shared by them as a matter of course. Nay, the spiritual merit, as says Mitra Miśra, accruing from charities and religious services that the gild may have undertaken in the past was believed to be beneficial to persons who were elected to membership long after the deeds had been performed. The usual mode of cooption was *sarva-sammati* i. e. unanimous approval.

Nothing illustrates better the "legal fiction" of corporations as "immortal persons" than these latter-day ideas in regard to *gaṇa*, *śreṇī*, and *varga*. It is clear, therefore, that Hindu *samûhas*, whether of capitalists, working men or peasants, and trade unions or commercial fraternities had the distinctive characteristics of a homogeneous "community" with common rights and common obligations, — the "real group-persons" of Gierke and Figgis.<sup>9</sup>

<sup>1</sup> Brihaspati, XVII, 22, 24.

<sup>2</sup> II, 180.

<sup>3</sup> XVII, 15.

<sup>4</sup> *Ibid*, XVII, 13.

<sup>5</sup> *Ibid*, XVII, 24.

<sup>6</sup> *Supra*, p. 41.

<sup>7</sup> p. 432. For schools of Hindu Law see G. C. Sarkar, pp. 28—29, Jolly's *Recht*, 31—41, and Mitra, 61—69.

<sup>8</sup> p. 188 (chapter on *Sambid-vyatikrama*).

<sup>9</sup> cf. Barker's article on the "Discredited State" in the *Political Quarterly*, Feb. 1915, p. 111. The importance of this question has not been grasped by previous authors although some of them have cited the relevant passages in other contexts.

### 3. *The Politics of Economic Associations.*

We shall now analyze the constitutional, political or civic immunities and liberties enjoyed by the guilds of ancient and mediæval India. This will throw light on the amount of decentralization achieved in Hindu polity. No governmental documents are available however. The only authorities are literary.

In the first place, *śrenīs* were monopolistic organizations anxious to maintain in tact their economic autonomy. We learn from Nārada that the guilds were indeed open to more than one socio-religious group or caste.<sup>1</sup> But generally speaking, their regulations were as exclusive in spirit as the ordinances, say, of the English hatters' craft in the fourteenth century.<sup>2</sup> They sought to regulate the number of apprentices and also the hours of labor.<sup>3</sup> On festive occasions, in street processions, and at social gatherings each *śrenī* was represented by its own banners and buntings bearing on them the implements and emblems of the respective crafts.

In the second place, the *jetthaka* (alderman) and *setthi*, i. e., the heads of corporations were treated by kings as representatives of the people functionally divided as artisans, merchants and peasants. In pre-Maurya times, i. e. previous to the third quarter of the fourth century B. C., it was through their guilds that the people were summoned by the king on important occasions.<sup>4</sup> *Śrenīs* appear thus to have played an important part in the public finance. The taxes to be paid by traders and other inhabitants of the town were agreed upon by the ruler "in consultation with the heads of the guilds".<sup>5</sup>

Necessarily, therefore, in the third place, *mukhyas* i. e. heads, presidents or representatives of the corporations constituted, like councillors of the king, an important "estate" of the realm. At the coronation of kings, e. g. in the *Rāmāyaṇa*, guilds had the right to the sprinkling or anointing ritual. Sometimes guild members occupied high state offices, as we know from the *Jātakas*.<sup>6</sup> Socially, on the whole, they were "peers" of the king. As poets of the *Mahābhārata*<sup>7</sup> have declared the royal ideal of manliness, kings were ashamed to return to their homeland if they were

<sup>1</sup> Hopkins' *India*, p. 174; Mookerji's *Local*, pp. 58, 61, 62.

<sup>2</sup> Unwin, p. 89; Palgrave's *Dictionary* ("Craft guilds").

<sup>3</sup> Birdwood's *Industrial Arts of India*, pp. 137—140; Hopkins' *India*, pp. 171—174, 193—196. See Nārada's rules of apprenticeship in Mookerji's *Local*, 51, 52.

<sup>4</sup> Rhys Davids' *Buddhist India*, p. 97.

<sup>5</sup> Hopkins' *India*, p. 176.

<sup>6</sup> Fick, p. 177.

<sup>7</sup> *Vana-parva*, Ch. 248, 16.

defeated in battles. For, "what would the elders of the gilds say to me", argued the kings, "and what should I speak to them in reply?" The moral control exercised by gilds on state policies may be presumed to have been of a high order. Undisputed, therefore, was their influence on public opinion.

In the fourth place, leaving aside the fact that men following the soldier's profession were often organized on the gild principle (*śreṇī-vaḥ* or gild corps<sup>1</sup> e. g. the Kṣatriya gilds of Gujarat described by Kautilya) the ordinary industrial and commercial *śreṇīs* had great military importance as well. The chief reason of course was their power over the purse or the sinews of war.

Political theorists, therefore, considered it a part of the statecraft to pacify the gilds of one's own state and try to win over the elders of the enemy's gilds. The methods suggested in the *Mahābhārata*<sup>2</sup> are the well known ways and means of *Realpolitik*, such as were appreciated by Philip of Macedon, Machiavelli the Italian, Walpole the Englishman, and Guizot the Frenchman. These are the corrupt practices of bribery and the sowing of dissensions among the members of corporations. Or perhaps in the language of Bolshevik economics these should partially be described as the traditional tactics of capitalism which is said to be "international" enough to seek allies even among enemy bankers.

#### 4. Functional Sovereignty.

Now, *śreṇīs* had their own judicial tribunals. The craftsmen had thus the privilege of being tried by the jury of their own peers. In the matter of legal decisions, if we may take Brihaspati<sup>3</sup> as a narrator of actual facts, even court practice had to yield to the opinion of gilds. Corporations were "invested with the power to decide law suits",<sup>4</sup> and their meetings were declared to be "resorts for the passing of a sentence".<sup>5</sup> As such, gild courts may have had jurisdiction over cases affecting the community at large and not solely over their own disputes. But it is to be observed that the judicial system of the Maurya Empire for which alone we have some reliable evidence does not have a place for gilds as public tribunals.

Of equal importance was the legislative or law-making power of *śreṇīs*. The gilds "made" or "declared" their own laws and had their

<sup>1</sup> *Artha*, pp. 415, 455.

<sup>2</sup> *Śānti-parva*, Ch. CXL, 64.

<sup>3</sup> II, 26.

<sup>4</sup> Nārada, I, Legal Procedure.

<sup>5</sup> Brihaspati, I, Constitution of a Court of Justice, 26—30.

own usages binding upon them.<sup>1</sup> As a rule, the state could not institute any regulations over-riding these gild customs. We learn from Manu, Brihaspati and other codifiers of laws or customs that "rules of their own profession" were recognized by the state for cultivators or peasants and farmers, artisans such as carpenters or others, artists, money-lenders, companies of tradesmen, dancers, persons wearing the token of a religious order such as the Pāśupatas, and even robbers.<sup>2</sup> Gautama also, the earliest of the writers, observes that peasants, traders, herdsmen, money-lenders, and artisans have authority to lay down rules for their respective classes. And in the suits brought before the state judiciary in appeal from gild tribunals, the royal judges were expected to learn the facts and rules "from those who in each class had authority to speak". The king's officers were to give legal decisions "in accordance with what were declared to be the rules in the *śrenī*".<sup>3</sup>

Last but not least, the administrative *sva-rāj* or "self-determination" of *śrenīs* was practically unconditioned. They could exercise their governmental power as almost sovereign units, as *imperia in imperio*, i. e., without depending on the sanction of the state. The right of the *samūha* to punish even the *mukhya* or president is stated by Kātyāyana as well as by Mitra Miśra<sup>4</sup> who cites him while interpreting Yājñavalkya's opinion on the question. In Brihaspati's law also the gild-*sabhitā* could normally punish one of the guilty members, ostracize or even banish him, as has been pointed out above. Only, if in boycotting him the gild were "actuated by hatred" might the state "restrain" the corporation.<sup>5</sup> The ultra-democratic constitution of Chinese gilds was all but outdone by the *samūhas* of India.<sup>6</sup>

The executive, judicial and legislative autonomies<sup>7</sup> of *śrenīs*, or the *laissez faire* enjoyed by these "local" bodies, must have been considerably restricted and circumscribed by the "centralizing" exploits of successful empire-builders or "nation"-makers.<sup>8</sup> But archaeological researches have

<sup>1</sup> *Mahā, Śānti*, Ch. 54, 20.

<sup>2</sup> Brihaspati, I, Constitution of a Court of Justice, 26; *Sūkra* IV, v, lines 35—36; Manu, VIII, 40, 41; Nārada X, 2, 3.

<sup>3</sup> Gautama, XI, 21, 22.

<sup>4</sup> *Vīra-mitrodaya*, p. 448; Yājñavalkya, II, 187; Majumdar, pp. 12, 21, 22.

<sup>5</sup> Brihaspati, XVII, 18—19.

<sup>6</sup> Morse's *Gilds of China*, pp. 9, 12.

<sup>7</sup> In regard to coins issued by gilds see Banerji's *Prāchīn*, p. 18, Cunningham's *Coins*, p. 59, Mookerji's *Local*, p. 214 and Marshall's article in the *Arch. Sur. loc. cit.*

<sup>8</sup> All economic and political interpretation of Hindu gilds must be regarded as hypothetical until light is thrown on this important constitutional question. This aspect of the problem has escaped the notice of antiquarians.

not as yet unearthed any evidence as to the adverse effects, inevitable as they must have been, of the *śāsanas* (i. e. legislative enactments or statutes and ordinances) of *sārva-bhaumas* on the immunities of gild-soviets. It is apparent, however, that, on the whole, the *sva-rāj* of Hindu *śreṇis* i. e. the "functional" sovereignty of India's old economic associations was essentially an analogue if not a replica of the *liber burgus* of mediæval Europe in so far as this latter was achieved by and dependent on gilds and crafts.<sup>1</sup>

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<sup>1</sup> Goodnow's *Municipal Government*, pp. 55—61, 137; Brissaud's *History of French Public Law*, 253; Gross, Vol. I, pp. 105, 159—162; Sidgwick, p. 253; Sarkar's *Pos. Back*, Vol. II, p. 98.

## CHAPTER IV.

### The Public Law of the Hindus.

#### Section 1.

##### *Sabhās or Administrative Assemblies.*

We shall now take up the institutions of Public Law, i. e. the political institutions proper. To begin with the *sabhās* or *comitias*. These were of three grades: the rural, the municipal and the national, corresponding to the territorial distribution of governmental or administrative powers.

The assembly or *comitia* of the rural institutions was known simply as the *sabhā* or *mahā-sabhā* (great assembly) of the *grāma*<sup>1</sup> (village). In mediæval times the village association came to be described in the vernaculars as *pañchāyat*<sup>2</sup> or "government by the five" (i. e. by a body of competent men). But the term is not to be found in Vedic or classical Sanskrit literature. Nor does it appear to be used outside of northern India.

As a unit of administration the town, known as *pura*, was necessarily the nucleus of a separate institution. In its corporate capacity, i. e., as a *municipium*, the *pura*<sup>3</sup> went generally by two, or rather three, different names, — the *pūga*, the *gaṇa*, and the *nigama*. The *pūga*<sup>4</sup> was a well-known organization in the days when the Buddhist *Vinaya* literature was being compiled. Nay, Pāṇini<sup>5</sup> was familiar with it. The municipal corporation was thus well established in pre-Maurya times. And, of course, Manu,<sup>6</sup> Yājñavalkya,<sup>7</sup> the later lawyers and their commentators also lived in an age when the *pūga* was the centre and basis of an institutional activity. *Pūga* was often employed as a synonym for *gaṇa*, as we have noticed above.<sup>8</sup>

<sup>1</sup> *Vedic Index*, Vol. I, 244—247.

<sup>2</sup> Sarkar's *Folk-Element*, 21, 66—67. cf. *Pāñch Pyārā* (Five Dear Ones) of the Sikh polity.

<sup>3</sup> *Vedic Index*, Vol. I, 538—540.

<sup>4</sup> *Chulla-Vagga*, V, 5, 2; VIII, 4, 1.

<sup>5</sup> V, 3, 112.

<sup>6</sup> III, 151.

<sup>7</sup> II, 31.

<sup>8</sup> p. 33.



*Nigama* as a term for the municipality is used in the Nasik inscriptions<sup>1</sup> of General Uṣavadāta in the first century A. C. It occurs also in the Casket inscriptions<sup>2</sup> of the second century found at Bhattiprolu in Southern India. In the fourth century Jāṇavalkya<sup>3</sup> also uses the term. But it is questionable if he would have employed it to denote the same institution for which he used *pūga* and *gaṇa*. In his hands, at any rate, *nigama*, seems to be specifically applied to a much limited category, viz., the corporation of traders. In any case *sabhā* as the name of a meeting, council or assembly would stand equally for the *concilium* or *comitia* of the *pūga*, the *gaṇa*, and the *nigama*.

The conciliar element in the national, supreme, or central body of the Hindu state was known simply as the *sabhā* in Vedic<sup>4</sup> times and in the poetry of the *Rāmāyaṇa*<sup>5</sup> and the *Mahābhārata*.<sup>6</sup> In Kautilya's language it was the *mantri-sabhā* (*sabhā* of ministers) or the *mantri-pariṣat*. *Pariṣat* is like *sabhā* a generic term implying an assembly or association.

The *sabhā* in each of the three stages of political jurisdiction can be taken as a deliberative or legislative body, as an executive council or committee, and even as a judicial assembly or court of justice. Unless the technical sense is clearly indicated, and except where the functions of government have been differentiated into distinct organs, the three territorial assemblies, the *grāma-sabhā*, the *nigama-sabhā*, and the *mantri-sabhā* may be treated indifferently as *comitias* of the legislature, the executive or the judiciary (of the village, the town, and the nation respectively). Normally speaking, Hindu *sabhās* are administrative or governmental councils of an all-round comprehensive character.

## Section 2.

### The *Sva-rāj* of Rural Communes.

#### 1. Pre-Imperial Local Units.

The folk-element in the Hindu constitution is for obvious reasons as old as the *Vedas*. Vedic India was for centuries a land of numerous *svarājēs*<sup>7</sup> or self-ruled commonwealths. Plentiful therefore as a matter

<sup>1</sup> *Ep. Ind.*, 1905—1906, p. 82; Bhandarkar's *Early Hist.*, Secs. IV, VII.

<sup>2</sup> Majumdar, p. 61.

<sup>3</sup> II, 192. Nārada's use of *nigama* in X, 2 seems to be identical.

<sup>4</sup> *Vedic Index*, Vol. I, 426, 427.

<sup>5</sup> *Ayodhyā-Kānda*, Ch. C, 18.

<sup>6</sup> *Sabhā*, ch. V, 30; *Śānti*, ch. LXXXIII, 6—11, 47.

<sup>7</sup> *Atharva*, XVII, I, 22, 23; *Vedic Index*, Vol. II, p. 494; Handiqui's "Word *sva-rāj* in the *Rig Veda*" in the *Mod. Rev.* for March 1919.

of course were the *sabhās*,<sup>1</sup> *samitis*, *samsads*, i. e. the *pañchāyats*, assemblies, *Versammlungen* or "soviets" of the people. All-comprehensive were the functions of such bodies, deliberative, judicial, military, and what not.

Kingship may be taken to have originated early among the Vedic institutions. But in regard to these folkmoths, which were really "direct democracies" of the people, the king's position was virtually that of a "permanent executive".

And as the whole state was conterminous with the tribe or the village, there could not arise any differentiation of functions between the central and local governments. The "nation" and the "rural commune" were convertible terms. No matter whether tribal (i. e. national) or rural (i. e. territorial), these earliest village councils of the Hindus were the counterparts or replicas of the Homeric *agoras* and the *gemots* of the Tacitean *civitas*.<sup>2</sup>

During the lifetime of Śākya the Buddha and after (c sixth century B. C.), the initiative in local civics and politics was regularly made use of by folk-India. *Santhāgāras* or mote-halls, rest-houses and reservoirs were constructed by the villagers through cooperative efforts. Self-administration extended even to the laying out of parks and the mending of thoroughfares between village and village.

This cooperation in communal politics was not however the monopoly of men. Women also were proud to be partners in works of public utility.<sup>3</sup> Such was the local government in republican India in which the *dramatis personae* of the *Jātakas* or Buddhist story-literature used to participate previous to the epoch of Maurya Imperialism (B. C. 322).

Probably the village institutions of this period were not much different from the rural communes of Vedic India. Nay, indeed, these may have been but descended from and were but continuing the traditions of those oldest units of self-rule on Indian soil.

Under Maurya, Gupta, and other imperial dynasties the government of India was extensive and complex enough to admit of a more or less rigid division between central and local functions. Institutions of rural

<sup>1</sup> *Vedic Index*, Vol. II, 426, 427, 430, 431; *Atharva*, II, 27, VII, 12, VI, 87; *Am. Pol. Sc. Rev.* for Nov. 1918, pp. 592—595, 597; Zimmer's *Altindisches Leben*, pp. 172—175; Basu's *Indo-Aryan Polity during the Period of the Rig Veda*.

<sup>2</sup> Stubbs, Vol. I, 26—30; Tacitus' *Germania*, II, 12; Vierkandt's *Staat und Gesellschaft in der Gegenwart*, p. 11; cf. the data on territorial associations in Lowie's *Primitive Society*.

<sup>3</sup> The stories may be read in the *Kulavaka* (no. 31), *Kharassara* (no. 79), *Ubhato-bhattha* (no. 139), *Gahapāti* (no. 199), *Paniya* (no. 459) and other *Jātakas*; cf. Rhys Davids' *Buddhist India*, p. 49; Majumdar, pp. 57, 176.

*sva-rāj* were conspicuous in the Western Deccan (Mahārāṣṭra and Gujarat) under the Āndhras of the early Christian era.<sup>1</sup> But on the solid basis of epigraphic evidence the best available picture we have of the constitution of *pañchāyats* (lit. government by the five, or council of five, i. e. a body of competent men), the primary units of political life, is that in regard to Southern India<sup>2</sup> and Ceylon between the ninth and the thirteenth centuries.

## 2. Local Government in Southern India.

We know of forty villages during the reign of the Chola Emperor Rāja-rāja I (985—1013) in which the villagers as a body managed their own affairs.<sup>3</sup> It was in public meetings that the business was conducted. Earlier, in Parāntaka I's time (907—948) we hear of a "full meeting of the great assembly, including young and old". Evidently there was a General Assembly for the entire village and this central *pañchāyat* seems to have been sub-divided into several committees or sub-*pañchāyats*. There was an annual committee in addition to four separate committees on gardens, tanks, gold and justice. And finally there was a committee styled *pancha-vara*. It was intended most probably for general supervision or possibly for the collection of a special tax.<sup>4</sup>

The local self-government ordinances of Chola India provided that members of the committees must be below 75 and above 30 years of age. The property qualification for *pañchāyat*-membership was twofold. First, the person must own more than a quarter *veli* (5 acres) i. e.  $1\frac{1}{4}$  acre of tax-paying land. Secondly, he must live in a house built on his own real estate.<sup>5</sup> The village assembly was thus not a commonwealth of all men, but a really exclusive institution, an oligarchy.

<sup>1</sup> *Early Hist. of the Dek.*, sec. VIII. Evidences of *smṛiti* and *nīti śāstras* have been generally avoided by the present author in the study of institutions. Majumdar's references (p. 60) to Viṣṇu III, 7, 11 and Manu VII, 115, 116 are irrelevant. The village, of course, must always have been a territorial unit of administration. But the assembly of the village folk is an altogether different phenomenon which needs a separate evidence, such for instance as can be furnished from south Indian inscriptions. His references (p. 66) to Nārada X and Brihaspati XVII are not convincing, for nobody is entitled to postulate about the constitution of a rural assembly all that is known about the gild organization.

<sup>2</sup> Aiyangar pp. 158—191; Matthai's *Village Government in British India*, pp. 25—30; V. Venkayya's "Irrigation in Southern India in Ancient Times" in the *Arch. Sur. Ann. Rep.*, 1903—04; Majumdar, pp. 67—69, 76—79, 82—84; *South Indian Inscriptions*, Vol. III, Pt. I, pp. 1—22; Mookerji's *Local*, pp. 135—142, 210.

<sup>3</sup> *Arch. Sur. Ann. Rept.*, 1904—05, pp. 130, 144, 145.

<sup>4</sup> *Madras Epigraphy*, *Ann. Rep.*, 1898—99, p. 23; 1915—1916, pp. 115, 116.

<sup>5</sup> *Ibid.*, 1909—10, p. 98; Aiyangar 169, 170, 173.

Two classes of persons were declared ineligible for membership on the committees. First are those who were members before but failed to render proper accounts. To the second class belonged those who were guilty of certain grave sins. And an important constitutional procedure excluded from membership those who had been on the committee for previous three years.

Impressive were the methods of voting and election for the constitution of the central body. "The village with its twelve streets was divided into thirty wards (the number of members is thirty). Every one who lived in these wards wrote a name on a ticket. The tickets were first arranged in separate bundles representing the thirty wards. Each bundle bore the name to which it belonged. The bundles were then collected and put into a pot and placed before the general body of inhabitants both young and old in meeting assembled. All the priests were required to be present. The oldest priest among the present then took the pot, and looking upwards so as to be seen by all people, called one of the young boys standing close by who does not know what is inside to pick out one of the bundles. The tickets in this bundle were then removed to another pot. After it had been well shuffled, the boy took one ticket out of this bundle and handed it to an officer called the arbitrator, who received it in the palm of his hand with fingers open. He read out the name, and it was then shouted out by the priests."<sup>1</sup> The village was governed in this way by popular "representatives".

Offices seem to have been strictly annual, and the officials were appointed, as we see, both by election and lot. The rotation of offices, provided for thereby, served as a school of almost universal education in public life and citizenship. The committee of supervision could thus become efficient in its control of the smaller committees.<sup>2</sup> It is interesting to observe that the female sex was not under any ban in rural civics. There was no absolute prohibition against women as such. Inscriptions furnish us with references to women members on village *sabhās*.<sup>3</sup>

### 3. The Content of Rural Democracy.

Not of a trivial order were the functions and powers of the village *sva-râjes* of mediæval India. The responsibility on the shoulders of the

<sup>1</sup> Aiyangar; Matthai; Majumdar; Mookerji's *Local*, 148—164; the long inscription found at Uttaramallur is reproduced by them all.

<sup>2</sup> Aiyangar, 173; Mookerji's *Local*, 155—156, 160. cf. "*l'amateurisme démocratique*" of Joseph-Barthélemy, *Infra*, p. 147.

<sup>3</sup> Matthai, *loc. cit.* In this connection cf. the ethnographic data bearing on woman's status in Lowie.



rural folk, peasants, shepherds, artisans, craftsmen, and priests, was great indeed. In the eleventh century, the rural communes of Ceylon<sup>1</sup> ascertained the facts of murder and robbery and sat in session thereon. They were entitled to levy fines and inflict punishment on the criminals. And they were responsible for the execution of the statutes and decrees promulgated by "His Majesty the King in Council".

The cultivators of Ceylon used to refer all questions of common interest to the local assembly of notables and elders. Especially in connection with irrigation did they feel the necessity for joint cooperative effort.<sup>2</sup> The communal administration of tanks was the normal feature of village politics. Repairs of irrigation works had to be done by all landholders each according to his share, or else they were refused water. Nobody was permitted by the *panchāyat* to irrigate fresh lands unless a surplus were available. In seasons of drought the peasants could claim only limited proportions of the diminished stream. The rural authorities determined with strict justice the rotation of watering and the order in which the cultivators would be supplied with water. Breaches of the irrigation regulations and thefts of water met with due punishment from the *sabhā*.

It can legitimately be generalized from over a dozen Chola inscriptions bearing on a Tamil village near Conjeeveram that the village *sabhās* had in their hands full responsibility for the entire administration of the rural areas.<sup>3</sup> The South Indian *panchāyats* were absolute proprietors of the village lands, with rights of ownership over newly cleared lands. They had authority to fine, in case of delinquency, the "great men of the year", i. e. the elected officials of the rural commune. They "received deposits of money and grants of land for charitable purposes, and administered the trust by a board of commissioners specially appointed for the purpose from year to year". They received all the taxes and had the right to render villages tax-free, and if necessary could grant to landholders an exemption from customary dues. Sometimes an independent corporation e. g. that of temple authorities was endowed with jurisdiction over certain lands by the ordinances of the village *sabhās*.

The *panchāyats* were also authorized to take possession of and sell the lands of persons who had failed to pay the Government dues for

<sup>1</sup> *Epigraphia Zeylanica*, Vol. I, no. 21.

<sup>2</sup> Deakin's *Irrigated India and Ceylon*, p. 243.

<sup>3</sup> Aiyangar, 163—164; Majumdar cites several new inscriptions not exploited by other writers, pp. 70—74. Note the twenty references to village assemblies serving (like guilds) as local banks (p. 73).

three years.<sup>1</sup> And of course local justice fell within the jurisdiction of these assemblies. Even in cases of murder they could sit in judgment, and what is remarkable, had the power to exercise discretion in meting out penalties. On several occasions the rural soviets of ancient Madras, finding that the murder was not culpable homicide, sentenced the defendants to simple fine instead of the usual capital punishment. And in order to carry out their decisions the village assemblymen did not have to refer the matter to the central authority represented by the royal officer.<sup>2</sup>

No attempt is being made here to give evidence in regard to the existence of "village communities"<sup>3</sup> in ancient India. The discussion as to whether and how far the lands were held in common and to what extent they were held in severalty is primarily of an economic character. This agrarian question of land-tenure is not to be confounded with the political administration of villages as the territorial divisions of a state. Communal proprietorship or no communal proprietorship, it is clear that the legislation of Ceylon and the Tamil Empire conferred immense powers of government on the inhabitants of the rural districts. The *pañchâyats* as the "representative" *sabhās* of the village people were very essential organs of Hindu public life. These were the principal agencies in and through which the masses could participate in the administration of the country.

#### 4. The Extent of Centralization.

There is a further distinction to be noted by students of constitutional history. In spite of the manifold privileges of self-determination, the rural communes of India since Maurya times must be sharply distinguished in political status from the "direct democracies" or patriarchal commonwealths of Vedic India and the smaller village or town republics of later times. For the *pañchâyats* and the like associations were no longer the full-fledged "sovereign" bodies of old, but institutions of "local government" enjoying rights and immunities only within the bounds of royal or imperial will, viz. according to the grants of charters.

<sup>1</sup> *Ibid*, 161.

<sup>2</sup> *ibid*, 168.

<sup>3</sup> Jolly's *Recht*, pp. 93—96 (*Feldgemeinschaft*). For Vedic land tenure *vide grāma* in the *Vedic Index* Vol. I, 244, 245. The alleged existence of "village communities" in all periods of Hindu history is taken for granted in Havell's *History of Aryan Rule in India*, pp. 31, 52, 69, etc. and in Mookerji's *Local*, 2, 3, 23—25, in fact, in every writing on Hindu institutions, without any evidence. See the chapter on public finance, *infra*. pp. 116, 123. *cf.* the discussions on private property in Löwicz.



The extraordinary authority which the village assemblies of Chola India possessed in regard to the distribution of rural lands was clearly defined by orders issued from the central government. Rāja-rāja<sup>1</sup> legislated from Tanjore that the land of those landholders who had not paid the taxes for three years "shall become the property of the villages and be liable to be sold by the inhabitants of those villages to the exclusion of the defaulting landholders". Now, if it was the royal will that conferred the right on the rural communes, it was also the royal officers, the *adhikārins*, superintendents or intendants that looked after the proper use of the right.

And, as a corollary, the *imperium* or autonomy of the *pañchāyats*, was legally subject to the control exercised by the imperial civil service. Not few and far between was the intervention of the supreme authorities in local politics, and hence the curtailment of village liberties. In 1230 the lands belonging to certain *drohins* (enemies of the state) in a South Indian village were sold by public auction. The initiative however was taken not by the village assembly but by the king who had sent eight officers to fix the price and conduct the affair.<sup>2</sup> In another village a new headman was appointed by the supreme government for the specific purpose of dealing with certain persons who were *rāja-drohin* (traitors to the king).<sup>3</sup> Sedition and treason appear thus to have been beyond the competency of the rural communes to handle. Even in far simpler matters the *pañchāyats* had to feel the limits of their jurisdiction as but the lowest rungs in an administrative hierarchy. It appears that on one occasion some money ear-marked for a temple was misappropriated by the village assembly. The temple authorities appealed to the king for redress. Both parties had to appear at the capital. The king's court found the assemblymen guilty and fined them. The money was eventually restored to the temple.<sup>4</sup> Besides, the inspection and auditing of *pañchāyat* accounts were normal functions of the Chola bureaucracy.<sup>5</sup>

These instances give us an insight into the amount of centralization and administrative unification achieved in Hindu India under efficient and masterful rulers. More comprehensive and far-reaching had certainly been the nationalizing consolidation brought about by the Maurya emperors, if we can depend on the financial and land measures described

<sup>1</sup> Aiyangar, 161, 162. *Vide Infra*, p. 102.

<sup>2</sup> *Mad. Ep.* 1910—11, p. 75.

<sup>3</sup> *Ibid*, 1912—13, p. 110.

<sup>4</sup> *Ibid*, 1906—07, p. 71.

<sup>5</sup> *Infra*, pp. 98—99, 112. *South Ind. Ins.* Vol. III, Pt. 1, no. 57.

in the *Artha-shāstra*.<sup>1</sup> Nay, it is difficult to believe that the *gopa* (village officer), the lowest grade member of the imperial civil service under Chandra-gupta or Asoka, left any important executive work to be administered by the rural *sabhā* through any of its committees. Too thorough and exacting were the supervision and control imposed on the *panchāyats* by the Supreme Government. The village *sva-rājes*, those primary units of self-rule, must then have been reduced, generally speaking, to an atrophied state, the moribund condition, say, of the French rural communes under the *ancien régime* of Richelieu.<sup>2</sup> To cite a modern analogue, the *de facto* initiative and responsibility of the Maurya rural assemblies were not more real than is the sham "local self-government" enjoyed by the municipalities and district boards of British India at the beck and call of the District Magistrate.<sup>3</sup> It is surprising and significant, at any rate, that Kautilya does not mention even by name these local nuclei of public life, although of course his silence does not argue their total annihilation.<sup>4</sup>

### 5. Empire vs. Village in World-Evolution.

Since the publication in 1832 of the Report of the Select Committee of the House of Commons<sup>5</sup> it has become almost a piece of sanctified idealism with foreign as well as Indian writers to wail over the disappearance of the "little republics" that are alleged to have been governing

<sup>1</sup> *Ind. Ant.*, 1905, pp. 7, 8. *Infra*, pp. 105, 121.

<sup>2</sup> Brissaud, pp. 255—257; Goodnow's *Comparative Administrative Law*, Vol. I, 162—165.

<sup>3</sup> *Report on Indian Constitutional Reforms* (Montagu-Chelmsford, 1918), pp. 11, 12, 103, 104, 154, 155, 157—161.

<sup>4</sup> Majumdar's reference (pp. 59, 63) to Kautilya (Book III, Ch. X) hardly indicates the existence of the assembly and proves the exact opposite of what he intends to demonstrate. The Kautilyan village-headman as a limb of the imperial civil service was eminently calculated, as Tocqueville would have remarked, to destroy village democracy and not conserve it. From the standpoint taken in the present treatise Mookerji's characterization of Indian rural institutions as *sui generis* (cf. *Local* pp. 5—10, 23—25) is questionable. See Gomme's *Principles of Local Government*, pp. 35—109. Indologists who are never tired of quoting Metcalfe should note Gomme's remark that in England also the "localities" have "survived all shocks, all revolutions, all changes, and their position on the map of England is as indestructible as the country itself" (pp. 39—40). The notion as to the distinctiveness of Hindu development is due to generalizations not sufficiently founded on Occidental data down to the industrial revolution. An intimate familiarity with Greek, Roman and mediaeval Europe will bring out the fact that East and West were replicas of each other. See the comparative study of "private law" in Gibelin's *Etudes*. cf. Asokawa's *Early Inst. Life of Japan*, pp. 2—3.

<sup>5</sup> Metcalfe, 1832, Vol. III, App., 84, p. 331; Romesh Chunder Dutt's *Economic History of India*, Vol. I, pp. 118, 119, 141, 206, 346—348, 359, 386—388; Mann's *Land and Labor in a Deccan Village*, pp. 150, 151; Maine's *Village Communities*, pp. 122—126; Coomaraswamy's *Mediaeval*, pp. 28—29; Birdwood's *Industrial*, 135—137; J. N. Sarkar's *Mughul Administration*, pp. 22—24, 78—80.

the so-called village-communities of India even as late as the period of the declining Maratha and Moghul Empires. In the light, however, of actual history based on epigraphy, as we have seen, the real self-sufficiency and genuine autonomy of rural *sva-rājes* must have been prominent by their absence during the ascendancy of *sārva-bhaumas* like Chandra-gupta Maurya and Kulottūnga the Chola-Chālukya (1070—1118).

Local self-government and national imperialism militate against each other, be it in southern Asia or in western Europe, be it under Marathas or under Bourbons. In so far, therefore, as the self-containedness and freedom of the village assemblies were facts of *Realpolitik* in the East or in the West, they are to be regarded as marks not so much of democratic independence or sovietic sovereignty of the people as of decay in imperial-militaristic pretensions and in centripetal activity on the part of the powers that be. The prevalence of rural liberties, whenever it may have obtained in ancient India, has to be explained more often by the temporary or occasional absence of the Hindu Louis XIV's than by the conscious application of *laissez faire* and decentralization in local politics as the well-reasoned statecraft of successful nation-makers and empire-builders. Or, perhaps, in certain cases the idyllic picture of autonomous village *pañchāyats* as a feature of old Hindu polity should have to be taken as depicting a "survival" in mediæval times of the more primitive folk-institutions of Vedic and republican India, untouched by the Samudra-guptan careers of the numerous *vijigīṣus*, Siegfrieds, or aspirants to world-dominion, and practically shunted off, like benighted Arcadias, from the main tracks of enlightenment and culture.<sup>1</sup> The precise amount of popular initiative and self-direction remains, however, to be worked up for the different epochs of Hindu polity. It is not safe as yet to generalize about all periods of Indian constitutional history in regard to the relations between national control and local democracy.<sup>2</sup>

<sup>1</sup> Traces of old rural democracy can still be detected in the administration of certain socio-religious institutions like the guilds of *gambhīrā* singers and playwrights in Bengal. Vide B. K. Sarkar's *Folk-Element in Hindu Culture* (references to *pañchāyat*, *mandala* etc.), pp. 20—22, 66—68. The socio-economic study of the village in Radhakamal Mukerjee's *Foundations of Indian Economics* (pp. 441—445) is not quite correct in the references to western economic history. And it might have appeared a little bit too romantic were it not for the fact that the possibilities of the village as a political unit even under conditions of the twentieth century science and mechanics are being demonstrated in and through the Russian *Mirs*. Cf. Asakawa's "Contributions of Feudal Japan to New Japan" in the *Journal of Race Development*, July 1912, Gomme's *Primitive Folkmoths*, pp. 20—69, *Folklore*, 353—364 and *Village Community* 290—295, Seebohm's *English Village Community*, 437—441, and Ashley's *Surveys Historic and Economic*, 92—156, Carlyle's *Med. Pol. Theory*, Vol. III, pp. 28—29, 75. Vide Lewinski's *Origin of Property*.

<sup>2</sup> Majumdar's Ch. II (esp. pp. 55—85), full as it is of long extracts from epigraphic volumes

All the same, the hypothesis can reasonably be advanced at the present stage of inquiry that India's story would but corroborate the trend of world-evolution exhibited by ancient and mediaeval Europe.

### Section 3.

#### Municipal Government.

We need not wait to catch a glimpse of the epic capitals like Ayodhyâ, almost an "ideal" city under Daśaratha as described in the *Râmâyana*,<sup>1</sup> or Indraprastha (near modern Delhi) and Dvârakâ, the seaport on the Gujarat coast, of the *Mahâbhârata*<sup>2</sup> fame. For, information is available in regard to actual life in the cities of northern and southern India from more genuinely historical sources.

#### 1. Urban Culture in Hindu India.

In Alexander's time and earlier, Taxila (to the northwest of modern Rawalpindi in the Punjab) was one of the greatest cities of Asia. The *Jâtakas* (Buddhist Birth-stories) describe it as a university town and the centre especially of *Âyurvedic* (medical) learning. Commanding as it did a strategic position in regard to the Afghan frontier it was selected as the seat of the northwestern viceroyalty of the Maurya Empire.

According to Pliny, in the first century A. C., Mâdurâ, the capital of the Pândya kingdom in the farthest south, although an inland town, was in commercial and political touch with the Roman Empire through ports on the Malabar Coast (Western). Its cultural pre-eminence was marked by the activities of the *Sangam* (Academy) of Tamil literature.

In Tamil classics of the early Christian era we have several model cities. Mâdurâ was famous for its lofty mansions and high buildings, Woraiyur for superb excellence in everything that contributes to healthy civic life, Vanji on the Malabar Coast for its commercial prosperity, and

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which evidently have not been exhausted, is in need of a thorough revision and a more critical handling from the angle of constitutional development. Altogether, the view of rural institutions set forth by the present author is fundamentally different from the conventional attitude represented by all recent writers. The prevailing fallacy arises from an incomplete comprehension of the stages of constitutional evolution in western Europe and an inadequate analysis of the relations between the local and central governments during the different periods. The attempt at interpreting ancient and mediaeval Hindu polity in terms of recent growths in Eur-America is equally unwarrantable. A scientific interpretation of the mass of facts such as are exhibited by Majumdar and Mookerji will require a special monograph which it is not sought in this volume to undertake.

<sup>1</sup> *Vâla-kânda*, Ch. V.

<sup>2</sup> *Jour. of the Am. Or. Soc.*, 1889, 174—179.

Pukar (Kâverippumpattinam) on the Coromandel Coast for its excellent natural harbor which secured safe anchorage for merchant vessels.<sup>1</sup>

In the seventh century Vâtâpi (Badami in Bijapur District) was the capital of the Châlukya Marathas. It was a city of international importance and attracted envoys from Khusru II (591—628), the Sassanian Emperor of Persia.<sup>2</sup> Some of the celebrated frescoes at Ajantâ in the Bombay Presidency were the handiwork of painters of this city.

One of the oldest cities of India is Tâmrâlipta (modern Tamluk), the seaport of Bengal. In the seventh century, in the words of Hiuen Tshang, it was situated on a bay and contained stores of rare and precious merchandise and a wealthy population. This is the port wherefrom passengers bound for China left Eastern India.

Kanauj on the Ganges in the Middle-West became the capital of Upper India first under the Vardhanas and next under the Gurjara-Pratîhâras. In the *Harṣacharita* we have a poetic picture of the city and the district from the pen of Bâṇa. Hiuen Tshang found here hundreds of institutions accommodating 10,000 scholars in Buddhist lore. The city was strongly fortified and extended for about four miles.<sup>3</sup>

Ujjayinî in Malwa is one of the most well-known Hindu cities. It was famous even in pre-Buddhistic times, and became the capital of the western prefecture under the Mauryas. For ages it continued to be a commercial half-way house between the cities of Northern India and the ports of the Bombay Coast which had maritime intercourse with Persia, Egypt, and the Greco-Roman world. It was from this city that Varâhamihira (A. C. 505), the astronomer of Gupta India, reckoned the longitudes of the earth.<sup>4</sup>

In Subandhu's romance, *Vâsavadattâ* (sixth century), we have a picture of Pâtali-putra (near modern Bankipore in Bihar). It may be taken for a poet's account for the closing days of the Guptas. We can wring out the solid fact, however, that the white-washed houses of the city were adorned with well-carved statues.<sup>5</sup> In Vardhana times it was only a second city of the northern empire. From the Pâla inscriptions we can to a certain extent reconstruct the military glories of Pâtali-putra

<sup>1</sup> Ayyar's *Town-planning in Ancient Deccan*, p. 16.

<sup>2</sup> Griffiths' *Paintings in the Buddhist Cave Temples of Ajanta*, Vol. I, p. 23, Plate V.

<sup>3</sup> pp. 81, 82; Smith's article on "The History of the City of Kanauj and of King Yasovarman" in the *Journal of the Royal Asiatic Society*, 1908, pp. 769, 771, 774, 782, 790.

<sup>4</sup> A romantic account of the city is furnished by Bâṇa in the *Kâdambari* (Cowell's transl.), pp. 210—214.

<sup>5</sup> pp. 75—76.



during its last epoch of political importance, namely under the Bengali emperors.

In Pāla times the colossal boats of war on the Ganges at Pātaliputra looked, as it were, like a range of mountains. So many in number were the dark huge elephants that the sun's rays seemed to be shut out by an extensive screen of clouds. The skies used to remain always dusky through the volume of dusts raised by the hoofs of countless horse with which the allied powers of northwestern India presented the eastern *sārva-bhauma* as tokens of friendship. Nay, the earth sank low under the steps of the infantry which the feudatory chiefs brought along with them when they came to the capital to render homage. And from their position in the high towers of the palace, the lions of gold which the kings, defeated in battles, had to surrender from their crowns were terrific enough to scare even the hare in the moon and to cause it to think of running away from its doom.<sup>1</sup>

The democratic spirit and militarism of some of the Punjab cities are testified to by Greek and Roman writers. Pliny's *Natural History*, and the Egyptian-Greek merchant's *Periplus of the Erythraean Sea*, both of the first century A. C., as well as Ptolemy's *Geography* (140) and Cosmās' *Christian Topography* (535) furnish pictures of the material well-being and commercial enterprise of the townsfolk especially at the sea-ports, from the mouths of the Indus to those of the Ganges, including the island of Ceylon. And the Chinese scholar-pilgrims from Fa Hien (fifth century) to Itsing (seventh century) speak of the cultural attainments as well as educational and religious charities of the public-spirited citizens in the interior of India.

But in regard to methods of city government hardly any details can be gleaned from these sources. We exclude, of course, from our present consideration the republican cities of Bihar in Eastern India described in Pali Buddhist books of the pre-Maurya epoch.

An important administrative function of cities is to be read in inscriptions of the earliest times. We hear of a city council in connection with what appears to have been a second class town in the Western Deccan under the Āndhras. The institution was known as the *nigama-sabdhā*. The municipal corporation of Govardhana (Nasik) is described as being a witness to and registrar of the deed of gifts made by General Uṣavadāta (c 100 A. C.) through two gilds. The town-assembly thus became responsible for the carrying out of his instructions in regard to the charities.<sup>2</sup>

<sup>1</sup> *Ep. Ind.*, 1896—1897, pp. 251—253; Maitra's "Bengali Ideals" in the *Sāhitya* (1916).

<sup>2</sup> *Supra*, p. 36.



Among the social functions of municipalities we have to note the endowment of temples out of public property. In the tenth century the city of Gwalior in the middlewest dedicated two pieces of municipal land to two divinities. And it is interesting to observe that instead of the city fathers themselves becoming the bankers they sought the cooperation of the gilds of oil-millers and gardeners with whom their gifts were invested for the permanent provision of oil and garlands.<sup>1</sup>

## 2. Town-Planning in Tamil Territories.

Tamil literature affords us some glimpses into the wards, streets, sewers, markets, gardens, tanks, temples and public buildings of South Indian cities. In regard to Mâdurâ we know that the streets around the palace and other streets, large and small, straight and crooked, were provided with *puri-mams* (dust receptacles). Such receptacles were built of bricks and were plastered over with white lime. There was one *purimam* at either end of each street.<sup>2</sup> There was a deep ditch around the walls of the fort. Into this ditch was received all the drainage water of the city.<sup>3</sup> "Red light districts" were segregated for public women with separate parks, baths and gardens.<sup>4</sup>

At Kâveripumpattinam the foreign (Roman) merchants were housed near the sea-coast. This was intended for the facility of collecting duties from them. Customs officials sealed the goods with the "tiger stamp" of the state. The removal of goods from the docks was forbidden until the duty was paid. The city maintained light-houses on the beach.<sup>5</sup>

There is an interesting account of the system of water supply for Vanji (Karur), the capital of the Chera state on the west coast. A ditch encircled the walls of the city. By a network of *tumbu* (conduit pipes) the water of the palace, public halls and private residences was conducted into the ditch. Those who could afford the expense had separate baths specially constructed for them in such a manner that water might be filled in or let out at pleasure.<sup>6</sup>

In Tamil books the cities of Madras are generally described in extent as nine miles each way or at any rate in length. The governors of urban areas paid considerable attention to drainage. Walled cities were universal like the *polises* of Greece. Hiuen Tshang<sup>7</sup> also noticed the "wide and

<sup>1</sup> Majumdar, p. 62.

<sup>2 3 4</sup> Ayyar, pp. 42, 44, 51.

<sup>5</sup> Pillai's *Tamils Eighteen Hundred Years Ago*, pp. 16, 24, 26; *Ind. Ship.*, 135—137.

<sup>6</sup> Ayyar, p. 61.

<sup>7</sup> *Si-Yuki*, Vol. I, 73—74.

high walls" and "inner gates" of Indian cities. In his account the walls are mostly built of brick or tiles, and the towers on the walls are constructed of wood or bamboo. Walled towns and villages have been the rule since Vedic times.<sup>1</sup>

### 3. *Pâtali-putra, the Indian Rome.*

The municipality of Pâtali-putra, the Rome of the Hindus, was administered almost like a complex modern city. According to Megasthenes,<sup>2</sup> the Greek ambassador (c. B. C. 302) to the Maurya Empire, the city fathers of Pâtali-putra were thirty in number. In their collective capacity they had "charge both of their special departments, and also of matters affecting the general interest as the keeping of public buildings in proper repair, the regulation of prices, the care of markets, harbors and temples".

The municipal corporation consisted of six divisions. Each had five members on the *panchâyatic* principle. The first jurisdiction of the city government was industrial arts. The second division looked after the entertainment of foreigners. To these the city assigned lodgings and kept "watch over their modes of life" by means of those persons who were appointed to assist them. The city arranged to "escort the aliens on the way" when they left the country, or, in the event of their dying, forwarded their "property to their relatives". Foreign visitors were treated indeed as guests of the nation. They were taken care of by the city when they were sick, and buried under government supervision if they died. Census and vital statistics constituted the jurisdiction of the third board. The City regularly recorded facts as to "when and how births and deaths occur, with the view not only of levying a tax, but also in order that births and deaths among both high and low might not escape the cognizance of Government".<sup>3</sup>

The fourth board superintended trade and commerce. Its members had charge of weights and measures,<sup>4</sup> and saw to it that the products in their season were sold by public notice. No one was allowed to deal in more than one kind of commodity unless he paid a double tax. The fifth division supervised manufactured articles which they sold by public notice. The new were sold separately from the old, and there was a fine

<sup>1</sup> *Vedic Index*, Vol. I, pp. 538—540.

<sup>2</sup> Mc Crindle's *Anc. Ind.*, pp. 87, 88; Abbott's *Roman Political Institutions*, 280—281, 367—369; Fairlie's *Municipal Administration*, pp. 16—17.

<sup>3</sup> Law's *Hind. Pol.*, pp. 106—114, cf. Abbott, 192—193.

<sup>4</sup> Arnold's *Roman System of Provincial Administration*, p. 209.

for mixing the two together. The sixth class of municipal governors consisted of those who collected the tithes (i. e. the tenths) of the prices of the articles sold. Fraud in the payment of this tax was punished with death.

Heavy was the responsibility of this Indian Rome's *nāgaraka* (mayor) and city council. For Pātali-putra in the third and fourth centuries B. C. was the largest city in the world. Its territorial limits were more than four times those of Periclean Athens (c B. C. 430) or of Augustan Rome (B. C. 27—14 A. C.), the greatest cities of ancient Europe.

The story is well known how the first rude settlements of Romulus on the Palatine Hill were gradually extended until the so-called "wall of Servius" furnished the "city of the seven hills" with a circuit about five miles (c B. C. 490). Never was the area of Athens larger than this of Servian Rome. For about eight hundred years, again, the physical dimensions of Rome remained unchanged. It was in the third century A. C. that Emperor Aurelian (270—75) enlarged the city beyond its historic limits. The walls of the new city including what may be called Greater Rome measured a circuit of 18, 337 metres (about  $10\frac{1}{2}$  miles). The number of towers over the walls was then 383 and there were 16 principal gates.<sup>1</sup>

Let us now consider the size and area of Pātali-putra as seen by Megasthenes,<sup>2</sup> and the magnitude of the municipal government would be apparent at once. The city was encompassed all round by a ditch, 600 ft. in breadth and 30 cubits in depth. The ditch was meant for defence of the city as well as for receiving its sewage. The wooden wall of the metropolis was "pierced with loopholes for the discharge of arrows". It was "crowned with 570 towers and had 64 gates". In the inhabited quarters, Pātali-putra "stretched to an extreme length on each side of 80 stadia" (about 9 miles). "Its breadth was 15 stadia (about  $1\frac{3}{4}$  mile). And it was of the "shape of a parallelogram". The total circuit was therefore about  $21\frac{1}{2}$  miles, i. e. slightly above the double of that of Aurelian's Rome. Verily, Hindu burgomasters must have had Atlantean shoulders to bear on them the financial burden and civic duties of two European Romes in one Asian capital.

#### 4. *Specimens of Municipal Legislation.*

If the town governments of the viceregal capitals like Taxila, Ujjayinī, Tosali and Suvarṇa-giri and other important cities of the empire were

<sup>1</sup> Ramsay and Lancian's *Roman Antiquities*, pp. 10, 15.

<sup>2</sup> Mc Crindle's *Anc. Ind.*, pp. 66, 68.

modelled on that at Pâtali-putra, we may believe that special attention was paid by the townspeople to sanitation. The health regulations were strictly enforced. Persons committing nuisance on roads, in bathing places, near reservoirs, temples and palaces were fined one *paṇa* (25 cents).<sup>1</sup> One-eighth of a *paṇa* was the penalty for throwing dust on the road. Persons carrying carcasses of dead animals on public roads were fined three to six *paṇas*. And the highest fine known to the Mauryas, that of 3,000 *paṇas*, was inflicted on persons who carried dead bodies by other than fixed paths. Houseowners were bound to keep the gutter of their houses in such condition as to allow a free passage to gutter water.<sup>2</sup> Violation of this municipal law was likewise punished with fines. Scrupulous cleanliness of the city was thus maintained by positive law.

To protect the city against fire<sup>3</sup> the inhabitants were ordered to cook outside the house. The fire brigade was very elementary, however. The householders were expected to have five earthen pitchers filled with water in front of the house. Nobody was allowed to keep haystacks, strawmats etc hard by. And in case of fire able-bodied citizens were in duty bound to help extinguishing it under pain of fine. Such cooperation with the municipal authorities was demanded of the people in other spheres also. Citizens were expected to be on the look out as to whether a merchant had or had not paid the toll at the customs office.<sup>4</sup>

Every arrival and departure of guests had to be notified to the city police by the inhabitants. Failure was visited with a fine of three *paṇas* provided there was no thieving at night. The city kept special watch on the movements and whereabouts of hermits and ascetics. The names of spendthrifts and persons cruel in nature were entered on the municipal "black list".<sup>5</sup>

The city tried to protect the consumers by market laws both as regards weights and measures as well as prices. In regard to the sale of bony flesh it was the law that butchers must give towards compensation as much more meat as was equivalent to the weight of the bone. False balance was punished with a fine of eight times the value of the meat sold. "Profiteering" was carefully guarded against, as there was an official attempt to regulate the prices of commodities. The pious

<sup>1</sup> *Ind. Ant.*, 1905, pp. 51, 52.

<sup>2</sup> *Ibid.*, 59.

<sup>3</sup> *Ibid.*, 51—52.

<sup>4</sup> *Ibid.*, 48.

<sup>5</sup> *Ibid.*, 51.

wish was also expressed that such large profits as are ruinous to the people should be abandoned.<sup>1</sup>

The municipal register of the *nāgaraka* recorded not only the arrivals and departures of persons. It was a complete statistical gazetteer similar to the record books of the village-magistrate, the *gopa*, and the district-magistrate, the *sthānika*. The inhabitants were numbered as males and females. Their castes and professions were described. The number of quadrupeds in each household was noted down. Even the family budgets, the incomes and expenses of the citizens found a place in this comprehensive city directory.<sup>2</sup> It was on the data of all these local statistics that the national or Imperial Gazetteer of Maurya India must have been compiled by the *samāhartā* or collector-general of the empire.

#### Section 4.

#### Supreme Councils.

We have seen that in addition to what may for general purposes be described as mass-meetings of the villagers and often as "representative" assemblies of the rural folk, ordinarily known as the *pañchāyats* (or councils of the five), Hindu India was used to several other *sabhās* or councils as organs of public administration. These were the conferences of the ecclesiastical associations (*samghas*), the agricultural, industrial and commercial *samūhas*, i. e. guilds or *śrenīs*, and the municipal corporations of cities like Govardhana, Pātali-putra, Ujjayinī, Taxila and so forth. The conciliar element in Hindu polity was further embodied in another important institution. This was the Supreme Council of the king or emperor.

In regard to these royal and imperial assemblies, however, no old constitutional documents or gazetteers have yet been unearthed by archaeological exploration unless the *Artha-śāstra* of Kautilya be partially treated as such. Neither the inscriptions on stone and copper plates discovered up to date nor the stories by Greek and Chinese travellers afford anything more than tantalizing glimpses into the institutions such as may have actually existed among the people.

#### 1. The Tamil Assemblies.

During the early centuries of the Christian era there were "Five Great Assemblies" in the kingdoms of Chera, Chola and Pandya in southernmost India. The assembly of "people's representatives" safe-

<sup>1</sup> *Ibid.*, 55—56.

<sup>2</sup> *Ibid.*, 51—52.

guarded the rights and privileges of the people. The assembly of priests directed all religious ceremonies. The assembly of physicians supervised public and royal health. The assembly of astrologers fixed auspicious times for public ceremonies and predicted important events. It was thus similar to the Roman college of augurs. And the assembly of ministers attended to the administration of justice and collection and expenditure of revenue. Each of these assemblies had a separate place in the metropolis for the transaction of its business and holding its meetings.<sup>1</sup> All these assemblies were what we should call "national" councils, i. e., different from and higher than the village *panchâyats*.

It is not clear as to which, if any, of these assemblies looked after the making of laws. Legislation may be presumed to have been the work of the "people's representatives" who constituted the first among the five national bodies. But there is another point on which more light is needed. Whom did this body represent? What connection did these representatives have with the primary assemblies, the rural *sabhâs*? The *panchâyats* of the villages or the local soviets may be presumed to have sent up deputies to the capital in order to form the metropolitan assembly of the people.

In any case it is apparent that representation as a political device has to be counted in its elementary form among the institutions of Hindu public life. And this representative system, in so far as election implies representation, was not confined to the national, central or supreme assemblies. For, as we have noticed in a previous section, even the rural communes were, as a rule, constituted on the elective principle, and not all village or local assemblies were therefore "direct" democracies of the entire folk.

For the present, however, the Tamil "great assemblies" should appear to be the only specimens of "indirect" or representative polity on a national scale. In reality, details about supreme councils in other periods of Hindu politics are almost nil. But in Maurya India, as we can glean from Kautilya's *Artha-shâstra*, there were two Imperial Councils.<sup>2</sup>

## 2. The Kautilyan Councils.

The first was known simply as the *Sabhâ* or the deliberative "Council of State". It studied the "means of commencing operations" and "providing men and materials". "Distribution of place and time" was one of its functions. And it also addressed itself to the "counteracting

<sup>1</sup> Pillai's *Tamils*, pp. 108—114.

<sup>2</sup> Law's "State Council in Ancient India" in the *Mod. Rev.* for April 1917.



of disaster" and "successful accomplishment". The councillors were asked by the Emperor for their advice individually and collectively, and their opinions had to be given together with reasons.

The second was the *Mantri-pariṣat* or the executive "Council of Ministers". Its functions were fourfold: commencement of work not begun, completion of the work already begun, improvement of accomplished work, and proper execution of passed orders. Members of this body did not ordinarily take part in the deliberations of the "Council of State" but only looked after their respective charges. On emergency, however, they might be invited to join the Council of State. The advice of the majority (*bhūyisthāh*) would appear to have often been rejected by the Emperor at discretion if some other course appealed to him as more conducive to success.

The description of the councils is however given in such general terms that one wonders as to whether Kautilya was here adumbrating a theory or giving an account of the actual institutions of public law.

In the theory<sup>1</sup> of the constitution as expressed in the *Mahābhārata*, *Kāmandakī-nīti*, *Śukra-nīti*, *Agni-Purāṇa*, and other treatises, the council is a very important estate of the realm. The councillors constitute, as Bharadvāja says, the "sole prop" of the state.<sup>2</sup> The ideal appears to have been realized to a certain extent in *Realpolitik*.

### 3. The Power of the Ministers.

In ancient Madras the orders of Rāja-rāja and Rājendra had to be approved of by the *Olai-nāyakam* (chief secretary) and another dignitary.<sup>3</sup> And it was with the approval of the viceroy and the rural *sabhās* concerned that the Chola promulgations were registered and preserved in the record office. It was in conjunction with the Council that the kings of Ceylon<sup>4</sup> conferred immunities, issued decrees, and made grants. Sometimes we find the councillors making themselves into king-makers. With the "people's approval" they elected at least one historical ruler, Harṣa-varḍhana, to kingship (A. C. 606).<sup>5</sup>

In Kashmir, as we read in the *Rāja-taraṅgiṇī*,<sup>6</sup> Pratāpāditya I was

<sup>1</sup> *Am. Pol. Sc. Rev.* for Nov. 1918, pp. 585—586. While it is possible to trace ideas of constitutional government in the political *śāstras*, it is not allowable, as Banerjea does (*Public*, 50—51), to describe the actual Maurya monarchy as "limited".

<sup>2</sup> *Artha*, Bock V, Ch. IV.

<sup>3</sup> Aiyangar's *Anc. Ind.*, 177—178.

<sup>4</sup> *Epigraphia Zeylanica*, Vol. I, nos. 9, 21; Vol. II, no. 5; *Infra*, p. 75.

<sup>5</sup> *Si-yu-ki*, Vol. I, pp. 210—211.

<sup>6</sup> Books II, verses 6, 114—116, and III, verse 528.

invited by the ministers from abroad and installed on the throne. Similarly they were instrumental in crowning one of themselves, the minister Sandhimati, as Ārya-rāja. The founder of the Karkota dynasty also, a man of humble origin, owed his coronation to the initiative of Premier Khankha (c 625).

There are, besides, several instances of the ministers remonstrating with the king against arbitrary expenditure. If Hiuen Tshang's stories are to be relied on, Asoka the Great's financial extravagance was greatly curbed by his minister Rādhā-gupta.<sup>1</sup> A councillor likewise prevented Vikramāditya of Srāvasti from indulging in ultra-philanthropic schemes. His arguments<sup>2</sup> were thoroughly modern. "Your Majesty", as the member of the council is said to have pointed out, "indeed will get credit for charity, but your minister will lose the respect of all \*\*\* and then fresh imposts will have to be laid \*\*\* and then the voice of complaint will be heard." The power of the council is likewise evident in an event of the second century A. C. It was out of his private purse that Rudradāmana, a satrap of the Kuṣāṇ Empire, was compelled to repair the Sudarśana Lake at Girnar (in Kathiawar, close to the Arabian Sea) because of the Council's opposition to the project.<sup>3</sup>

As indicated above, the *Sabhā* or *Pariṣat* as a supreme council of the state is well known in the *Rāmāyaṇa*, the *Mahābhārata* and the *nīti-śāstras* (literature on polity).<sup>4</sup> But as yet positive knowledge about the institution exhausts itself merely in stray references to a few premiers, financiers or minister-generals of actual history.

#### 4. Bourbonism in the East and the West.

Apparently the supreme councils of Hindu polity, although "permanent" bodies, did not for all practical purposes rise above the pretensions and powers of the Frankish *Champs de Mars* and *Champs de Mai*, or the *officium palatinum* of the Visigoths and the Council of Toledo in Spain.<sup>5</sup> The *Sabhā* of Hindu monarchies could not thus be anything more than a privileged oligarchy. And evolutionally speaking, it came

<sup>1</sup> Hiuen Tshang, Book VIII.

<sup>2</sup> *Si-Yu-ki*, Vol. I, p. 106, 107.

<sup>3</sup> *Ep. Ind.*, 1905—1906, p. 49.

<sup>4</sup> *Mahābhārata* (*Sabhā*, V, 30; *Śānti*, LXXXIII, 47), *Rāmāyaṇa* (*Ayodhyā*, C, 18), *Satapatha Brāhmaṇa*, II, 3, 2, 3; V, 3, 1, 10. *Atharva Veda*, V, 31, 6, VII, 12, 1, 2; *Rig Veda*, VI, 28, 6, VIII, 4, 9; *J. A. O. S.*, Vol. XIII, pp. 148—151; *Śukra*, II, lines 23, 105—109, 110—113, 141—143, 145—148 (number of councillors), 220—224, 232—233 (board of three members for each department of state) etc.

<sup>5</sup> Guizot's *History of Representative Government*, Lect. XX, XXVI.

to discharge the functions of the democratic *agora* of the Vedic *civitas* in much the same manner as the council of the *witan* in the early English constitution inherited, as a close exclusive body, the status of the ancient Teutonic folk-moot.

The expansion of the state in area and population was responsible both in Asia and Europe, first, for the strengthening of the monarchy, and secondly, for the gradual dwindling of the old democratic assembly of the entire people or of the majority of the masses into an aristocratic corporation of the king's ministers, advisers or councillors.<sup>1</sup>

England is distinguished from the rest of Europe by a continuity of democratic evolution during the Middle Ages, at any rate from the fourteenth century on, up to the "glorious revolution" of 1688. But, for over two thousand years since the destruction of Greek liberties by the "Emathian conqueror" and the final abolition of the last Hindu republics by the Gupta "superman" the world both in the East and the West knew of only one statecraft. In one word it may be summed up in Bourbonism such as was embodied in Louis XIV's dictum, *L'état c'est moi*.<sup>2</sup>

None of the references cited by K. P. Jayaswal in his article on "The Hindu Parliament under Hindu Monarchy" in the *Modern Review* for February 1920 can be interpreted to indicate that the *jānapada* is "an institution", viz. the *sabhā* or assembly of the *janapada* (country) as he claims it to be. It is impossible on the strength of his evidences to attach any technical significance to the term. It denotes nothing more than "an inhabitant of *janapada*". The singular number, wherever it occurs in connection with the term, must not mislead anybody, for according to the grammatical aphorism (*jātau ekavachanam*) the singular simply indicates "a class".

No extraordinary value is therefore to be attributed to the passage in the Hāthigumphā inscription (165 B. C.) where the word *jānapada* occurs. The import merely is what is conventionally related of almost all Hindu kings in the epics, stories and eulogistic verses. We are to understand simply that Khāravela's work afforded satisfaction to his subjects. The passage cannot imply that "privileges" were granted to "parliament" (the "national assembly").

All such statements, whether epigraphic or literary, bespeak at best

<sup>1</sup> Jenks' *History of Politics*, 88.

<sup>2</sup> cf. Uyehara's *Political Development of Japan* (1867—1909), pp. 23—27. Vide Adams' two books on English Constitution for the "feudal contract" origin of limited monarchy. The idea that the democratic institutions of England can be traced back to old Teutonic polity seems now to be exploded.

the general democratic trend<sup>1</sup> of Hindu political speculation but do not by any means necessarily point to the popular, parliamentary or conciliar government of the realm. If we are asked to take the *jānapada* in an institutional (corporate or collective) sense wherever it occurs in relation with a king, or for that matter if we have to take every passage in Sanskrit or Prakrit bearing on a ruler's satisfactory performance of his duties towards the *prakṛiti* (people) as evidence of a legal control or even a *de facto* authority exercised by the people in administration, the entire history of Hindu India down to 1300 should have to be treated as the history of constitutional monarchy, — more radical at times perhaps than has yet been realized any where on earth. Only a postulate like this can explain how Mr. Jayaswal has been carried away from point to point until he is forced to the furthest logical consequence, viz. the sensational pronouncement at Sec. 288.

### Section 5.

#### The Making of Laws (*Śāsanas*).

##### 1. *Hindu Archives.*

The supreme government of the Chola Empire (900—1300), had a record office<sup>2</sup> as one of its bureaux of administration. It was here that every *śāsana* (or *rājñām ājnā* as it is called by Kāuṭilya, i. e., "command of the state") was registered. This department was the depositary also of all official papers having permanent value. In southern India historiography must thus have received an impetus from the public registration of royal decrees and charters.

Hsien T'sang noticed that in regard to the records of events each prefectural province of the Vardhana Empire (606—647) had its own official for preserving them in writing. The records were called *nīla-pita* (blue deposit). Good and evil events were mentioned therein, as well as calamities and fortunate occurrences.<sup>3</sup>

Further, we know from Megasthenes<sup>4</sup> that under the Mauryas (B. C. 322—185 B. C.) the city fathers of Pātali-putra regularly kept census and vital statistics of the municipal area. Such data were compiled for every territorial jurisdiction, as is borne out by the *Arthaśāstra*. The

<sup>1</sup> Vide the section on the "doctrine of resistance in Hindu thought" in the *Pos. Back.* II, pp. 43—46.

<sup>2</sup> Aiyangar's *Anc. Ind.*, pp. 175, 177, 178.

<sup>3</sup> *Si-Yu-ki*, Vol. I, p. 78.

<sup>4</sup> Mc Crindle's *Anc. Ind.*, pp. 87—88.

gazetteer of the village was compiled by the *gopa*.<sup>1</sup> The *sthānika* was responsible for the district gazetteer, as the *nāgaraka* for that of the city. The imperial gazetteer was the compilation of the *samāhartā* or collector-general from these local directories. All details from the number of males and females to the incomes and expenditures of the families were to be found in these official registers.

But, curiously enough, with the exception of certain sections in the *Artha-śāstra*<sup>2</sup> bearing on revenues and on crimes and punishments students of Hindu polity can hardly point to any collections of *śāsanas*, (ordinances and statutes) or statistical documents in ancient Indian archives. Semi-historical writings like Kalhana's *Rāja-taranginī* (Kashmir) Sandhyākara's *Rāma-charita*<sup>3</sup> (Bengal) and Bilhana's *Vikramānka-charita* (Deccan),<sup>4</sup> all of the twelfth century, which may be likened to a certain extent to the *Shu* books of China are, moreover, few and far between. Further, in the Sanskrit literature on legal institutions no treatise has yet been discovered which can be compared to the three volumes compiled during the reign of Justinian (526—565), viz., the *Digest* containing fragments of the work of lawyers like Gaius and Ulpian of the second and third centuries, the *Institutes* drawn up by his own lawyers, and the *Code* embodying the imperial "constitutions" from Hadrian (117—138) to his own times.<sup>5</sup>

## 2. The So-called Law-Books of the Hindus.

The only literature available for the present is twofold. First are the *dharma-śāstras*<sup>6</sup> associated with the names of Manu, Yājñavalkya, Brihaspati and others. Next come the *nīti-śāstras*<sup>7</sup> like the *Kāmandakī-nīti*, *Śukra-nīti* and Bhoja's *Yukti-Kalpa-taru*. For our present purpose

<sup>1</sup> *Ind. Ant.*, 1905, p. 5.

<sup>2</sup> Books III, IV. Kautilya defines *śāsana* as *rājñām ājñā*, i. e. the commands of rulers. *Vide Law's Hind. Pol.*, pp. 122—123.

<sup>3</sup> Edited by Hara-prasad Shastri (*Memoirs of the Asiatic Society of Bengal*, Vol. III, no. 1).

<sup>4</sup> Edited by Bühler for the *Bombay Sanskrit Series*.

<sup>5</sup> Mackenzie's *Studies in Roman Law*, pp. 21—27; Article on Justinian in the *Enc. Brit.*; Moyle's *Institutes of Justinian*; Taylor's *Mediaeval Mind*, Vol. II, 239—248.

<sup>6</sup> *The Sacred Books of the East Series*, Vols. II, VII, XIV, XXV, XXXIII. For a general account of the entire legal literature see Jolly's *Recht* (Ch. I. *Die Quellen*). In his articles in the *Zeit. Deut. Morg. Ges.* (1913, pp. 51—90, and 1914, pp. 345—347) he has pointed out the passages that the *Artha-* has in common with the *Dharma-* and *Kāma-śāstras*.

<sup>7</sup> Sanskrit text of Kāmandaka in the *Bibliotheca Indica Series* (English translation by M. N. Dutt); Sans. text of Śukra edited for the Madras Government (Engl. transl. for the Panini Office Series by B. K. Sarkar); Sans. text of Bhoja published by the Sanskrit Press Depository, Calcutta.

the important question is to find out how much of the laws and manners mentioned in these books constitute "law" in the Austinian sense. From this point of view it is doubtful if these so-called legal codes of India have barely even as much legitimacy or validity as the twelfth and thirteenth century compendiums of feudal customs<sup>1</sup> in Europe which were expressly modelled on Justinian's achievements. Neither the *Manu Samhitâ* nor the treatise of Sukra can legitimately be likened to the *Spiegel* ("Mirrors") of the Saxons and Swabians, the *Summa de legibus* of the Normans, and the *Consuetudines Feudorum* of the Lombards, or the "*Bracton-niti*" (*De Legibus et Consuetudinibus Angliae*) of England and the contemporary *Beaumanoir-niti* (*Coutumes de Beauvoises*) of France. The simple reason is that there is a lack of undisputed archeological proofs concerning the actual life in ancient India. Consequently it is not easy to analyze these Indian *śâstras* (*Wissenschaften*) and point out precisely which passages describe the conscious and positive "will" of the state (*râjnâm âjnâ*) or actual laws enforced by "sanction", which indicate merely the immemorial customs or "unwritten laws" of the land, and which others, finally, are nothing but the "pious wishes" of the Hindu Ciceros and Senecas, Alcuins and Jonases, Augustines and Isidores, those champions of *dharma* (i. e. justice and truth).

### 3. Epigraphic Data on Hindu Dharma (Law).

It is not surprising, therefore, that Henry Maine whose indology was confined mostly to the *śâstras* and the so-called "village communities" of a politically defunct India should have started the notion, since then held in reverence by Eur-American sociologists, that Hindu states were not *dharma*-enacting i. e. legislating *samûhas* but mere tax-exacting bodies or rather tribute-collecting corporations.<sup>2</sup> But the student of Indian epigraphy today is master of enough historical material to be able to demonstrate that for the period of over fifteen hundred years from Kautilya, the Richelieu or Bismarck of the Mauryas, to Kulottûnga, the Châlukya-Cholâ, the statesmen of India consciously instituted laws and modified and revised them at will. The "making" of laws in addition to the simple "declaration" of traditional usages must therefore be reckoned among the institutional achievements of the Hindus.

The inscriptions, although mainly donative in character, leave no doubt as to the legislative functions of the states. The fiat of official

<sup>1</sup> Carlyle's *Mediaeval Political Theory in the West*, Vol. III, pp. 35, 36, 42; Walsh's *Thirteenth, Greatest of Centuries*, p. 361.

<sup>2</sup> *Early His. of Inst.*, Lect. XIII, pp. 380—383. See *infra* (analysis of *dharma*, *danda* etc.).



proclamations is known to have often abolished old customs and introduced new usages. The new regulations were held binding within jurisdictions for which they were intended. And the state exercised its "sanction" (*danda*) or penal authority, the essence of Austinian sovereignty, in order to punish the violation of its orders and announcements.

#### 4. *Legislation in ancient Madras and Ceylon.*

It was a law of Râja-râja the Great by which in 986 the village *panchâyats* of southern India were authorized to take possession of and sell the lands of the persons who failed to pay the government dues for three years.<sup>1</sup> The abolition of tolls that had weighed heavily upon the people for generations was likewise effected by Kulot-tûnga's liberal legislative enactment in 1086.<sup>2</sup> The "positive" character of Chola legislation is manifest as much in the local government ordinances as in the cadastral and other centralizing measures.

In Ceylon the charter by which the rural commune enjoyed its liberties emanated from the state as an 'Act to confer immunities'. In the tenth century a law was passed by King Kassapa IV (963—80) "in Council" to define the privileges of a village belonging to a hospital. "Whereas it was decreed," ran the proclamation, "that boundary stones \*\*\* should be set up \*\*\* all these officers of state \*\*\* have come from the council and set up in this village a pillar." According to this bill of rights granted by royal order, enforcers of customary laws were not to enter the village. It was placed beyond the jurisdiction of headmen of districts and keepers of district records. Servants of the royal family were likewise declared inadmissible. Laborers, carts, oxen and buffaloes of the territory were not to be appropriated. It was also made into an asylum against the right of extradition. Criminals who sought refuge in the village could not be arrested.<sup>3</sup>

We have specimens of fiscal legislation also in Ceylonese inscriptions. From a desire that "succeeding kings should not again impoverish the inhabitants of Lamkâ by levying excessive imposts" Kirti Nissamka Malla (1153—86) ordained certain rates at which alone revenue should be collected. And since "those who labor with billhook in clearing thorny jungles for cultivation earn their livelihood distressfully" he granted them by the same Act perpetual exemption from taxation.<sup>4</sup>

<sup>1 2</sup> Aiyangar, pp. 161—162, 149—150. For other Chola legislation see *supra* (the section on rural communes) and *infra* (national finance).

<sup>3</sup> *Ep. Zeyl.*, Vol. II, no. 5.

<sup>4</sup> *Ibid.*, Vol. I, nos. 9, 21.

### 5. The Institutes of Asoka.

Asoka's Edicts<sup>1</sup> are well known to have been mainly moral or social in their scope. Some of these declarations can be scheduled as "sumptuary" regulations in a wide sense. Not all the proclamations of the Emperor-propagandist were, however, *rājñām ājñā* or statutes binding on the empire as a political organization. The *corpus* of Asokan rescripts had, on the whole, no greater authority on the state than are the announcements of a zealous and sincere educational missionary. Constitutionally speaking, they belong to the same category as the Educational Rescript (1890) of Mikado Mutshuito in *Meiji* Japan, or the "messages" to Congress from the Presidents of the United States.

These the people were persuaded by commissioners, magistrates and judicial officers to respect and observe. But the main body of Asoka's time to time messages was not treated as the "commands of a sovereign", the violation of which would be cognizable offence to be tried and punished by the courts of justice. All the same, a minute analysis brings out the fact that some real legislation or lawmaking is to be found in the midst of these thirty pronouncements of various sizes.

One positive law is referred to in Pillar Edict IV. (c B. C. 243). By it Asoka gave respite of three days to prisoners convicted and sentenced to death.<sup>2</sup> It was universally applicable throughout the Empire and calculated to bring about legislative centralization and uniformity. An imperial command to this effect was specially called for, because otherwise there might be a great diversity in administrative practice. And such diversity was naturally expected because of Asoka's custom of granting independence to the members of the civil service "in the award of honors and penalties" in order that they might "in security and without fear perform their duties". The Provincials' Edict likewise embodies the purport of a law by which officers in charge of the city were to "prevent unwarranted imprisonment or unwarranted torture of the citizens".<sup>3</sup>

Regulations in regard to *ahimsā* or non-slaughter i. e. sanctity of animal life appear also to have been laws in the strictest sense of the term. According to Pillar Edict V (c B. C. 243), parrots, starlings, adjutants and other animals were exempted from killing.<sup>4</sup> By Rock Edict I (c B. C. 257) Asoka disallowed even the animal sacrifices indispensable for certain ceremonial performances.<sup>5</sup> The humane legis-

<sup>1</sup> Cunningham's *Inscriptions of Asoka*.

<sup>2</sup> <sup>3</sup> Smith's *Asoka*, pp. 148—150, 136—138.

<sup>4</sup> <sup>5</sup> *Inscr. of As.*, pp. 138, 117, 118—119.

lation was thus arbitrary and intolerant enough to curtail religious liberty, or, at any rate, the freedom of practice. When, therefore, we read the touching self-complacent note in Rock Edict IV (c B. C. 257)<sup>1</sup> in which the monarch congratulates himself on the growth of non-killing and "prevention of cruelty to animate beings" in his reign, can we not believe that the ideals of a "moralist" had indeed in a considerable degree been rigidly transformed into positive law?

Similarly in the statement recorded in Pillar Edict V (c B. C. 243) that "in the period extending up to my twenty sixth coronation day I have twenty five times liberated the prisoners", one may read the gist of a law on the general pardon of convicts at coronation-anniversary.<sup>2</sup> Further, in the report about the growth in humanitarianism among Asoka's subjects we are told by this self-conscious emperor that the thing was unknown "for many hundred years past". Here then is to be detected a change of ancient customs brought about, although not exclusively perhaps, by definite commands of the state.

#### 6. Code Kautilya.

We are on more solid ground in regard to the legislation of Asoka's grandfather, Chandra-gupta,<sup>3</sup> the founder of the Maurya House. Megasthenes (B. C. 302) was an eye-witness to the law about the license-tax paid by merchants and the tithes on sales. A person convicted of bearing false witness suffered mutilation of his extremities. He who maimed any one not only suffered in return the loss of the same limb but his hand also was cut off. If he caused an artisan to lose his hand or eye, he was put to death.<sup>4</sup> The *Artha-śāstra* corroborates all these statements of the Greek. Laws of foreign trade regulating the customs duties are given in Kautilya's treatise.<sup>5</sup> It describes also the laws relating to the sale of lands, escheat, the royalty from mines, and the terms on which salt, a government monopoly, could be manufactured by private capitalists.

All violations of harbor regulations<sup>6</sup> were severely punished by the *nāvadhyakṣa* or superintendent of ships (port commissioner). The ships of pirates were doomed to destruction, as well as those bound for the

<sup>1</sup> *Inscr. of As.*, pp. 118—119.

<sup>2</sup> Smith's *Asoka*, pp. 150—152.

<sup>3</sup> Vide "The Law of Contract" in Law's *Hind. Pol.*, and Shamasastri's article on "Land and Revenue Policy" in the *Ind. Ant.*, 1905.

<sup>4</sup> *Meg.* XXVII in Mc Crindle's *Anc. Ind.*, p. 71.

<sup>5</sup> II, xxii, xxxv, xxxvi.

<sup>6</sup> *Ind. Ship.*, pp. 106, 107, 109, 111.

enemy's country. The legislation required the arrest of suspected persons, e. g. those having a perturbed appearance, those travelling without baggage, and those pretending to be suffering from disease. And the commodities of persons travelling without a pass as also of those who with a heavy load forded a river at an unusual place and time were liable to confiscation at the discretion of the harbor or port officials.

The violation of fiscal laws was generally punished with confiscation or fine. The evasion of the tax on sales was a capital offence. The punishment for false statements to census officers about age, income, expenditure, etc. might extend even to death. Offenders against sanitary and other municipal laws were punished with fines which ranged from  $\frac{1}{8}$ th of a *paṇa*, i. e. about 3 cents to 3000 *paṇas* (\$ 750).<sup>1</sup>

### 7. Despotism of Custom in Europe.

The enactment of law is the most important function of modern states. This "modernism" dates however from the promulgation of the Code Napoleon.

But in the present epoch students of political science, used as they are to daily law-making and legal reforms, are apt to forget the comparative absence of "legislation" in ancient and mediæval European polity and to ignore the long ages during which the "despotism of custom" held its sway in the West.<sup>2</sup> When, therefore, they come in touch with the institutions of the Old Orient they are easily tempted to dwell on the "primitive" character of Asia's achievements and mark them down as distinctively "oriental". They are, moreover, misled by the paucity of reliable data into taking for granted that law-making was not practised by Hindu states at all.<sup>3</sup>

But now, no epigraphist and archeologist entertain any doubts as to the complex, centralized and well-differentiated machinery of imperialism wielded by the Maurya, Gupta, Pāla, Chola and other *sārva-bhaumas* (world-emperors). One might then suggest, even on *a priori* grounds, that the extensive *Weltherrschaften* consolidated through the enterprise of men of "blood and iron" were not based exclusively on moral maxims,

<sup>1</sup> *Ind. Ant.* 1905, pp. 52, 59.

<sup>2</sup> Jenks' *Law and Politics in the Middle Ages*, Ch. II, pp. 59, 63—64; Carter's *Law, Its Origin, Growth and Function*, p. 109; Willoughby's *Government of the Modern States*, pp. 306—308.

<sup>3</sup> Maine's *Ancient Law*, Ch. II, p. 22.<sup>2</sup> On this point as on others Banerjea (pp. 137, 139) echoes the stereotyped notions. He misunderstands, besides, the term *droit administratif* in employing it with reference to Hindu *śāsanas*. For its technical significance see Dicey's *Law of the Constitution*, 326—346.

"declared" customs and unwritten laws like the tribal commonwealths of the earlier epochs of pre-Maurya and Vedic India.

The postulate about the "unchanging East" is indeed an *idola* of the nineteenth century. In any event, Asia was not more stationary than Europe, epoch for epoch. The dynamic process in India's legislative annals can be illustrated by the changes in the penal code from age to age.

#### 8. *Dynamic Character of Hindu Law.*

It is undeniable that the criminal legislation of the Mauryas<sup>1</sup> was exceedingly severe. Lengthy was the schedule of capital offenses even under Asoka the Great, benevolent preacher though he was of *ahimsā* (mercy to animal life) and propounder of the cult of *dhamma* (piety or duty). We have only to observe, however, that the capital list in the East was much too short when compared with that in the West.

There is nothing exclusively oriental in this barbarity of the Maurya laws. Europe's record in penal legislation down to very recent times has not been at all different from that of Asia. Let us ignore for the present the Roman XII Tables and the Christian Inquisition. The penal code of England during the seventeenth, eighteenth, and early nineteenth centuries was fostered in the same psychology and was as inhuman and Draconian as was that of India of the third and fourth centuries B. C. During George III's reign more than sixty offences were added to the list of capital crimes. In 1845 two hundred and fifty offences (including, of course, some of the most trivial, e. g. breaking a window and stealing two pence worth of paint) were punishable by death. The generation preceding this date witnessed 1400 executions among the English people for offences that have since then been removed from the capital list.<sup>2</sup>

In the perspective of this criminal statistics in modern Europe the India of the Gupta Vikramādityas in the fifth century A. C. must have been a veritable *utopia*. For it was a land of profoundly humane legislation, almost millennial, that Fa-Hien, the Chinese traveller, found in the Hindu Empire. To say that the administration of the criminal law appeared to him milder than in China would not mean much to the modern mind. But the important point is that fines were the ordinary punishments for almost all crimes, capital punishment being all but unknown. Amputation of the right hand was the penalty for repeated

<sup>1</sup> *Artha*, Book I, Ch. iv, II, xxxv, xxxvi.

<sup>2</sup> Article on "Capital Punishment" in the *Enc. Brit.* Lea's *His. of Inquis.*, Vol. I, pp. 234—236, 421—423, etc.; Vol. III, p. 300. For severity of the Twelve Tables and punishments in Roman law see Mackenzie, 5, 6, 351—356.

rebellion, brigandage, and so forth. But even this was resorted to very rarely; and the Chinese scholar testifies to the absence of judicial torture among Hindus.<sup>1</sup>

India's judicial sense did not thus stop at the findings of Kautilya recorded in the *Artha-śāstra*. Radical legislative changes embodied the new tendencies of the Hindu mind in subsequent ages; and the law-makers knew that they were deliberately breaking the traditional customs.

For the seventh century Hiuen Tshang gives the same evidence as Fa Hien for the fifth in regard to the absence of capital punishment. The offenders against the "power of the ruler", i. e. seditionists were imprisoned. They were "simply left to live or die and were not counted among men". This amounted to life-long social ostracism. Amputation of limbs or deportation was a penalty for the violation of what in Confucian ethics is known as the rules of domestic "propriety". For other offenses the punishment was a small payment of money. In the investigation of criminal cases there was no use of rod or staff to obtain proofs of guilt.<sup>2</sup>

Gupta and Vardhana India was thus inestimably in advance of that of the Mauryas. Nay, the modern world which has restricted capital punishment to three crimes, viz., murder, treason, and piracy (Act of British Parliament, 1861) and which liberally practises torture to extort confession is still behind the Hindu conscience of the fifth century. It was left to the Bolsheviks of Russia to revive India's ideal under the Guptas by removing capital punishment from statute books for the first time in European history.

In any case it ought to be clear to students of *Staatswissenschaft* that Hindu law (public or private) cannot be summed up in single shibboleths, whether those of Kautilya, or, as it was the custom so long, the slogans of the hoary Manu. It has changed from epoch to epoch and region to region. Besides, for the study of the legal institutions and positive laws of India the attention of scholars must have to be diverted from the so-called lawbooks<sup>3</sup> to the inscriptions and archeological documents. The fact that the rates of assessment on land which obtained in Maurya and Chola India<sup>4</sup> are entirely different from the conventional  $\frac{1}{6}$ th of the produce idealized in the *śāstras* is but one of

<sup>1</sup> Legge's *Fa Hien*, Ch. XVI, pp. 42—43.

<sup>2</sup> *Si-Yuki*, Vol. I, pp. 83—84.

<sup>3</sup> Jolly's *Recht und Sitt*e is a comprehensive study of Hindu laws and morals based on this body of literature. See Gibelin's *Etudes*, Vols I and II, for a comparison of Hindu "private law" with that of the Greeks, Romans and Teutons.

<sup>4</sup> *Infra* (National Finance), pp. 115—116, 124.



many instances of discrepancy between custom and actual law which should warn the student of *Realpolitik* against depending too much on the Manu's and the Śukraś in his institutional investigations.

## Section 6.

### The Jury System (*Ubbahika*).

Modern liberty, both political and judicial, has, theoretically at any rate, one of its greatest corner-stones in the trial by jury. It consists in the right to be judged by one's peers. As such its origins can be traced to the primitive Frankish, Teutonic and Anglo-Saxon customs. But the definite beginnings of the institution, as it obtains in Europe, are to be sought in the Civil and Criminal Juries of England in the twelfth century. To a certain extent its crude origins are furnished also by the *Vehm-gerichte* or Fehmic Courts of the thirteenth century which were developed in the German-speaking lands (viz. Westphalia) between the Rhine and the Weser.<sup>1</sup> India's political experience seems, however, to furnish the first land-marks of the system among the Indo-European races.

#### 1. *The Jury as a Hindu Institution.*

The oldest historical date for the institution of the Hindu jury is B. C. 443, a hundred years after the death of Śākya the Buddha. The occasion was brought about by the "ten heretical practices" of Vesali which were submitted for examination to a committee of eight presided over by a judge. In conformity with a rule established by Śākya, one Revata proposed to refer the matter to a jury. He chose four *bhikkhus* (monks) from the east and four from the west. This choice was formally approved by the *Samgha* (Ecclesiastical Council). There was added to the arbitrators, as regulator of the sittings, a monk named Ajitā.<sup>2</sup>

The idea of the jury is therefore at least as old as Śākya (sixth century B. C.). Evidently it was an well-established institution in the public law of his time. By advocating and adopting the system for the settlement of disputes in ecclesiastical matters this spiritual doctor gave but another evidence of his strong civic and legal sense. "If, O *bhikkhus*", said he on one occasion, "whilst the case is being inquired into by those *bhikkhus*, pointless speeches are brought forth, and the sense of any

<sup>1</sup> Holdsworth's *History of English Law*, Vol. I, 135, 145, 149, 156, 158; Walsh's *Thirteenth*, 368—369; Article on "Jury" in Lalor's *Cyclopaedia of Political Science*, Vol. II, 653—662. It is well known how List in his *National System of Political Economy* attaches an extraordinary importance to the jury system in its effects on the British political mentality.

<sup>2</sup> Poussin's "Buddhist Councils" in the *Ind. Ant.*, 1908, p. 85.

single utterance is not clear, I enjoin upon you, O *bhikkhus*, to settle the case by referring it to a jury or commission (*ubbahika*)."<sup>1</sup>

Not everybody could be elected on the jury. The *Chulla-vagga* mentions ten qualifications of the juror. It was held, among other things, that the *ubbahika* must be "competent to point out both friends and foes, to get them to understand a thing, get them to see it and recognize it, and able to pacify them". Secondly, the person to be chosen on the jury must be "clever in judging both as to the origin and as to the settlement of disputes". And thirdly, he must "understand legal questions, the origin thereof, the close thereof, and the way that leads to the close thereof".<sup>2</sup>

The method of appointing a jury was also clearly described. First, the *bhikkhu* was to be asked as to whether he was willing to undertake the office. Then some discreet and able monk was to address the *Samgha* thus: "May the venerable *Samgha* hear me \*\*\*. Let it appoint *bhikkhus* of such and such a name, and of such and such a name on a committee. This is the motion \*\*\*. The *Samgha* appoints *bhikkhus* of such and such names on a committee to settle the case."<sup>3</sup>

Traces of the jury system are to be detected in Maurya India. For, by a ruling of Kautilya in the *Artha-shāstra*, disputes concerning boundaries, fields and "miscellaneous hindrances" were to be decided by elders of the neighborhood. If they were divided in their opinions decision was to be given in favor of the opinion of the honest *vahavah*, i. e. the "many" or the majority.<sup>4</sup> There is here an anticipation of the Grand Assize of Henry II by which the claimant to disputed lands could demand the nomination of four knights of the neighborhood. The Kautilyan principle is also the same as that of the Assize of Northampton by which the property due to heirs was determined in the identical manner.

## 2. Hindu Ideas about the Jury.

The institution could not but influence the political thinking of the philosophers. Śūkra and other writers on the theory of the constitution

<sup>1</sup> *Chulla*, IV, 14, 19.

<sup>2</sup> *Ibid*, IV, 14, 19.

<sup>3</sup> *Ibid*, IV, 14, 20.

<sup>4</sup> The interpretation of *vahavah śuchayah* (vide the *Artha*, Bk. III, Ch. IX) in Jayaswal's "Introduction to Hindu Polity" in the *Mod. Rev.*, June 1913, is more accurate than that in Shamasastri's translation (pp. 214—215). For the law of the majority see also Śūkra, I, lines 732—733. Bosanquet is certainly more chauvinistic than philosophic when he naïvely makes the statement that the principle of the majority is "found for the first time as an everyday method of discussion in Greek political life" (*Phil. Theory of State*, pp. 45). cf. *Pos. Back*, II, p. 19.

have therefore naturally been the spokesmen of the philosophy that underlies the English Assizes and the Fehmic Courts of Westphalia. The principle of trial by one's peers is thus stated in the *Śukra-nīti*:<sup>1</sup> "The foresters are to be tried with the help of foresters, merchants by merchants, and soldiers by soldiers." Śukra lays down also the principle of local judges for local cases in the following terms: "In the village the cases are to be settled by persons who live with both parties, i. e. by neighbours. Those persons are the best judges of the merits of the case who live in the place where the two parties stand, and where the disputed matters and grounds of quarrel exist."<sup>2</sup>

In Hindu thought merchants<sup>3</sup> appear to have been in high demand as qualified to serve on the jury. Their strong commonsense was evidently their chief merit, or perhaps they were likely to have legal knowledge. In the *Śukra-nīti* even the audience at a court of justice is regarded as part of the jury. In regard to the man who happens to know the law we are told that "one can speak, whether appointed or not, because he speaks the voice of God who knows the law".<sup>4</sup> And we are also asked to entertain respect for the layman's commonsense view of the case. For, an extremely radical view is adumbrated by Śukra when he declares that "either one should not come to the court or should speak truthfully. That man is a sinner who keeps silence or utters falsehood".<sup>5</sup>

Altogether, then, in Śukra we have to recognize a theorist in regard to the institution of which the practical regulations had been laid down by Śākya for his Congregation. And if in the absence of evidences from inscriptions or contemporary writings it be safe to take the passages in the *Śukra-nīti* as describing the actual judiciary in certain states of India in any period of its history, the jury must be regarded as an essential feature of the system of Hindu tribunals.<sup>6</sup>

## Section 7.

### Deposition and Election of Kings.

In England James II was deposed, among other reasons, for having violated the "original compact", Richard II as "useless, incompetent,

<sup>1</sup> IV, v, lines 44, 45.

<sup>2</sup> IV, v, lines 45—47.

<sup>3</sup> IV, v, 52.

<sup>4</sup> IV, v, lines 53, 54; see also Nārada, *Legal Procedure*, III, 2.

<sup>5</sup> IV, v, 55, 56.

<sup>6</sup> Banerjea's identification of the *sabhyas* (members of a judicial assembly i. e. assessors) with the jury (*Public Adminis.*, p. 143) is not acceptable.