THE POSITION OF WOMEN IN HINDU LAW.

[THESIS APPROVED FOR THE DEGREE OF DOCTOR OF LAW IN THE UNIVERSITY OF CALCUTTA.]

BY

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PREFACE.

Of late years much stress has been deservedly laid in all branches of historical enquiry upon the original sources. The text of this thesis is generally based on original research; but I have not hesitated to avail myself of the results achieved by previous writers on Hindu law. Indeed the writer on any one branch of Hindu law is the debtor of all those who have gone before him in his particular sphere. I have noted my obligations to these writers in their appropriate positions. An idea of the sources from which my information is taken may be gathered from a reference to the index of authors and writers quoted in the text (pages xxix to xxxii). I claim as original those portions of the thesis which set forth before the reader the new light thrown by the aphorisms of the sage Jaimini on the status and proprietary position of women (pages 56—133; pp. 432—460). The aphorisms of the sage Jaimini have not hitherto been accessible in an English form. I have translated these aphorisms and the comment of Sabar Swami thereon so far as they bear on the subject of this thesis. I have attempted while dealing with the status of women in Chapter II to refute the generally accepted doctrine of the perpetual tutelage of women in Hindu law and this discussion, I believe, is original. Other portions of the thesis which are claimed as original have been indicated in the foot-notes. For instance, at page 240, I have shown that Hemadri whose authority is respected in the Bombay Presidency throws considerable light on the question of the validity of intermarriage between different sub-divisions of the same caste—a question upon which there is conflict of judicial opinion and which is involved in much difficulty.

My research has been conducted independently. My investigations appear to me to advance the study of law in the following respects :—Women's position in Hindu Jurisprudence is so unique that it justifies a separate treatment in detail. The subject of this thesis in its entirety has never before been thoroughly explored and elucidated. It is believed that the investigations in the following pages attempt to trace historically the various stages in the development of the position of women in Hindu law. In unfolding the principles of Hindu law on the subject I have also found it instructive to refer occasionally to the principles of Roman law which is regarded as the highest embodiment of the juridical reason of the ancient world.

CALCUTTA,

August 10th, 1912.

Dwarka Nath Mitter

ERRATA.

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„	13	line 10	„ „	„	"obebience"	„	"obedience."
„	19	„ 3	„ „	„	"you"	„	"one."
„	22	„ 1	„ „	„	"mentiond"	„	"mentioned."
„	58	„ 9	from bottom :	„	"theroy"	„	"theory."
„	58	„ 7	„ „	„	"clamied"	„	"claimed."
„	59	„ 1	„ top :	„	"ol"	„	"of."
„	59	„ 6	„ „	„	"Vyvahara"	„	"Vyavahara."
„	60	„ 6	„ „	„	"*etcetra*"	„	"*et cetera.*"
„	60	„ 7	„ „	„	"word *etcetra.*"	„	"words *etcetera.*"
„	60	margin :		„	"dissussion"	„	"discussion."
„	72	„ 2	from top :	„	"capaciiy"	„	"capacity."
„	72	„ 4	foot note :	„	"impractable"	„	impracticable
„	91	„ 13	from bottom :	„	"word *etcetra.*"	„	"words *etcetera.*"
„	91	„ 12	„ „	„	"lends"	„	"lend."
„	112	„ 8	„ top :	„	"restaint	„	"restraint."
„	128	„ 8	„ bottom :	„	'*Vade macum*"	„	*Vade mecum.*
„	133	„ 10	„ top :	„	"kritima"	„	"kritrima."
„	133	„ 13	„ „	„	do.	„	do.
„	137	„ 14	„ „	„	"artributes"	„	"attributes."
„	164	margin :		„	"acnaughtens"	„	"Macnaughten's.
„	173	„		„	"judical"	„	"judicial."
„	200	„		„	"non-Aryaus"	„	'non-Aryans.'
„	202	line 8	from top :	„	"Westernmarck"	„	'Westermarck.'
„	204	„ 6	„ „	„	"the"	„	'one of those.
„	214	margin :		„	"Kahatriyas"	„	"Kshatriyas."
„	216	„		„	"prohibit"	„	"prohibits."
„	217	Page heading :		„	"Apacity"	„	"capacity."
„	218	line 6	from bottom :	„	"Pthisis"	„	"Phthisis."
„	255	„ 7	„ „	„	"incompetence"	„	"incompetency."
„	265	„ 6	„ „	„	"the maiden"	„	"the betrothed of the maiden."
„	277	„ 9	„ top :		omit "*a*"		

Page 279	line 2	from top :	*for*	"seems"	*read* "seem."
„ 288		note (*b*) :	„	"5 Cal"	„ "5 Cal, 776."
„ 288		„ „	„	"Kanlasami v. Muru."	„ "Kandasami v. Muruga."
„ 289		margin :	„	"Smrities"	„ "Smritis."
„ 328		margin :	„	"persons"	„ "person."
„ 328		note (*a*) :	„	"Bhrb"	„ "Bhairab."
„ 329	line 5	from top :	„	"a husband or wife"	„ "the husband and the wife."
„ 376		margin :	„	"validlty"	„ "validity."
„ 387	line 9	from bottom :	„	"(*b*)"	„ "(*a*.)"
„ 404	„ 12	„ top :	„	"subsitence"	„ "subsistence."
„ 424		note :	„	"(*b*)."	„ "(*a*)."
„ 426	line 6	from top :	„	"*in extense*"	„ "*in extenso*."
„ 428		margin :	„	"High Court"	„ "High Courts"
„ 428		note (*a*) :	„	"Ramrulton"	„ "Ramrutton."
„ 429		Page-heading :	„	"oe"	„ "of."
„ 431		do.	„	"Re-marrige"	„ "Re-marriage."
„ 437	line 10	from bottom :	„	"that those"	„ "those that."
„ 440	„ 13	„ „		omit "and others"	
„ 446	„ 11	„ „	*for*	"texts"	„ "text."
„ 449	„ 14	„ top :	„	"inheritannce"	„ "inheritance"
„ 449		margin :	„	"possale objections"	„ "possible objections."
„ 455		„	„	"derived ; from"	„ "derived from."
„ 456		„	„	"ffounshed"	„ "flourished."
„ 477		„	„	"remarrige"	„ "remarriage."
„ 504		note (*d*) :	„	"Matammal"	„ "Muttammal."
„ 511		margin :	„	"Sir Lawrence Jenkins, C.T."	„ "Sir Lawrence Jenkins, C.J."
„ 527		Page-heading :	„	"setate"	„ "estate."
„ 541		margin :	„	"winow"	„ "widow."
„ 590	line 11	from top :	„	"representive"	„ "representative."
„ 591	„ 7	„ „	„	do.	„ do.
„ 610	„ 9	„ bottom :	„	"Vachaspati Misra"	„ "Mitra Misra."
„ 610		margin :	„	do.	„ do.
„ 611		„	„	"relognizes"	„ "recognizes."
„ 648	line 4	from bottom :	„	"is"	„ "in"
„ 655		note (*a*) :	„	"Geremonies"	„ "Ceremonies."

TABLE OF CONTENTS.

CHAPTER I.

Introductory.

CHAPTER II.

Status of Women generally.

of Jaimini's Mimansa—Translation of the Aphorisms—Conclusion from Jaimini's Aphorisms —Right of women to *Upanayana* and to study the *Vedas*—Equal right of men and women in sacrifices—Legal importance of Jaimini's conclusion—Women incompetent to study the *Vedas* in the period of the *Smritis*—No initiation for women—Reasons for the degradation in women's status suggested—Possible objection to the new theory answered—Jaimini—Right to study the *Vedas*, test of legal status—Narada—Asahaya—Caste, another test of status in Hindu Law—Origin of caste—Tendency in *Dharmasastras* to reduce women to the level of *Sudras*—Dependence of women—Original Sanskrit authorities regarding such dependence—Conclusion from an analysis of Manu's texts on the point—Yajnavalkya's view on the question — Mitakshara — Sanskara Kaustava — Nilkantha — Narada — Asahaya—Jagannatha—Mitra Misra—Dayabhaga —Vrihaspati—Conclusions from the Sanskrit texts—Dependence is only moral and not legal subjection—Commentaries also take the same view—Mitakshara—Viramitrodaya—Dayabhaga—Nilkantha—Views of European writers on the question of dependence—Sir Henry Sumner Maine takes woman's position in Hindu Law to be one of perpetual tutelage—Maine's view criticised—Analogy between Hindu and Roman law only partial—Prof. Wilson differs from Sir Henry Maine—Mr. Cowell's view—Cowell's view not reasonable—Texts inculcating respect for women—Danger of basing conclusions on isolated texts—Sir William Macnaughten—Mayne—Colebrooke—

West and Buhler—Judicial interpretation of the dependence of women—Judgment of Privy Council in *Collector of Masulipatam* vs. *Cavaly Vencata* criticised—Mitakshara gives an absolute estate to widows inheriting their husband's property—Theory of perpetual tutelage has affected personal status—View taken by the Madras High Court—Bombay—Allahabad—Capacity of women in the matter of adoption—Adoption by women in the *Vedic* period—Result of the application of Jaimini's method of interpretation to this text—Nanda Pandita's view—Dattaka Chandrika—Dattaka Nirnaya and Dattaka Tilaka—Jagannatha—Maiden's right to adopt—Analogy with Roman Law—English Law does not recognise adoption—Adoption of daughters—Nanda Pandita's view about adoption of daughters criticised—Adoption of daughters not allowed by modern Hindu Law Adoption in Roman Law—Adoption of daughters under the Roman Law compared—Capacity of a woman to give in adoption—Authority of widow to give differs in different schools—Basis of the mother's right to give in adoption—Rights of women to serve as guardian—King as *parens patria*—In Early Roman Law women could not be appointed guardians—No positive rules regarding guardianship of women in the texts—Mother preferred to father as guardian in the Mithila School—Testamentary capacity of women under Hindu law—Capacity of women to make wills in respect of *Stridhana* established by Judicial decisions—Madras—Bombay—Woman's power over *Soudayika Stridhana* confined to movables in Bombay—Woman's power of testamentary disposition over

her *Stridhana* in Bengal—Law in the Mithila School—Benares School—English Law compared —Early Roman Law—Right of woman to enter into contract under Hindu Law—Women quite free to enter into contract in the *Vedic* period—Women's capacity to do so not taken away by the *Smriti* writers—Capacity of women to contract not affected by marriage—Distinction with Roman Law—Narada—Vishnu—Yajnavalka—Jagannath's comment on Yajnavalka — Katyayana—Sec. 11 Indian Contract Act—Indian Majority Act—Sottomayor vs. De Barros—Sir Thomas Strange's view—Sir William Macnaughten's view—His view criticised—Commentators on the text of Manu regarding persons excluded from entering into contracts—Judicial decisions—Extent of woman's liability on contract—Position of Mahomedan women compared—Women as surety—Roman and Hindu law compared—Burden of proof in suits based on contracts entered into by women-Origin of *Parda*—Judicial decisions regarding burden of proof in contracts with Pardanashin women—Suggested limits of the rule of the Judicial Committee—Women not generally qualified as witnesses—Manu—Vasistha—Yajnavalka—Section 118 Indian Evidence Act—Right of women to maintenance—No systematic treatment of maintenance of females in original texts—Maintenance of mother, wife, and infant daughter, not dependent on possession of property—Texts of ancient sages regarding woman's rights to maintenance—Manu — Dayabhaga—Narada — Vrihaspati—Right to maintenance of mother—Step-mother not entitled to maintenance—Unchastity

---

CHAPTER III.

STATUS OF WIFE AND THE LAW OF MARRIAGE.

deals with marriage rituals—Verses in the *mantras* shew girls mature in mind and body were brides—Similar rule in the *Sutra* period—Jaimini's Grihya Sutras—Marriage of infant girls strictly enjoined in the *Smritis*—Condition of society in the *Vedic* period not primitive—Hymns of Rigveda betray advanced state of civilisation—No evidence of the social state of Aryans in prevedic times—Legend of Svetaketu—Legend of Svetaketu does not represent early stage of Aryan civilization—Legend of Svetaketu may refer to the social condition of early non-Aryans—Gradual adoption of Aryan customs by non-Aryans—No mention of the legend of Svetaketu in the Chhandogya Upanishad—State of promiscuity prevalent in primitive societies—Views of Bachofen, McLennan, Morgan, Lubbock and others—Contrary view of Darwin—Andrew Lang agrees with Darwin — Westernmarck considers marriage existed at the commencement of the human race—Nothing in the *Vedas* suggests state of promiscuity—Legend of Svetaketu may represent condition of non-Aryans—Or may be fiction—Indication of polyandry in the hymns to the Aswins—Other hymns shewing Aswins to be friends of the bridegroom—One of those hymns Mr. Mandalik does not regard these passages as evidence of polyandry—Mayne holds polyandry had become rare in the earliest times—Prohibition in the Aitareya Brahmana—Story of Draupadi—Comment of Kumarila on the story of Draupadi—Kumarila explains that Draupadi was a super-human being and her example is not to be followed—No trace of polyandry in the *Smritis* —Polygamy prevailed in the *Vedic* period—Girls

could choose their husbands in the *Vedic* Age—Marriage ceremony in the *Vedas*—Marriage ritual more complex in the *Sutra* period—Abhorrence of incest in *Vedic* times—Story of Yama and Yami—Marriage between certain blood relations seems to have been allowed in the *Vedic* times—Law of marriage in the *Smritis*—Eight forms of marriage in the *Smritis*—*Brahma* and *Asura* forms of marriage prevalent at the present day—*Brahma* form of marriage allowable for all classes—Origin of different forms of marriage—*Brahma* form of marriage—*Daiva* form of marriage—*Arsha* form of marriage—*Arsha* marriage not a sale—*Prajapatya* form of marriage *Asura* form of marriage—Payment of money—the test of *Asura* form of marriage—*Gandharva* form of marriage—*Gandharva* form allowed to Kshatriyas alone—Gobinda and Narayana hold that *Vedic* nuptial text need not be recited at *Gandharva* marriage—Judicial decisions hold otherwise—The *Rakshasa* form of marriage—Sec. 366 of the Indian Penal Code prohibits such marriages—The *Paisacha* form of marriage—*Paisacha*, the basest form of marriage—Customary forms of marriage—Capacity of persons to marry—Under Hindu law, man is the active agent and woman, the passive agent in the transaction of marriage—Disqualifications which render a girl unfit to be taken in marriage—Manu's rules laying down such disqualifications are not mandatory—Kalluka Bhatta and Raghunandana agree in this view—Wife of another person, not fit to be taken in marriage—Marriage of widows prohibited by some and allowed by other sages—Indian

Legislature has allowed remarriage of widows—Incapacity of girls to be taken in marriage on the ground of kinship—Manu's text laying down the qualifications of a girl fit to be married—*Sapinda* and *sagotra*—The text of Manu is the basis of the rule of prohibited degrees in marriage in Hindu Law—Raghunandan's view accepted in Bengal—Kamalakar's view accepted in other schools—Significance of the word *cha* in this text—Vyasa—Medhatithi—According to this text and Kulluka's comment thereon, *Sapinda* relationship for purposes of marriage ceases with the seventh person — Raghunandan's view — Bride groom is to avoid eight *Sapindas* reckoning from himself—Sulapani's view—The word मातृ: refers to the maternal grandfather—According to Raghunandan, *Sapinda* relation for the purposes of marriage ceases with the 7th and 5th degrees from the father and mother respectively—Raghunandan's comment on Paithinasi's text—Sulapani's comment of Paithinasi's text—Ratnakara's view on the question—Maxim of Hindu Law regarding interpretation of texts—Prohibition to marry extends to *sapindas* of *Bandhus* of father and mother—Narada's text on the subject—Who are *Bandhus* of father and mother—*Gotra* and *Prabara* explained—Rules relaxing the rigidity of prohibition of marriage within the 7th and 5th degrees from the father and mother respectively—Girls removed by three gotras may be married—Text in support of the position—Yajnavalka's text on prohibited degrees—Comment of Mitakshara on the above—Diversity of opinion among sages on the question of prohibited degrees—Method of counting prohibited

degrees in Mitakshara—The rule of the canonist followed in counting prohibited degrees—Counting upwards, only male ancestors are reckoned : counting downwards, both male and female descendants are taken into account—Reason for the rule of prohibited degrees—Montesquieu ascribes the rules of prohibited degrees to the practice of cousins living under the same roof, where they were regarded as brothers and sisters—The same reasons apply to the rule of prohibited degrees in Hindu-Law—Legal effect of marriage within the prohibited degrees—Intermarriage between different castes—Manu—Mitakshara and Dayabhaga on the point—Judicial decisions on the point—New light thrown by Hemadri—Marriage of a Hindu with a Christian woman not invalid—Marriageable age for girls—Infant marriage not peculiar to India—Manu on the point—Guardians for the purposes of marriage—Absence of the guardian's consent does not invalidate marriage—Judicial decisions—Preceptor's daughter not eligible for marriage—Incompetency of males to marry—Minority no bar—Impotent persons and eunuchs—Insane persons—Having a living wife, no incompetency in Hindu Law—Formalities attending marriage—Betrothal—Betrothal is revocable—No specific performance of betrothal—Damages the proper remedy—Unwillingness of the girl to marry no defence—Vedic marriage, a simple rite—The three principal ceremonies in marriage—Performance of what ceremonies constitutes marriage—Diverse opinions on the subject—Texts of Manu—Yajnavalkya—Narada—Raghunandan's opinion—Madana Parijata—Performance of neces-

sary ceremonies presumed—Roman Law—Effect of marriage—Co-ownership of husband and wife —Jaimini's view—Smritis and the deterioration of the wife's right—Subsequent improvement of her rights—English Law compared—Apastambha's view—According to Jaimini, the wife a co-owner not in a subordinate sense—Jimutavahan's view—Mitramisra's view opposed to Jaimini's—Judicial decisions follow Mitramisra—Wife's share on partition between her husband and his sons, and its extent—In Bengal—In Benares—In Bombay—In Madras—In Mithila—Difference between the Bengal and other schools—Wife's right to maintenance—Its basis—Views of Justice Mukerjee—No agreement evades right—The husband primarily liable and his relations in certain circumstances—Forfeiture of maintenance—Desertion of the husband—Unchastity—Texts of the Smritis —The texts, mandatory or preceptive—Views of the commentators—Unchaste wife entitled to bare maintenance—Judicial decisions in Bengal and Madras—In Bombay—Amount of maintenance—Decree for arrears of maintenance transferable—Effect of marriage—Reciprocal duties—Husband's right of chastisement—Husband the legal guardian of the wife—Restraint of the wife's liberty—Wife must reside with her husband—English Law compared—The rights of the husband capable of legal enforcement—Restitution of conjugal rights by the Courts—Cases on the point—In Calcutta—In Bombay—In Allahabad—Place of accrual of cause of action in such suits—Wife's defence in such suits—Cruelty—Features of cruelty in English Law—What constitutes cruelty in India—Dular

vs. Dwarka—In some cases, conduct short of cruelty is good defence—Text of sages on the point—Principle of humanity recognised in Hindu Law—Marriage with second wife no defence—Nor is imputation upon wife's chastity—Degradation of husband from caste—how far a good defence —Right of wife to sue for restitution of conjugal rights under Hindu law—Defences open to the husband—Renunciation of religion by wife no defence in suit by husband—No formal demand and refusal necessary before suing for restitution—Limitation Act (XV of 1877)—Sir Lawrence Jenkins's view of the question—Limitation Act (IX of 1908)—Mode of enforcement of decree for restitution of conjugal rights—Civil Procedure Code, Act V of 1908—Right of wife, to enter into contract previously dealt with — English law on the point compared—For purposes of contract wife and husband not one person—Re-marriage of woman while her first husband is alive not permitted—Wife incompetent witness for or against husband under Hindu law—Except in certain circumstances—Not so under Evidence Act—Sec 122 Indian Evidence Act (1 of 1872)—Husband could not make a gift to wife under the common law of England—Not so under Hindu law—Apastamba—Jaimini on unity of husband and wife —Effect of marriage on the capacity of husband and wife to sue each other—Katyayana—Jagannatha —English law compared—Effect of marriage on the status of husband—Marriage no bar to adoption—Husband's right to marry during the life time of the wife—Diversity of opinions as to the amount of compensation to a superseded wife—

CHAPTER IV.

STATUS OF WIDOWS.

—Power of widow to adopt—Divergence of opinion in different schools—Mithila—Bengal School —Marhatta School—Benares School—Dravida School—These different views based on different theories—Basic Theory of the Mithila School—of Bengal School—of Benares School—of the Marhatta School—Roman Law compared—Sir Lawrence Jenkins's view—Reasons for the Bombay view—Vyavahara Mayukha—Madras or Dravida School—Ramanaad Case—Berhampore Case—Motives of the widow for adoption—Its effect on the validity thereof—Guntur Case—Evidence as to motive of widow in making adoption is not relevant—Assent of *Sapindas* necessary, in what cases—Assent of nearest presumptive heirs of husband necessary—Power to adopt may be given either verbally or in writing or by will—Authority must be strictly followed—Limits of the widow's power to adopt—Bhoobunmoyee *vs.* Ramkishore, 10 M. I. A. 279—Puddo Kumari *vs.* Court of Wards, 8 Cal 302 (P. C.)—Thayammal *vs.* Venkatrama—Taracharan *vs.* Suresh Chandra—Original authorities on Hindu law silent on the point—Minority of widow no bar to her power to adopt—Not so in Bombay—Reason for the difference between Bombay and Bengal—Unchastity of the widow a bar to her exercising the right to adopt—Pollution of widow of twice born classes renders adoption invalid—Effect of adoption by a widow on her status and proprietary position—Effect of adoption by a widow on status of co-widows—Its effect where the estate vests in the adopting widow by inheritance—Conflict of authorities in Bombay on the point—Ante-

adoption agreement how far binding on adopted son—No text of Hindu law on the point—Judicial decisions thereon—Conflict of authorities in Madras on the question—Ante-adoption agreement upheld by authority of the caste—Alienations by widow before adoption of the life-interest binding on adopted son—Effect of adoption on *Stridhan*—Original authorities on widow's power to give in adoption—Capacity to give in adaption, how far a survival of *patria potestas*—Vyavahara Mayukha denies ownership over wife and children—Right of Hindu widow to maintenance—Smriti Chandrika—Mitakshara—Viramitrodaya—Obligation to maintain widow not absolute—Benares School—Moral obligation in the ancestor to maintain ripens into legal obligation in the heir—Bengal School—Judicial decisions on the point—In Bengal—In Bombay—Devisee not bound to maintain if relieved by the testator—In Madras—Comment on the decisions—Residence in her husband's house not necessary to sustain a claim for maintenance—Wife's right in this respect contrasted—No separate maintenance where property is small—Obligation to maintain extends to King—Principles on which amount of maintenance is fixed—Suit for arrears of maintenance—Maintenance how for a charge on family property—Judicial decisions—Sec. 39 of the Transfer of Property Act (IV of 1882)—Widow cannot be deprived of maintenance by will in Bengal—A husband cannot make a gift of all his property without providing for maintenance for his widow after his death—Madras decisions on the point—Bombay decisions thereon—Effect of unchastity on the widow's right to main-

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CHAPTER V.

PROPRIETARY POSITION OF WOMEN.

(Inheritance).

Mitra Misra compared—The five-fold importance of the discussion of the Vedic Text in the Viramitrodaya—Smriti Chandrika—Mitakshara does not notice the Vedic Text, nor does Vyavahara Mayukha—Vivada Chitamoni silent on it—Apararka takes the Vedic Text as explanatory text and not as a rule (*Vidhi*) and refers it to the case where there are sons—Weight of authority is against the theory of general exclusion of women from inheritance—New light thrown on the question by the aphorisms of Jaimini—Difficulty of formulating a definite theory—A plausible theory suggested—Baudhayana—Text of Baudhyana is in great confusion—Certain possible objections to our theory answered—An objection based on Yaska's comment on the Vedic text about exclusion of women—Yaska's remarks criticised—A passage from the Rig-Veda cited in support of our theory—An objection based on Prof. Krishnakamal Bhattacharyya's reading of another Vedic text—Prof. Bhattacharyya's remarks commented on—A third objection based on the analogy drawn from other patriarchal societies—Argument derived from analogy of no use in this case—Dr. Mayr's view criticised Superior position of women in Jaimini's time—Degradation of their status during the period Baudhayana flourished—Relative age of Jaimini and Baudhayana—Apastamba—Position of women during the age of the metrical Smritis—Manu—Yajnavalka—Vrihaspati—Narada—Vasistha—Commentaries on the theory of position of women in the field of inheritance—Widow—Mitakshara on the widow's right to inherit—Chaste widow entitled to succeed—Three objections to this view con-

sidered—Theory of female ownership as propounded by Vijnaneswara—Second objection—Third objection—The theory of the Mitakshara that succession is confined to the widow of a separated brother commented on—No texts of sages cited by him in support of his theory—This theory is assented to by all except Jimutavahana—Viramitrodaya supports it—Mayukha also agrees with it—Smriti Chandrika supports it by two texts of Vrihaspati and Katyayana—Madhava interprets the texts of Vrihaspati differently from the Smriti Chandrika—Vachaspati Misra takes the same view as the Mitakshara—Dissentient opinion of the founder of the Bengal School—Jimutavahana denies the fundamental principle of the Mitakshara that several undivided brothers are like joint tenants—His opinion marks the era when the patriarchal system lost its hold—Summary—An agreement for partition operates as a division of the family property—Chastity is a condition precedent to the right of succession of the widow—Mitakshara—Dayabhaga—Subsequent unchastity is not a cause of disinhersion—Criticism of Mr. Justice Mitter's view on the point—Dr. Mayr's view—Legal effect of re-marriage by the widow on her deceased husband's estate—Succession by several widows—Mitakshara—Dayabhaga—Madras decision—Tanjore Case—Vyavahara Mayukha on the same—The daughter comes next after the widow—Mitakshara—Unprovided daughter preferred to the wealthy one—No preference to a daughter likely to have issue over barren or childless daughter—Divergence between the two Schools—Bengal and Benares on the point—Incontinence

of the daughter is no bar to her succession under Mitakshara—Mayukha on succession of daughters agrees with Mitakshara—Bombay decisions affirm the same—Principle of succession as between married daughters—Vivada Chintamoni—Vachaspati Misra - The Mithila School on the daughter's incontinence—Daughter's succession in the Dravida or Southern School—Smriti Chandrika on precedence in succession among daughters *interse* —View of Smriti Chandrika regarding succession of barren daughters—Madras High Court does not accept it—Is chastity a preliminary condition to a daughter's succession—Principles of succession of daughters in the Bengal School—Order of succession among daughters according to Dayabhaga—Dayabhaga regards chastity as a necessary condition to the right of the daughter to succeed—Judicial decisions confirm the view—Mother's right to succeed—Divergence of opinion amongst commentators as to right of mother to succeed in preference to father—Mitakshara prefers mother to father—Smriti Chandrika agrees with Mayukha—Vivada Chintamoni always places mother before father—In the Bengal School father preferred to mother—Effect of unchastity on mother's right to inherit—In Bengal—In Bombay and Madras—In Allahabad—Mother does not include a step-mother—Step-mother not an heir in Bengal—Step-mother not excluded from succession in Bombay—Sister is not an heir in Bengal—Sankha and Likhita may be cited in support of her right to succeed—A text of Vrihaspati in support of sister's right—Sister not an heir in the Benares School—In Bombay on the other hand sister is

an heir—Vyavahara Mayukha—Mayukha places the sister in the line of heirs as being a sapinda by birth—Bombay decisions on the sister's right to inherit—Vinayak *v.* Laksmi Bai—Examination of earlier decisions by Sir Lawrence Jenkins, C. J.—Sister comes in after grandmother in some parts of Bombay—Ballambhatta's theory examined and rejected by Bombay High Court—Sister preferred to half-brother where Mayukha paramount, not so in other parts of Bombay—Sister's right in Madras—Sister's right to inherit not originally recognised in Madras—Sister subsequently admitted as heir—Mr. Mayne's criticism of Kutti Ammal's case—Madras High Court rejects Mr. Mayne's view—Half sister as an heir in Bombay—Principle of general exclusion of women from inheritance not accepted in Western India—Brother's widow and uncle's widow are not heirs under the Benares and Bengal schools—Contrary rule in Bombay—Rights of widows of gotraja Sapindas to succeed by inheritance very slender under the Mitakshara and Mayukha—Mr. Justice West admits them as heirs on the ground of positive acceptance and usage—Female gotraja Sapindas in the nearer line succeed in preference to male gotraja Sapindas in the remoter line—In Madras widows of Gotraja Sapindas are not in the line of heirs—Females admitted as heirs in Bombay and Madras but not in Bengal and Benares—Rights of women over property inherited by them—Nature and extent of—Smritis do not restrict the rights of women in inherited property—Nature and extent of an estate inherited by a widow — Katyayana — Narada — Mahabharata—

Comment on the Smriti texts—The commentaries on the widow's power of disposition of her husband's estate—The Mitakshara—The Mitakshara on the nature of woman's property—Yajnavalka on the devolution of Stridhan—The Viramitrodaya on the widow's right of disposition of her husband's estate—Nilkantha—Dayabhaga on the widow's power of disposition of property inherited from the husband—Property inherited by a widow is not woman's property according to the Dayabhaga —Extension of the Dayabhaga doctrine to provinces governed by the Mitakshara—Widow taking as heir takes a qualified estate—Thacoor Dayee *v.* Rai Baluck Ram—Bhagawandeen *v.* Myna Baee—Restrictions on widow's dominion over inheritance from her husband apply to landed and other properties—Exception to the general rule in Bombay—Mr. Justice West's view regarding the restrictions on widow's inheritance—Early Bombay decisions with regard to moveables inherited from husband—The view of the Full Bench—Widow's power over moveables in the Mithila School—Commentaries support the view that it is absolute —Not so in Bengal, Benares and Madras Schools —Character of estate inherited by mother and grandmother—Same as that of widow—In Bombay females inheriting take the full estate except the widow—Nature and extent of daughter's inheritance—Decision of Privy Council in Chotay Lal *v.* Channo Lal settles the law in Bengal both under the Mitakshara and Dayabhaga and also in Mithila—Privy Council holds the same view as regards the Madras School—Early decisions in Bombay with regard to the daughter's estate—

In Bombay daughters take absolutely—Nature of estate taken by sister—Vinayek *v.* Laksmibai—Widow entitled to usufructuary enjoyment of property—Limits in Shastras to the personal expenditure of the widow are moral injunctions and have no legal force—Mr. Justice Dwarkanath Mitter's view discussed—Widow's power as regards accumulations—Distinction between want of independance and want of ownership recognised in Mitakshara and Dayabhaga—Judicial decisions—Soorjeemoni Dassee *vs.* Dinobundhoo Mullick 9 M.I.A. 123.—Chundrabulee *vs.* Brody, 9 W.R. 584—Grose *vs.* Omritomoyee, 12 W. R. A. O. J. p. 13.—Gonda Koer *vs.* Koer Oodey Sing, 14 B. L. R. 159—Judicial decisions on the widow's right over accumulations—Bholanath *vs.* Bhagabati—Puddomonee *vs.* Dwarkanath—Isri Dutt Koer *vs.* Hansbutti—Sheolochun *vs.* Saheb Sing—Saodamini *vs.* Administrator-General of Bengal--Madras decisions on the widow's right over accumulations—Comment on the Madras decision—Comment of the Madras High Court on Isri Dutt's case—Rivett Carnac *vs.* Jivibai—Isri Dutt's case leaves open the question as to what constitutes accumulations—Powers of Hindu widows to alienate—Jimutavahana — Vyavahara Mayukha—Mitra Misra—Smriti Chandrika—Vivada Chintamoni—Collector of Masulipatam *vs.* Cavaly Vencata, leading case on the subject—Widow's power of alienation can be exercised in case of necessity and for spiritual purposes—Expenses for pilgrimage by the widow justify alienation of a portion—Whether gift of the entire property of the husband for religious and charitable purposes is valid—Alienation by

widow of husband's estate for pious purposes—Alienations by widow for paying barred debts of the husband are legal—Position of widow and manager of a joint family contrasted—Qualifications of the above rule—Mr. Justice West's view—S. 53 of the Transfer of Property Act—What are religious purposes—Distinction in regard to power of alienation between religious purposes and worldly purposes—Viramitrodaya on the point—What is legal necessity has to be gathered from instances—Is litigation a legal necessity—Costs of litigation for the preservation of the estate justify alienation—Costs of litigation for the purpose of obtaining possible benefits justify alienation if such litigation ends in actual benefit—Principles governing the action of the manager of an infant in dealing with the estate of the latter, laid down in the case of Hanooman Pershad *vs.* Musst Babooee and held applicable to the case of widows and other female owners—Permanent leases granted by the widow for the benefit of the estate are valid—Not so however in Bombay—Responsibility of a *bona-fide* creditor as laid down in Hanooman Pershad's case—Burden of proving necessity is on the creditor or purchaser—Test of the validity of the sale by the widow—Unsecured debts how far binding on reversioners - Conflict of Judicial decisions—Full Bench decisions of the Bombay High Court—In the absence of legal necessity a widow can alienate property with the consent of her husbands' kindred—Consent of the reversioners for the time being—how far sufficient—Behari Lall *vs.* Madho Lall (P. C.)—Question recently examined in Bombay—Question

set at rest by the Judicial Committee in Bajrangi *vs.* Manokarnika—Alienation by widow with the consent of the next reversioner is valid—Alienation by a widow of a portion of husband's property with the consent of next reversioners is valid—Madras High Court thinks otherwise—Where next reversioner is a female, her consent will not bind the male reversioner—Alienation by widow without consent of reversioner and without justifying necessity is not void but voidable—Daughters take the same estate as widows—Not so in Bombay—Private sales and sales in execution of decrees governed by the same principles—Estate would pass, where the decree is obtained against the heiress as representing the estate—Ishan Chander Mitter *vs.* Buksh Ali—Law on the subject summarised by Mr. Justice Mookerjee in Roy Radha Kissen *vs.* Nauratan—Where the suit is for a personal claim against widow, only her limited interest passes—Where the suit is upon a cause of action affecting the inheritance, the whole estate passes—Katama Natchiar *vs.* Raja of Shivagunga, 9 M. I. A. 543—Widow's possession as heiress not adverse to reversionary heir but where she holds independently of her husband it is otherwise—Extinction of widow's right does not extinguish that of reversioner—Art. 141. of Limitation Act (Act IX of 1908)—Wastes by widow how restrained—By suits in the nature of *bills quia timet* of Courts of Chancery—Or by appointment of a receiver—Reversionary heir has a like remedy against transferee of widow or other limited heir—Land Acquisition Act (Act I of 1894)—The same principles which apply to inheritance from males govern

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CHAPTER VI.

PROPRIETARY RIGHTS OF WOMEN—STRIDHAN.

both from males and females governed by the same principle—Sheosankar *vs.* Debi Sahai, I.L.R. 25 All, 468—Sheopratab *vs.* Allahabad Bank, I. L. R. 25 All, 476—The law on the point in Madras—In Western India property inherited by a woman, whether from male or female is Stridhana—Property inherited by widows is exception to the rule—Judicial decisions—Divergence amongst sages and commentators regarding nature of Sulka—Vyasa — Mitakshara—Ballambhatta—Viramitrodaya—Dayabhaga—Katyayana—Vyavahara Mayukha—Madanaratna—Vivada Chintamoni—Smriti Chandrika—Is the share obtained by woman on partition her Stridhan—Vijnaneswara applies the special rules of descent to property obtained by woman on partition—Is share alloted to woman on partition in lieu of maintenance—Early decisions of the Calcutta High Court held that it is so—But the view is opposed to the Mitakshara—The share of mother on partition is not her stridhan—Under the Mitakshara—And also under the Bengal School—Hemangini *vs.* Kedarnath, the leading case on the subject in the Bengal School—But it is regarded as Stridhana in Bombay—Property acquired by adverse possession by the widow is her Stridhana—Property derived by a daughter under her father's will is her Stridhana—Mourashi Mokarrari lease granted by a father to his daughter after her marriage is her Ayautaka Stridhana according to Dayabhaga—Jimutavahan uses Stridhana in the technical sense—Vijnaneswara uses the word in its widest sense—Extent of the rights of a woman over her Stridhana—The

CHAPTER VII.

STATUS OF COURTESANS AND DANCING GIRLS.

Concubines tolerated by Hindu Law—Position of concubines in Roman law compared—Prostitution distinguished from concubinage in Hindu law—Prostitutes regarded as the fifth caste—Mitakshara—Nilkantha—Vachaspati Misra—Dancing girls attached to temples in the south of India—Probable origin of the institution of dancing girls—Customary rules govern succession amongst dancing girls—Judicial decisions—Mathura Naikin *vs.* Esu Naikin, leading case in Bombay—Mr. Justice West's view—Mr. Justice West's view criticised by Mr. Justice Ayyar of Madras—Further comments on Mr. Justice West's view—How far S. 372 of the Indian Penal Code affects adoption by dancing women—When adoption by a dancing girl would be illegal—Rules governing status of dancing girls—Custom if any would seem to determine such rules—Custom or usage of any class regulates status of that class—Prostitution not necessary incident of the lives of dancing girls—Consequence of prostitution on the relation between prostitute and members of her original family—Cessation of ties of kinship whether necessary result of lapsing into prostitution—Cessation of ties of kinship with original family would depend on the nature and character of unchastity—Judicial decisions—Is the rule of severance an inflexible rule—Views of Madras and Allahabad High Courts—Act XXI of 1850—Contracts by and with prostitutes. 651—685.

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TABLE OF CASES CITED.

A

B

C

D

H

I

J

K

L

M

Q

R

S

T

U

V

W

Y

Z

A THESIS ON

THE POSITION OF WOMEN IN HINDU LAW.

CHAPTER I.

Introductory.

In these chapters an attempt will be made to show not only what the position of women in Hindu law is, but also how it came to be what it is. The latter part of our enquiry is apt to be regarded by the practical lawyer as unprofitable, for he will probably say that such an enquiry cannot claim to have anything more than an antiquarian interest. To such as are inclined to this mood of mind it might be sufficient to say, in the words of Chief Justice Holmes, that the history of what the law has been is necessary to the knowledge of what the law is. We might also tell them that in the field of law, as in other fields of enquiry, the present is an outcome of compromises which the past alone can explain, and that if Hindu law has grown, as we will show hereafter that it has, then in order to understand any branch of that law it has to be studied in relation to the pro-

cesses of its development. Viewed in this light an enquiry into the legal position of women in the past cannot fail to be of value to the student of Historical Jurisprudence, which, it has been said, holds fast the thread which binds together the modern and primitive conceptions of law and seeks to trace the line of connection between them. The value of such an enquiry, however, is not confined to the field of pure legal theory. It must now be recognized that, apart from its theoretical utility, the study of legal history serves the practical purposes of the lawyer. In matters of Hindu law questions of detail have not unfrequently arisen in the courts which could only be solved by the light thrown by these antiquarian enquiries. Of the numerous decisions of the different High Courts in India which illustrate this, reference might be made to the early case of Lallubhai *vs.* Mankuvar Bai (*a*) in which Mr. Justice West of Bombay discusses the bearing of the vedic rule as to the inheritance of women on modern Hindu Law, and to a very recent case (*b*) in the Calcutta High Court in which Mr. Justice Asutosh Mookerjee, in considering the validity of a gift by a widow

(*a*) I. L. R. 2 Bom, 388.

(*b*) Churamon *vs* Gope, I. L. R. 37 Cal, 1.

for the Dwiragaman ceremony of her daughter, alludes to the vedic practice of the marriage of girls after attainment of puberty.

In such a thesis as this, the first word must explain precisely what determines the position of a person in the law ; in other words, the scope of the subject must first and foremost occupy our attention.

Scope of the subject.

The position of an individual in any legal system is determined with reference to his *estate* and *status* therein. Every independent State, says Foote (*a*), assumes by its laws to regulate the *status*, the acts, property, of those who are subject to it. The terms *estate* and *status*, which are in their origin the same, now convey two opposite notions, and the process of their differentiation in legal meaning forms one of the interesting topics in the history of English law (*b*). Both of these are complex terms and require to be analysed into their simpler elements in order that we may properly understand the scope of the subject of our thesis.

Position in law consists of *estate* and *status*.

Estate.

By the term *estate* when used with reference to a person is signified the aggregate of such person's proprietary rights.

(*a*) Foote's Private International Jurisprudence, third edition, page xxvii.

(*b*) Pollock & Maitland, History of English Law, pages 10 & 78.

Proprietary rights, in a limited sense, mean the extension of the power of a person over portions of the physical world. But there is a wider sense in which the term "rights" includes both "jus in rem" and "jus in personam". In this sense a man's proprietary rights would include not only his rights to land but also his rights to the shares and debts due to him.

Status.

Status, however, is a term which is used in a variety of different meanings, and modern writers on Jurisprudence have found no little embarrassment in fixing the precise significance of the term with perfect clearness. As Mr. Hunter beautifully puts it, in his work on Roman law *(a)* :—"Status is a word that in jurisprudence has been much given to wandering at large." It is commonly used to denote a man's legal condition so far as his personal rights and burdens are concerned to the exclusion of his proprietary relations *(b)*. A person's status in this sense means the sum total of his personal rights, duties and liabilities. Thus, for instance, when we speak of the status of a wife we mean all the personal rights and obligations of a woman which are involved in and flow from the marriage relation. And throughout this thesis we shall use the

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(a) Roman Law, (Hunter), page 138.

(b) Salmond on Jurisprudence, page 211.

word status, in this its more usual sense. We may as well mention that in its widest sense the term status means and includes both personal and proprietary conditions of any kind and would thus seem to include a person's general position in the legal scheme. Lord Justice Brett, for instance, says (*a*) that the status of an individual used as a legal term means the legal position of the individual in or with regard to the rest of the community. But the use of the term in its most comprehensive sense is rare, and modern Jurists limit the term status to include personal condition only. Sir Henry Sumner Maine in his now celebrated dictum about the movement of progressive societies from status to contract apparently uses the word status to mean both proprietary and personal legal conditions except such as are imposed by the agreement of parties. But, as has been observed above, status is more frequently applied to mean personal condition only, consisting of the sum total of a man's personal rights, duties, and disabilties, and as such is opposed to estate. This may be made clearer by an example. A man's right of personal liberty and of reputation and of freedom from bodily injury are personal. The rights of a husband

(*a*) Niboyet --vs.--Niboyet. L. R. 4 P. D. p. 1.

with respect to his wife, those of a father with respect to his children are personal rights. It is the sum total or aggregate of rights such as these that constitutes a person's status in the law. The distinction between personal and proprietary rights is to be kept apart from the distinction between personal and real rights as understood by English jurists. A real right corresponds to a duty imposed on persons generally, a personal right corresponds to a duty imposed on determinate individuals. A real right is available against the world at large, whereas a personal right is available only against particular persons. The distinction between real and personal rights corresponds to the distinction between rights in rem and rights in personam. But a personal as opposed to a proprietary right may be a right in rem as well ; for instance, the personal right of a woman to have her reputation for chastity untarnished is available against the world at large, and no one has a right to injure the good opinion that other persons may have of her. It is to be regretted that English jurists should use the same expression *personal* to indicate two different kinds of rights. But it is the context in which the terms are used that saves much confusion of thought likely to result from the same expression being used in

different senses. It is to be noticed that although the term estate includes only rights, the term status includes not only rights, but also duties, liabilities and disabilities. So that the value of any claims which others may have against a person, being his proprietary liabilities, can not be said to be his estate.

From what precedes it is manifest that a person's position in the law is the sum total of his proprietary rights and personal duties and liabilities as well as rights. The present thesis is an attempt to set forth and explain the proprietary and personal condition of women in Hindu Law at different periods of its growth and development.

Notion of status in Hindu Law.

Let us now pass on to consider whether there was any notion corresponding to that of status, in the limited sense defined above, in Hindu law. The nearest parallel to the conception of status is to be found in the writings of the sage Jaimini whose Purva Mimansa contains the principles of interpretation of the Vedic law. In the sixth book of the Sutras the sage describes Adhikara Vidhis which are the rules regarding personal capacity or right. Jaimini there deals with the question as to the class of persons who are entitled to enjoy the benefit of the Vedic law and its institutions, as also with the reasons for the defective status of those who are not

so entitled. The word Adhikara according to the Sanskrit grammarian Panini involves the idea of authority (right) with obligation (*a*). According to the Sahitya Darpan, Adhikara means the right to obtain the fruits of actions, and Adhikari means one who has the capacity to have such right (*b*). We shall see in a later chapter how the question of the competency of women to join in the duty of performing sacrifices enjoined by the Vedas is discussed in the sixth Book of the Mimansa, and further what bearing that question has on the status of women in Hindu law.

Hindu Law recognizes distinction between *estate* and *status*.

It may also be affirmed here that Hindu law does not ignore the broad distinction between the rules of property and the rules governing personal status.

The need of discussing the nature of Hindu Law.

A person's rights both proprietary and personal determine, as has been observed above, his or her whole position in the law. But what is it in virtue of which a person has legal rights? In modern times it is usually in virtue of his submission, absolute or partial, to the sovereign of the country in which he happens to reside, that a man is capable of acquiring all rights which are comprised under the Private law of the state

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(*a*) अधिरीश्वरे स्वरितेन अधिकारः अनभिहिते।

(*b*) अधिकारः फले स्वाम्यं अधिकारी चतत्प्रभुः। साहित्यदर्पण।

within whose limits he is domiciled. We find therefore that the words *right* and *duty*, when used in a modern book on Jurisprudence, imply that there must be a human authority by whom rights are created and duties are enjoined. The modern conception of law is that it is an essentially human institution and that there can be no law apart from the state. In order to realize the strangeness of this view, so essentially modern, to the ancient Hindu mind, a brief notice of the nature of Hindu law becomes necessary. Besides, the subject of our thesis being the Hindu law relating to the position of women, a discussion regarding the nature of that law will not be foreign to our enquiry. On the other hand, it may be useful to enquire what Hindu Law is and has been, if not for any other purpose, at least for the purpose of indicating the difficulties with which the treatment of the subject of our thesis is surrounded. Such a discussion will also aid us in another direction. It will disclose to us the sources from which we must seek to derive materials for the treatment of the subject of our investigation.

Vedic conception of law

In a text of the Vedas translated by Sir William Jones, according to the gloss of Sankara, we have the following (*a*) :—

(*a*) Sathpatha Brahmana 14, 4, 2, 23. Brihat Aranayaka Upanishada 1, 4, 14.

"God, having created the four classes had not completed his work, but in addition to it, lest the royal and military class should become unsupportable through their power and ferocity, he produced the transcendent body of law, since law is the king of kings far more powerful and rigid than they; nothing can be mightier than law by whose aid as by that of the highest monarch even the weak may prevail over the strong." As we shall see later the Vedas are undoubtedly, at least in theory the primary source of Hindu law, and the passage cited above conveys the notion that to the Hindu mind, Law and not the State or visible Ruler is supreme. This reverses the modern conception of positive law which is associated with the name of Austin, for according to that distinguished jurist, although the state or sovereign may be bound by law, it can change the law at will, and hence in a very real sense, is superior to it. The Vedic conception of law reminds one of the forcible criticism of the Austinian theory of sovereignty by a modern writer. "How", says Mr. Watt, "is the enforcement of law to be regulated? By the law itself. The force is exercised in fact according to law. Even when its exercise seems arbitrary there must be some legal method behind it. It is the law, then, and not the force which is supreme.

Differs from the Austinian conception of law.

The law by which the ruler rules can not be the outcome of its ruling" (*a*). The text of the Vedas cited above also brings into prominence the idea that law is ordained by a divine ruler and is not a mere matter of human institution ; it also presents in a striking manner the contrast between Hindu law and positive law, for every positive law exists as positive law through its position or institution given to it by a sovereign government (*b*). It is thus clear that the Hindu conception of law differs from the Austinian conception in the essential points of source and sanction. Sir Gooroo Das Banerjee while dealing with the authority on which Hindu Law was originally based has with great clearness pointed out the distinction between the Hindu and Austinian conception of law in a luminous passage : "In the second place" says Dr. Banerjee, in his Tagore lectures, "the notion that every law is a command of the sovereign, so fully developed in the analysis of Austin, was never associated with the Hindu's idea of law. The Hindu regards his law as commands not of any political sovereign but of the Supreme Ruler of the universe—commands which every political sovereign is

Dr. Banerjee's view.

(*a*) Legal Philosophy, page 18.

(*b*) Austin's Jurisprudence, Vol. II., page 534.

most imperatively enjoined to obey." Positive law, according to Austin, rests on force and owes its formal validity to the command of the sovereign power. When the principles of Hindu law began to be enforced by British Courts of Justice, it then assumed the character of positive law in the modern sense of the term. Was there then no law of the Hindus before the advent of British rule? Law undoubtedly there was, but much of it fell short of the conditions which analytical jurists hold essential to law. The idea of law backed by irresistible force with which Austin has made us familar was absent from the Hindu mind.

Idea of law in the Smritis.

Coming to later times we find in the Smritis the same view of the character and origin of Hindu law as we find in the Vedas. Manu, the first and principal of the sages or lawgivers who composed the Smritis says :—"The immutable Power having enacted the code of laws himself taught it fully to me in the beginning ; afterwards I taught Marichi and the nine other holy sages" (*a*). "Let the king" (*b*) says the same sage, "decide causes justly observing primeval law," thus implying that law is not made by the sovereign but exists independently of him. In the Institutes of Yajnavalka we

(*a*) Manu, I, 58. (*b*) Ibid, Chapter VIII.

find the same idea underlying the following text (*a*) :—"The king divested of anger and avarice and associated with the learned Bramhins should investigate judicial proceedings conformable to the sacred code of the laws." Hindu law was not made by the king. It was made for him to obey and to see that it is obeyed. The Roman Emperor could say "for though the laws do not bind us yet we live in obebience to them" (*b*). The Hindu king could not have said the same thing for he was as much under an obligation to obey the law as any of his subjects.

Primitive theory of the nature of law.

If there be any primitive theory of the nature of law it seems to be that laws are the utterance of some divine person who reveals or declares as revealed to him that which is absolutely right and this desire to attribute laws to a Divine Being from whose statutes and ordinances it would be impiety to depart, is satisfied with excessive minuteness in the Brahminical recensions of early Hindu law. Whenever and wherever such notions prevail the distinction between legal and moral duty can at best be but imperfectly realised. So long as the people believe in the divine origin of

Agrees with the Hindu theory.

(*a*) Yajnavalka, cited in Mitakshara Chapter I.

(*b*) Moyle's Translation of Justinian, p. 78.

laws, the legal and moral sanctions would act with equal force on their minds and they fail to recognize the distinction between the two. This brings us to another striking characterstic of Hindu law as embodied in the writings of Sages and lawgivers viz, that moral and legal injunctions are blended together therein. In the code of Manu which has always been treated by Hindu Sages and commentators from the earliest times as being of paramount authority, we have a mixture of positive law, morality and religion. In the writings of other sages likewise the distinction between moral and legal duties is not always kept in view. The conscious separation of law from morals and religion has been a slow and gradual process for we find the later commentators like even the ancient sages mix moral rules with rules of positive law. Their Lordships of the Judicial committee of Privy Council in a recent case made some pertinent observations in this behalf. "All these text books and commentaries" say their Lordships "are apt to mingle religious and moral considerations not being positive laws, with rules intended for positive laws. In the preface to the valuable work on Hindu Law, Sir William McNaughten says, 'It by no means follows that because an act has been pro-

Mingling of moral and legal injunctions in writings of sages and commentators.

hibited it should therefore be considered as illegal. The distinction between *vinculum juris* and *vinculum pudoris* is not always discernible'" (*a*).

Distinction by Jaimini between obligatory and directory precepts.

It may be observed here however that the sage Jaimini, the author of the Mimansa aphorisms (sutras) noticed the distinction in his writings between obligatory precepts and the precepts which are not so obligatory. A study of Jaimini's aphorisms where he discusses the difference between KratuDharma and Purusha Dharma (*b*) would tend to show that the distinction between legal and moral precepts is an old one for the distinction between Kratu Dharma and Purusha Dharma would correspond to the distinction between positive law and moral precept. It is true Jaimini's aphorisms deal with Vedic law and its object is to interpret the Vedic law in so far as that law related to religion and religious precepts. But as Colebrooke pointed out years ago, "the logic of the Mimansa is the logic of the law ; the rule of interpretation of civil and religious ordinances," (*c*) and

(*a*) Rao Balwant vs. Rani Kishori I. L. R. 20 All 267, *Sc.* 25 I. A. 54.

(*b*) Jaimini B. III, Chap. IV, Adhi. 2, 18 : Ibid B II. chap. IV, Adhi. 1.

(*c*) Colebrooke's Miscellaneous essays, vol. I, p. 317.

therefore the same modes of reasoning that would apply to the elucidation of the distinction between the obligatory and optional injunctions in matters that relate to religion would assist us in appreciating the distinction between mandatory and directory injunctions in considering the texts of Smriti and Sruti that relate exclusively to jurisprudence. In a recent text-book (*a*) dealing with the Mimansa rules of interpretation it is pointed out that the Mimansa sutras make another division of the Vedic Law viz., Vedic Law relating to individual culture and Vedic Law relating to duties of man as a member of the Vedic Community. The latter are of a positively obligatory character while the former are of the nature of religious precepts. The later commentators like Vijnaneswara, the author of the Mitakshara, or Jimutvahana, the author of the Dayabhaga draw a sharp and clear line of distinction between what is positive law and what is a mere moral religious precept, and the view has therefore prevailed in some quarters that the distinction originated with them. But in point of fact that is not so. The distinction is a much older one. When the sage Jaimini pronounced the aphorisims, civil law was dependent on the religious law and the

Distinction clearly recognized in Dayabhaga and Mitakshara.

(*a*) K. L. Sircar's Tagore Lectures. (1905) Page 52.

tendency of civil law to disintegrate itself from the religious law had not manifested itself. But at the time when the later commentaries such as Mitakshara and Dayabhaga were written the disintegration had been almost complete. Neither is the distinction confined to the Bengal School as some scholars think (*a*). In the case of Wooma Daee (I. L. R, 3 Calcutta, p. 587 P. C.) it is pointed out that the distinction seems to obtain in the Mitakshara School also.

Hindu Law a growth.

A discussion regarding the nature of Hindu law involves an enquiry into the history of its growth and development. Ihering, a writer of great vigour and originality has in his book on Roman law described the totality of the law to be an organism. Savigny, the founder of the Historical School maintains that law is an organic growth which comes into being by virtue of an inward necessity and con-

(*a*) A Hindu Lawyer, who is also a great Sanskrit scholar has gone the length of stating that the distinction between legal and moral obligations is hardly known outside the Bengal School and that it was invented by this school in order to make that wide departure from the general body of the Hindu law, the departure which consists in giving absolute power to the father over ancestral property.

K. K. Bhattacharjya's Tagore Lectures 1885, pages 281, 282.