tinues to develop in the same way from within by the operation of natural forces. The researches of Sir Henry Sumner Maine have demonstrated that legal ideas and institutions have a real course of development as much as the genera and species of living creatures. Hindu law forms no exception to the rule of evolution to which all legal systems are subject. "The law grows," *(a)* it has been well said, "as the nation grows" and Hindu law has assuredly grown with the growth and development of Hindu society. It has however been the fashion in some quarters *(b)* to speak that society in India is not progressive and the fact that there is no other nation on earth which can vie with the Hindus in preserving much of its antiquity in tact has undoubtedly given rise to this erroneous opinion. But society in India has never been stationary, and the fact is now recognized that even the East does change, though slowly.

This fact however seldom realized.

The importance of the fact that Hindu law has grown is unfortunately seldom realized. The notion that Hindu religion is exclusively the source of Hindu law, to

---

(*a*) Mr. Carter's History of English Legal Institutions, p. 3.

(*b*) Macnaughten's Hindu Law. Vol I page XX.

no small extent accounts for this (*a*) ; for when law is attributed to a Divine origin you can not fail to associate with it the idea of rigidity and conservatism. According to the Vedas (Sruti) and the Smritis Hindu law is Divine law—the command of God imposed on men. It is the eternal law as having existed from the commencement of the world and is immutable or unchangeable. It is not allowable to alter or derogate from it. It seems to me that it is due to the existence of this line of thought amongst the numerous followers of Hindu faith that the British Government have not legislated for the Hindus in regard to their personal status and inheritance. In the first report of the Commissioners appointed to prepare a body of substantive law for India, it has been stated that the Hindu law and the Mahomedan law derived their authority from Hindu and Mahomedan religions respectively and that therefore it follows that as British legislature can not make Hindu or Mahomedan religion so neither can it make Hindu or Mahomedan law. And the justification for this wise inactivity on the part of the British Govern-

(*a*) The greatest impediment In the way of progress of Hindu Jurisprudence was offered by the theory of its Divine origin which stamped a stationary character on it. Tagore Lectures on Adoption, (1888), page 84.

ment apparently seems to be that Hindu law being religious law purporting to rest on some ancient and infallible revelation, all who profess the religion must be assumed to wish the law to remain unchanged.

In theory, Hindu law incapable of Growth.

In theory at least Hindu law is incapable of growth and development but the most superficial student of Hindu law will not fail to observe that in reality its history has been otherwise, and he will easily discover an occasional want of harmony between the ideas of the nation of the present day and the spirit of the sacred ordinances of the Vedas and the Smritis British courts of justice in India have taken up the same view as the Indian legislature and the result has been that Hindu law has in one sense ceased to be a living law with the institution of judicial tribunals in the country.

Not so in reality.

History of the development.

The institution of British Courts of justice arrested the indigenous development of Hindu law. As far as modern nations are concerned, the development of the living law must of necessity be carried on in the the main by legislation. But, as has been observed above, Hindu law has not been altered or modified generally, with the fewest possible exceptions, in the slightest extent by British legislation out of deference

Development of Hindu Law before British rule.

to Hindu sentiment. It will however appear that until the advent of British rule and the simultaneous institution of British courts of justice Hindu law has been a living law and has kept pace with the progress of society.

The assertion can be made certainly without rashness that legislation by the Mahomedan rulers had nothing to do with this progress and development. The Mahomedan rulers were so pre-occupied with the collection of taxes and the imposition of Zezia that in legal matters they followed the line of least resistance and left Hindu jurisprudence untouched.

Agencies which contributed to such development.

What then are the agencies by which Hindu law has been brought into harmony with the necessities of a growing national life ? It has not been legislation, which, Sir Henry Sumner Maine rightly considers to be one of the chief agencies by which law is brought into harmony with society. To our mind, custom or usage has been one of the main instruments of legal development ; It has destroyed part of the primitive Hindu law as contained in the texts of the sages, and has created new law. These usages or customs have grown side by side with the revealed law and have tended to modify imperceptibly the law as expounded therein.

Custom, chief of such agencies.

Manu regards custom as source of law.

Custom is mentiond in the code of Manu as one of the sources of Hindu law. "Immemorial custom," says Manu, "is transcendent law approved in the sacred scripture and in the codes of Divine legislators ; let every man therefore of the three principal classes who has a due reverence for the supreme spirit which dwells in him diligently and constantly observe immemorial custom" (*a*). The position assigned to custom as one of the sources of law in the code of Manu has facilitated the reception of the customary doctrine into the law, for Manu is indisputably the oldest of the law-givers and the most authoritative of the sages. Vrihaspati says that a text in the code of Manu prevails over any contrary text of the other sages.

Later Smriti-writers influenced by Manu's view.

The later Smriti-writers must have been greatly impressed by Manu's text regarding the force and efficacy of custom and they felt no hesitation in recording in their writings the changes of custom that took place from time to time and thus incorporated much of the customary law therein. In fact, the author of the Viramitrodaya in his disquisition on the temporal nature of proprietary right points out that all commentators consider Smritis on Vyavahara (Civil law) as simply reciting customs recognized by

(*a*) Manu, Chap. I., 108.

the people. Mr. Mandlik, to whose sagacity and research we owe the admirable edition of the Institutes of Yajnavalka, maintains that custom has always been the main source of Aryan law from the earliest times. It is said that as the different Smritis were compiled they served merely to record the changes in the customs of the people that took place from time to time. The view that the different Smritis (recensions) are the reflex of the development of Hindu law at different periods or ages was carried to such length that we find it stated in the Parasara Dharma Sastra that the different *Smritis* are for different ages. In the Satya Yuga the laws of Manu must be observed, in the Treta those of Gautama, in the Dwapara those of Sankha and Likhita and in the Kali age those of Parasara (*a*). But this view has not been accepted by some of the writers on Hindu Law. It has not found favour with Messrs West & Buhler (*b*). The later commentators have under the colour of interpretation aided in the development of

Smritis incorporated custom.

So did the commentaries.

(*a*) कृते तु मानवा धर्म्मा स्त्रेतायां गौतमस्य च।
द्वापरे शङ्खलिखिताः कलौ पाराशरः स्मृता॥

Parasara Sanhita, Jibananda Vidyasagar's Edition, Page 55.

(*b*) See West and Buhler; Introduction to Hindu Law p. 15.

Hindu Law. To them is due in no small degree, the credit of accomplishing the task of bringing Hindu Law into harmony with the requirements of life. These commentators have interpreted the text according to their own views of justice and expediency and according as their views have been accepted in one place and rejected in another have grown the different schools of Hindu Law.

Origin of schools of Hindu law.

These commentaries were all written either by Kings (*a*) or Prime Ministers or Brahmins, who on account of their great learning and high order of intelligence always occupied a commanding position in Hindu society. Their views were formed in accordance with the current public opinion which they had ample opportunity of gauging. It was the reflection of this general sentiment of right which found expression in their writings and which is the real basis of customary law. They twisted and tortured a text of the Smriti according to their own views of justice and practical utility, and those views were but the expression of the general sentiment of the people living in the particular tract where the commentator lived and flourished. What has been said above may be made clearer by an instance.

(*a*) King Aparaka of Konkan completed his well-known gloss of Yajnavalka Smriti.

Vijnaneswara, the author of the Mitakshara, which is a running commentary on the Institutes of Yajnavalka when discussing the text prescribing unequal shares for sons according to their priority of birth, lays down the general principle that practices expressly inculcated by the sacred ordinances may become obsolete and should be abandoned if opposed to public opinion. So also Nilkantha, the author of Mayukha in discussing the right of Sudras to adopt expressly refers on the authority of his own father, to custom as justifying him in the particular interpretation put by him on the following text of Saunaka :—"But a daughter's son and a sister's son are affiliated even by Sudras." Again relying on custom he comes to the conclusion that a boy can be adopted even after marriage. "According to my venerable father," says Nilkantha, "even one married and the father of a male issue is fit for adoption. And this is proper since there is nothing opposed to it." Mr. Justice Ashutosh Mookerjee has in a recent decision (*a*) noticed a passage in the Viramitrodaya where Mitramisra, the author of Viramitrodaya refers to custom as justifying him in the particular interpretation put by him on the text of the Smritis regarding re-union. That

(*a*) Basanta. vs Jogendra I. L. R. 33 Cal. pp. 374.

passage gives the view of the author of Viramitrodaya as to the person with whom re-union is permissible and therein the author maintains that he can not agree with the view of Mitakshara on the question, as to do so would be to hold that the re-union with daughter's son and the like which is recognized by the practice of the people would be improper. There cannot be therefore any doubt that these treatises and commentaries were intended to incorporate new customs and they actually did so. It was in this wise that slowly and cautiously, portions of the customary law were worked out and tested and finally incorporated into the organism of Hindu law. Such was the course of development of Hindu law before the British rule. After the institution of British courts of justice another instrument of development which affected the growth of Hindu law consisted in judicial decisions.

Development of Hindu law after British rule.

Judicial decisions contributed to such development.

When the administration of the country passed into the hands of the English people, Hindu law was allowed to remain as the personal law of the Hindus. By regulation IV of 1793 it was enacted that the Hindus were to be governed by their own law as regards succession, inheritance, marriage, religious institutions and caste. And so far as the Supreme Courts of Calcutta, Madras,

and Bombay were concerned, all matters of contract between Hindus were directed to be governed by the law and usages of the Hindus. (See 21 George III C. 70 S, 17). When therefore cases involving a dispute in regard to any one of these matters had to be decided by British courts of justice, Hindu law was made applicable. But much of the law was contained in Sanskrit texts which were inaccessible to European Judges who had to administer justice. These Judges accordingly had to seek the assistance of Pundits who gave their opinion on the disputed questions of law and these opinions were implicitly followed by them. These Pundits, like the commentators of old, twisted and tortured the texts so far as to make them harmonise with their general view of expediency and justice, which view was again coloured by the prevailing usages or customs of the time. So long therefore as the opinion of the Pundit was invariably followed, the indigenous development of the law continued. But then European scholars like Sir William Jones, Colebrooke and Sutherland turned their attention to the translations of the texts of the sages on which the Pundits rested their opinion. With the publication of these translations the Judges did not any more credulously follow the opinion of the Pundits,

Opinion of Pandits.

but tested their accuracy by light of these translations. They sometimes rejected their opinion when the original texts did not seem to support them. But in other cases these opinions were allowed to influence the decision of Judges. In the case of the Collector of Madura vs. Moottoo Ramlinga Sathupathy (12 M. I. A. 438) their Lordships of the Judicial Committee condemned the summary treatment of the opinion of the Pundits by the Judges of the Madras High Court. Their Lordships said "these opinions at one time enjoined to be followed, and long directed to be taken by the Courts, were official and could not be shaken without weakening the foundation of much that is now received as Hindu Law in various parts of British India. Upon such materials the earlier works of European writers on the Hindu Law and the earlier decisions of our courts, were mainly founded. The opinion of a Pundit which is found to be in conflict with translated works of authority may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country."

When the translations made the remoter sources of Hindu law available to European

Judges there was a natural tendency to decide a case on the texts of the sages irrespective of the fact whether such opinion was or was not accepted by the Pundits or by the commentaries which represented the prevailing usage current in the part where the Pundits lived or commentators flourished (*a*). This was a course which was considered inadvisable by the Judicial Committee for European Judges to pursue in administering Hindu law. In the case last cited their Lordships pointed out that the duty of the Judge was to adhere to the law contained in commentaries prevalent in that part of the country where the question arose for decision. Even the wisest of legislators cannot foresee all possible contingencies that may arise. And the commentaries were silent in matters of detail. The Judges had consequently to supply these omissions according to their own views of Hindu Law. If the commentary of one school was silent on a particular point the Judges did not hesitate to borrow the law on the point from a digest or a commentary which was authoritative in another school and which contained a reference to the point in dispute (Bishen Chand vs. Asmaida Koer, L. R. 11. I. A., 164 *S. C.* 6 All. 560 at p. 574). Then again Courts have

(*a*) Mayne on Hindu law 7th Ed. page 44.

sometimes applied the principles of one school to determine the rights of a party governed by a different school. As we shall show hereafter the proprietary rights of women under the Mitakshara have been curtailed by the application of the principle of the Bengal School to them. Moreover certain principles of English law like *stare decisis*, and "*communis error facit jus*" have been introduced by English Judges in the decision of cases governed by Hindu law (see Bhagwan Singh vs Bhagwan Singh 21 All 412 and Jagdish vs Sheo Partab 28 I. A 100, *S. C.* 23 All 369).

Sources of Hindu law.

An enquiry into the nature of Hindu law involves the enquiry regarding the sources of that law. The phrase "sources of law" has diverse meanings in jurisprudence. In one sense God is the one source of Hindu law just as sovereign is the source of law in modern European jurisprudence. But it is not here used in the sense of the fountain-head of law, but in the sense of the quarter from which we derive our knowledge of law. From what has been said already regarding the development of Hindu law in the preceding pages, it has been sufficiently indicated that the sources of Hindu law are (i) the Vedas (ii) the Smritis (iii) Commentaries (iv Judicial decisions and (v) Customs.

But there are a few more besides these which will appear from the sayings of sages to be quoted presently. Manu says : "The Veda, the Smriti, approved usage and what is agreeable to one's conscience where there is no other guide have been declared by the wise to be the four-fold direct evidence of Dharma or law (*a*). Yajnavalka Says :—(*b*) The Sruti, the Smriti, approved usage, what is agreeable to one's soul, a good conscience and desire sprung from due deliberation, are ordained the foundation or evidence of Dharma. The same Sage tells us (*c*) that there are fourteen sources of knowledge and law. They are the four Vedas, the six Vedangas, the Dharma Shastras or codes of law, the Mimansa or disquisitions on the rules of Scripture, the Nyaya or science of reasoning and the Puranas or records of antiquity. Sruti which literally means "hearing" indicates that which was directly heard by or as we should say revealed to the holy Sages of old. The Srutis, which consist of the Vedas being the direct word of revelation are the primary source of Hindu law. But, although the Srutis represent the first phase in the evolution of Hindu jurisprudence, they do not contain much matter that

Sruti, or Vedas primary source of Hindu law.

(*a*) Manu II 12. (*b*) Yajnavalka, verse 7 ;
(*c*) ibid. Verse 3.

may be said to pertain to jurisprudence and therefore they are practically of little importance as source of law. The Vedas are four in number Viz. Rig, Yaju, Sam and Atharvan. The first three above were at first recognised as canonical scriptures, being in the next stage of Vedic literature spoken of as the three-fold knowledge (trayee vidya). The fourth collection, the Atharva Veda attained to this position after a long struggle. The Rig Veda which is the oldest consists of lyrics mainly in praise of different Gods. The Sama Veda consists of stanzas taken from the Rig Veda and arranged solely with reference to their place in Soma sacrifice. The Yajur Veda is a book of sacrificial prayer. The Atharava Veda is in the main a book of spells and incantationsand deals with witchcraft. But in all these Vedas thereare incidental allusions to rules of law. These rules of law have also sometimes to be inferred from analogies or metaphors in which thay are veiled. In the Rig Veda, for instance, as we shall see hereafter on the chapter which deals with marriage occurs the following hymn :—

As a virtuous (maiden) growing old in the same dwelling house with her parents (claim from them her support) so come I (to thee for support) (*a*).

(*a*) Rig Veda 6th Chap. Anuvak II. Sukta VI. Vers. 7.

From this, two rules of law may be inferred *viz.* that infant marriages were not considered imperative, and that the marriage of girls was not compulsory in the Vedic age ; and secondly, that the life-long maiden was in any event, entitled to be maintained out of her father's estate under certain conditions, if not entitled to a portion of the paternal estate.*

Vedas composed of two parts—
(1) Mantras.

The Vedas consist of two portions—the Mantras and the Brahmanas. The former consist mainly of hymns which are sung by priests at sacrifices in praise of Gods. These belong to the creative period of the Vedas. The era of creative genius was followed by an epoch in which there seemed to be no necessity for offering new prayers to the Gods but it was considered more meritorious to repeat those hymns that were handed down by tradition. The main importance of old Vedic hymns and formulas lay now in their application to the details of sacrifice. The Brahmanas explained the mutual relation of the sacred text of the Vedas and the ceremonial, and contained theological speculations on the symbolical meanings of these sacrifices. The latter portion of these Brahmanas are called Aranyakas and the final portion of

(2) Brahmana

* I believe that the passage commencing from "In the Riga Veda" &c... to "estate" is original.

these Aranyakas again deal with high philosophic themes and are known as the Upanishads.

(ii) Smritis.

Leaving the sources of law which belong to the sphere of revelation we descend to the Smritis (Memory or what is remembered) which embody the tradition derived from ancient sages to whom the Divine commands had been directly communicated. They are of practical value as sources of law as they contain much that pertain to civil law and usage. The Smritis represent the second phase in the evolution of Hindu jurisprudence. The Judicial Committee in a recent case said "the Smritis are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like Sruti in the very words uttered by that Being but still in the language of inspired men; they contain precepts whose authority is beyond dispute but whose meaning is open to various interpretations and has been and is the subject of much dispute which must be determined by ordinary process of reason" (*a*). As we have said already, they do not contain matters exclusively appertaining to jurisprudence but

---

(*a*) Sri Balusu Gurulingaswamy vs. Sri Balusu Ramlakshamma I. L. R. 22 Mad. 398. *S. C.* I. L. R., 21 All. 460.

mingle matters of religion, cosmogony, law, ritual and morals. These Smritis fall into two divisions *viz.*. (1) the Sutras which are in prose (2) the Dharmasastras which are in verse. Research has shown that the Sutras are earlier than the Dharmasastras. The Sutras deal with Vedic ritual on the one hand and customary law on the other. As their very name shows, (Sutra—thread), these Sutras are in the form of strings (aphorisms) and aim at extreme conciseness. These Sutras again fall into two classes, *Viz.* (1) the Srauta Sutras (2) the Grihya Sutras and Dharma Sutras. The former are based on Sruti or revelation. The latter are based on Smriti or tradition. The Grihya Sutras deal with the household ceremonies. The Dharma Sutras as their name implies deal with Dharma or law. As a type, the Grihya manuals must be somewhat later than the Srauta for they regularly presuppose a knowledge of the latter (*a*). As the Srauta Sutras deal mainly with the sacrifical ritual we need not say anything more about them. Of the Grihya Sutras we need say nothing more than this, that they were attached to different Vedas and followed their doctrines. The Cankhayana Grihya Sutra, the Cambhya Grihya and the

Two divisions of Smritis.

(*a*) Sutras.

(*a*) Macdonell's History of Sanskrit Literature P. 249.

Acvalayana Grihya belong to the Rig Veda. The chief Grihya Sutra of the Samveda is that of Gobhila. The Grihya Sutra of the white Yajur Veda is that of Parasara which is also known as Kateya or Vajasaneya Grihya Sutra. There are seven Grihya Sutras of the black Yajur Veda; only three of them have as yet been published. The second branch of the Sutra literature based on tradition or Smritis consists, as we have already seen, of the Dharma Sutras, which deal with the customs of every day life. "They are," says Professor Macdonell, "the earliest Indian works on law, treating fully of its religious and briefly of its secular aspect. The term Dharma Sutra is strictly speaking applied to those collections of legal aphorisms which form part of a body of Sutras belonging to a particular branch (Shakha) of the Veda" (*a*). Only three of such Dharma Sutras have been preserved, all of them attached to the Taittiriya division of the black Yajur Veda. These are the Dharma Sutras of Apastamba, of Hiranya Kesin and of Baudhayana. The whole body of Vedic works composed in the Sutra style is according to the Indian traditional view divided into six classes called Vedangas (members of the Veda) which are referred to as one of the fourteen

(*a*) Macdonell's History of Sanskrit Literature, P. 258.

sources of knowledge and Dharma in the text of Yajnavalka cited above.

(*b*) Dharma-sastras.

Next we come to the second class of Smritis, those which are in verse. They are known in common parlance by the name of Dharma Sastras. They are posterior to the Sutras (*a*). Sayana in commenting on a passage of the Taittiriya Aranyaka (*b*) observes that Manavadi Sastra derives its origin from assumed Sruti. Sayana would derive Manu and others from the Vedas. The orthodox view is that to every Smriti there corresponded a Sruti which is now lost. Professor Max Muller considers the Dharma Sastras in verse to be more modern versifications of ancient Dharma Sutras. Thus he regards the code of Manu (Manava Dharma Sastra) not to be the work of Manu but a metrical redaction of the Dharma Sutra of the Manavas, a Brahmanical School attached to one branch (Sakha) of the black Yajur Veda (*c*). That the Sutras or the Grihya Sutras were the sources of Smritis is also the opinion of Professor Weber (*d*). Mr. Muir (*e*) and Mr. Monier

Origin of Smritis.

(*a*) See Dr. Jolly's Tagore Lectures, 1883, p. 41.

(*b*) See Calcutta edition of Tattiriya Aranyaka P. 9.

(*c*) See Professor Max Mullers' History of Ancient Sanskrit Literature. 206-208.

(*d*) Weber's History of Indian Literature.

(*e*) Muir's Sanskrit Texts Vol. III. p. 26.

Williams (*a*) take the same view. Whatever their origin, there can be no doubt, these metrical Smritis or Dharma Sastras have exercised an immense influence on the development of Hindu Law and have attained more universal authority than the Sutras. Thus the Code of Manu, with its numerous commentaries, have been studied all over India whereas the Dharma Sutra of Apastamba is not read anywhere except in certain parts of southern India. Yajnavalka mentions the name of twenty sages as having complied the Dharma Sastras. They are Manu, Atri, Vishnu, Harita, Yajnavalka, Usanas, Angiras, Yama, Apastamba, Sambarta, Katyayana, Vrihaspsti, Parasara, Vyasa, Sankha, Likhita, Daksa, Gautama, Satatapa and Vasistha (Yajnavalka i, 4-5), On this passage the Mitakshara makes the following comment :—"This is not an exhaustive enumeration but merely illustrative" and he mentions the names of Baudhayana, Narada and Devala as authors of Dharma Sastras. Mr. Mandlik says that the number of the Smritis is very great and that many have been lost and that some exist as fragments and that others are only known from quotation in other Smritis or Digest of more modern

Their large influence on Hindu Law.

Number of Smritis.

(*a*) Monier Williams' Indian Wisdom p. 213.

writers (*a*). He points out that the Smritis quoted by Nilkanta are 97 in number. In the Nirnayasindhu, Kamalakara refers to 131 Smritis. The general belief is that Manu is the first law-giver of India. There has been much controversy regarding the origin of the Manu Smriti. But the generally accepted view is that of Professor Max Muller according to which Manu Smriti is based on, or is in fact a re-cast of an ancient Dharma-Sutra (*b*).

(iii) Puranas, as sources of law.

With regard to the Puranas, Professor Wilson in his introduction to the Vishnu Purana says that "Puranas are not authority in law, they may be received in explanation or illustration but not in proof." But a writer of repute like Raghunandan has relied on the authority of the Aditya Purana in enjoining that certain practices should be eschewed in the Kali (Iron) age for instance, Niyoga etc (*c*). Vyasa recognizes the authority of these Puranas and says that in a conflict between Smritis and the Puranas, the former should prevail. Sulapani also regards the Puranas as sources of law (*d*).

(*a*) Mr. Mandlik's Introduction to Vyabahara Mayukha p. xiii.

(*b*) See Introduction, Sacred Books of East, Vol. XXV p. xviii. (*c*) See Raghunandan's Udbaha-tattwa.

(*d*) इतिहास पुराणानि तु क्वचित् अलौकिकमर्थमप्रमाणयन्ति अतो धर्मोऽपि प्रमाणम् ।

(iv) Custom, one of the sources.

Custom is one of the sources of law and as has been observed before has played no small part in the development of Hindu law. Custom, say the Judicial Committee of the Privy Council is a rule which in a particular family or in a particular district has from long usage obtained the force of law. It must be ancient, certain, and reasonable and being in derogation of the ordinary law of the country must be construed strictly (*a*). There has been a difference of opinion amongst commentators and modern writers on Hindu law on the question whether customs which are in conflict with some texts of Srutis and Smritis can be enforced or given effect to. *Sabarswamy, the great commentator of Jaimini inclines to the view that usage cannot be disregarded although it contravenes some texts of the Vedas (*b*). Kumarila Bhatta(*c*), another com-

Requisites of a valid custom.

Custom outweighs written text of law.

(*a*) Hurprasad vs. Sheo L. R. 3. I. A. 259, 285.
Rama vs. Shiva 14 M. I. A. 570, 585.

(*b*) See Mimansa Darsan, Benares Edition Chowkhamba series p. 45—48, Chapter I.

(*c*) यद्या सत्ववयेषापि एतदेवाधिकरणं व्याख्यातव्यं ।

इहार्य्यावर्त्तनिवासि शिष्टाचाराणेवेदादृत्य पूर्ववत् प्रामाण्याप्रामाण्यसन्देहे शिष्टाकोपऽविरुद्धम् सिद्धान्तस्तावदुपक्षप्यते तथाहि ।

शिष्टं यावच्छ्रुतिस्मृत्योर्न यत्र विरुध्यते ।
तच्छिष्टाचरणं धर्म्मे प्रमाणत्वेन गम्यते ॥
यदि शिष्टस्य कोपः स्याद्विरुद्धेन प्रमाणता ।
तदकोपात्तु नाचार प्रमाणत्व विहन्यते ॥

Tantravartika, p. 145 Benares Edition, 1883.

mentator of Jaimini who has written a gloss on Sabar's commentary, on the other hand maintains that if custom is against express text of Sruti and Smriti then its validity is negatived.**

Kulluka Bhatta in commenting on the text of Manu regarding the duty of a King to respect established usages in framing laws (*a*) adds the gloss that the King must respect the customs peculiar to the families, to the guilds and to the classes and districts, provided such customs or usages are not repugnant to the revealed law contained in the Vedas. Mr. Mayne rejects this gloss of Kulluka as mere dictum and maintains that Manu contemplated no such restriction (*b*). Dr. Jogendra Nath Siromani however strongly maintains that there is no authority for the doctrine that custom can prevail, although contrary to revealed law (*c*). Colebrooke is of the latter opinion. He says as follows on the point :—"any usage which is inconsistent with a recorded recollection is not to be practised, so long as no express text of scripture is found to support it" (*d*). The matter

** This is believed to be the result of original research.

(*a*) Manu, VIII, 46.

(*b*) Mayne on Hindu Law. 7th Edition, p. 46.

(*c*) Dr. Jogendra Siromani's Hindu Law, p. 51.

(*d*) Colebrooke's Miscellaneous Essays Vol. I. p. 313.

however seems to be now settled by the highest tribunal for India in the case of Collector of Madura vs. Moottoo Ramlinga (12 M. I. A. 397) that clear proof of usage will outweigh the written text of law (*a*). Another element necessary to render a custom valid is that it should not be immoral and contrary to public policy. So far back as 1879 Mr. Justice West refused to recognise the custom of the adoption of a daughter by a dancing girl on the ground that it was contrary to morality and to public policy (*b*). But subsequent decisions both in Madras and Bombay have drawn nice distinctions and such adoptions have been sanctioned on the ground that prostitution is not a necessary consequence of becoming a dancing girl. The ratio decidendi in the Bombay case were disapproved by the learned Judges of the Madras High Court in a later case (*c*) and

Custom must not be immoral or contrary to public policy.

(*a*) See however, I. L. R., 22 Madras 398 where the Judicial Committee observe as follows :—The extent to which the Smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any opinion about it. But in a discussion about the sources of Hindu Law by Dr. Jolly published in 1883 (See page 33), that learned Sanskrit scholar states grounds for holding that customs are only recognised by the Smriti when they do not contravene Divine laws.

(*b*) Mathura Vs. Esu I. L. R., 4 Bombay 545

(*c*) Vanku vs. Mahalinga I. L. R. 11 Madras 393.

even the High Court of Bombay refused to adopt those reasons in their entirety in a subsequent case(*a*). The Madras High Court has in a series of decisions adopted the rule laid down in the case in I. L. R., 11 Madras and the result is that such adoptions only would not be recognised which are made with an immoral object so as to bring the case within the provisions of the penal law of the country. We shall have to say more of this in another place.

(v) The Commentaries.

The commentaries which represent the third phase in the evolution of Hindu Jurisprudence must now be regarded as of the greatest practical importance as sources of law, for the Judicial Committee have once for all laid down that commentaries which are respected in the district where the case arises for decision, are decisive of the question at issue.

Mitakshara.

Of all the commentaries, that by Vijnaneswara known as the Mitakshara has the widest range of influence. Its authority is supreme in the United provinces and in Behar. In western India it is decisive except in the Island of Bombay and Guzerat where the Vyavahara Mayukha prevail. In southern India it is supplemented by the Smriti Chandrika, the Daya Bibhaga, the

Vyavahara Mayukha.

(*a*) Tara Naikin vs. Nana I. L. R. 14 Bombay 90.

Smriti Chandrika.

Dayabhaga.

Saraswati Vilasa and other works. Its authority is denied in Bengal in so far that it yields to the Dayabhaga in points where they differ. The Mitakshara is a running commentary on the Institutes of Yajnavalka and its age has been fixed to be the 11th century of the Christian Era (*a*). It is supposed to be earlier that the Dayabhaga although opinion on this point is not unanimoús (*b*). In Mithila, the Mitakshara is supplemented by the Vivada Chintamoni, which prevails over the Mitakshara in points where they differ. The Viramitrodoya by Mitramisra is regared as an authority by the Benares School in points which are left doubtful by the Mitakshara (*c*). It may also be consulted in Bengal in cases where the Dayabhaga is silent (*d*).

Vivada Chintamoni.

The commentaries have given rise to five schools of Hindu Law. The term 'schools of Law' as appiled to different legal opinions as prevalent in different parts of India seems to have been first used by Colebrooke. Those schools are the Bengal, the

(*a*) West and Buhler's Digest of Hindu Law, second edition p. 17.

(*b*) See Dr. Jolly's Tagore Lectures 1883 p. 26.

(*c*) Giridhari Lal Roy vs. The Bengal Government 12 M. I. A. 448, 466.

(*d*) Moniram Kolita vs. Keri Kolitani I. L. R. 5 Cal 776 (p. c.)

Benares, the Mithila, the Maharastra, the Dravida schools of law. But in the opinion of Mr. Mayne there are really two schools of law marked by a vital difference of opinion viz., one which follows the Mitakshara and the other which follows the Dayabhaga (*a*). And in fact the Judicial Committee of the Privy Council in one of its earlier decisions took the same view (*b*).

But now five schools of law are recognised as we have already indicated, and the commentaries that are respected as authorities in the respective schools are given below (*c*),

*The Hindu law contains within itself the

(*a*) Mr. Golap Chandra Sircar is also of the same opinion. (See Hindu Law. Ed. 1910 p. 5)

(*b*) Cavaly Vencata vs. Collector of Masulipatam 8. M. I. A. 500, 513.

(*c*) Bengal School :—Dayabhaga, Mitakshara, Dayatattva, Dayakramasangraha, Viramitrodaya.

Benares School :—Mitakshara, Viramitrodaya.

Mithila School :—Mitakshara, Vivadaratnakara, Vivada Chintamoni.

Mahrasthra school or Bombay :—Mitakshara, Vyavahara Mayukha, Viramitrodaya, the Nirnayasindhu of Kamalakara, the Sanskara Kaustuva.

Dravida or Madras School :—Mitakshara, Smriti Chandrika, Parasara Madhavya, Viramitrodaya.

* Views expressed here are believed to be original.

Rules of Interpretation

Jaimini's Mimansa.

rules of its own interpretation. The Mimansa of Jaimini which is known as the Purva Mimansa furnish such rules (*a*. Although it purports to interpret the Vedic law, its disquisitions bear a certain resemblance to juridical questions. The logic of the Mimansa is the logic of law, the rule of interpretation of civil and religious ordinances. But the Mimansa system of interpretation has not received the amount of attention it deserves. On the other hand we find so great an authority as Mr. Mayne averse to apply to any discussion on Hindu law the Mimansa principles of interpretation. Speaking with reference to one of such Mimansa rules, Mr. Mayne expressed himself as follows :—"The rule, if finally accepted as a governing principle of interpretation would be of such a far-reaching character that it would be advisable to examine whether such a novel and disturbing element should be added to the difficulties which already encompass

---

(*a*) The Vedanta school of Philosophy, the founder of which is Vyasa, is also denominated Mimansa and in order to distinguish it from Jaimini's philosophy, the Vedanta is called the Uttar or posterior Mimansa, and the other Purva or prior Mimansa.....The Mimansa of Jaimini deals with practical or ceremonial precepts whereas the Mimansa of Vyasa relates to the theoretical or theological precepts contained in the Upanishadas.

See Mr. Golap Ch. Sarkar on Adoption p. 74.

every discussion on Hindu law"(*a*). Although the commentators refer to the rules on interpretation of Jaimini in discussing doubtful questions of law, it is strange that these rules were not judicially considered before the adoption case from Allahabad (*b*). The fact seems to be that it was thought that the rules of Mimansa had nothing to do with the interpretation of law but were intended to elucidate Vedic ritual and they were consequently overlooked by Hindu as well as English text-writers and commentators. But that the Mimansa contains much that is valuable from a legal point of view will become apparent when we deal with Jaimini's views on the status of women in the next chapter. That there is no full English translation of the Mimansa aphorisms also accounts for the paucity of reference by judges and English text-writers on Hindu law (*c*). There can be no doubt that the Mimansa of Jaimini contains no new rules of construction but are authoritative rules for the interpretation of the texts of the sacred law of the Hindus.

(*a*) Mayne's Hindu Law, (Sixth Ed). Pages 34 and 35.

(*b*) Beni Prasad vs. Hardai Bibi (F. B.) I. L. R. 14 All 72.

(*c*) See the observation of Sir John Edge in Beni prasad vs Hardai Bibi I. L. R. 14 All 70.

Difficulties of the subject :—

* It has been shown that Hindu law has been subject to the rule of evolution and has had growth and development. But though a growth, the whole process of evolution does not unfold itself, as it were, before our very eyes by slow and almost imperceptible gradation. In this respect Hindu law offers a striking contrast to Roman law. "In the history of legal conceptions," says Dr. Hunter, "the Roman law occupies a position of unique value. It forms a connecting link between the institution of our Aryan forefathers and the complex organisation of modern society. Its ancient records carry us back to the dawn of civil jurisdiction and as we trace its course for more than a thousand years there is exhibited a panorama of legal development such as can not be matched in the history of the laws of any other people" (*a*). From the time that Rome emerges into the light of history a continuous history of the Roman law can be obtained. But it is not so with Hindu law. Hindu chronology is extremely uncertain. As writers have speculated and differed widely, it is not always possible to obtain

Arising from uncertainty of Hindu chronology.

---

* The discussion in the remaining pages of this Chapter is believed to be original.

(*a*) Hunter's Introduction to Roman Law, p. 1.

direct evidence of the relative antiquity of the texts of Hindu law. "The ancient History of India," say Messrs West and Buhler, "is enveloped in so deep a darkness and the indications that the Smritis have frequently been remodelled are so numerous that it is impossible to deduce the time of their composition from internal or even from circumstantial evidence" (*a*). The historical order of the different authorities on which our conclusions must rest is uncertain. Although European writers of celebrity like Sir William Jones and Professor Max Muller, not to mention a host of other names, have with great research and sagacity, tried to find out the historic order of the texts of the different sages, they have not succeeded in placing the matter beyond the region of conjecture and speculation. And the conclusion can be safely hazarded that neither internal nor external evidence will ever suffice to make the chronology of Hindu law certain and precise. Indeed, great difficulties are felt in dealing with any question on Hindu law in a systematic way beginning from the earliest times till now by reason of the want of an authentic history regarding its growth and development.

(*a*) West & Buhler's Digest of Hindu Law, p. 16. (2nd Edition.)

We do not for instance know whether Jaimini preceded Baudhayana in point of time or came after him. The practical difficulty arising out of such uncertainty of chronology is manifest. Our speculations have no certain basis. To take an example, Jamini's views regarding the rights of women are, as we shall see hereafter, more liberal than those of Baudhayana. If we were certain that Jaimini preceded Baudhayana then we could get sure ground for a theory that women possessed higher rights in Jaimini's time which had been curtailed by later Brahminical sages.

As illustrated by Jaimini's and Baudhayana's views regarding women's rights.

As has been said already, from the same remoter sources of Hindu law, commentators have come to different, and sometimes to almost opposite conclusions. The age of the commentaries can not be definitely fixed and it is impossible to say how and when different rights accrued to women in the different areas. The opinions among commentators regarding women's rights are sometimes diametrically opposite. For example sister is no heir under the Bengal school of Hindu law, although she is an absolute heir in Bombay. It is indeed difficult to trace how and when from the same remoter sources the two schools came to two most divergent conclusions.

Arising from mingling of Law and religion and ritual.

The next difficulty arises from the minging of law, religion, ritual, cosmogony all in the same code or Dharma Shastra. If a precept of law is placed side by side with a moral or religious precept, it oftentimes is a matter of difficulty to distinguish between them. Numerous instances may be cited from Manu where the distinction between law and religion is completely overlooked.

Arising from want of an orderly classification.

There is no orderly classification as in the Roman law or any of the continental systems based on the Roman law. In the Institutes of Yajnavalka, for instance, the Dharma Shastra is divided into three sections Achara (ritual), Vyavahara (Jurisprudence), and Prayaschitta (Expiation) and the law of marriage is contained not in the section which deals with Vyavahara (Jurisprudence) but in that which deals with Achara or ritual although it is clear that the law of marriage is one of the important topics that fall within the province of Jurisprudence.

Arising from Juxtaposition of obsolete and current usages.

Then again although such purely legal writers as the author of Viramitrodaya discusses mariages between persons of different castes, there can be no doubt that the author is talking of something which had long ceased to exist. Yet in discussing this part of the law of marriage, he descends to such

minute details that it would seem as if the author was describing the actual practice of his time. An obsolete custom or usage is referred to in the apparent faith as if it was a current one.

Arising from the maxim that every sacred text is equally true.

Another difficulty arises from the maxim of Hindu law that every sacred text is equally true. The logical consequence of this maxim is a search for consistency. The judges are bound to elicit consistent doctrines from the Hindu law texts and the writers on Hindu law are bound to evolve a consistent theory out of them. The disinclination of judges as also of the writers on Hindu law to hold that the author of Mitakshara denied the proprietary incapacity of women in general and included inherited property within the category of stridhan is to be referred to this search for consistency The decision of the Judicial Committee in the case of Thakoor Deyhee vs. Rai Baluk Ram (11 Moore's I.A.p.173) illustrates this to a certain extent. One of the questions raised in that case was whether under the Hindu Law as administered in the Benares school, property inherited by a woman becomes her stridhan and a passage of the Mitakshara directly supporting the affirmative of this proposition was strongly relied on in the course of argument. But their Lordships

As illustrated by the view of Mitakshara regarding stridhan.

declined to act upon this passage and one of the reasons assigned by them was that it was inconsistent with the general spirit of Hindu law as shown by the numerous texts declaring the perpetual dependence of women. In coming to this conclusion their Lordships ignored the fact that the Mitakshara and the Smritis which contained the texts about perpetual tutelage of women represent very different stages of development of Hindu law. It would have been right to hold that the author of Mitakshara was a stronger advocate of women's rights than the ancient sages and the passage relied on should have been accepted notwithstanding its apparent inconsistency with the tenor of Hindu law as laid down by the early sages. The truth is, as has been well said (*a*) that the law is only approaching and never reaching consistency. It will become entirely consistent only when it ceases to grow. These are the numerous difficulties that beset the investigator in this and other branches of Hindu law.

Importance of the subject.

The subject of our thesis, besides being of considerable interest, is really one of great importance, for the position of women in any civilisation shows the stage of evolu-

(*a*). Holmes' Common Law p. 36.

tion at which the civilzation has arrived. Law is one of the agencies by which the life of a nation is developed and the position of women in Hindu law furnishes a true test of Hindu civilisation and culture. Law it has been said is the result of social and economic forces and cannot be studied in isolation from those forces. The position of women in any system of law represents the thought and feeling of the community with regard to them at the time when the law was made. "The degree," says Sir Henry Maine, "in which personal immunity and proprietary capacity of women are recognized in a particular state or community is a test of the degree of the advance of its civilization ; and though, the assertion is some times made to give it value, it is very far indeed from being a mere gallant common place. For in as much as no class of similar importance and extent was, in the infancy of society, placed in a position of such absolute dependence as the other sex, the degree in which the dependence has voluntarily been modified and relaxed serves undoubtedly as a rough measure of tribal, social, national capacity for self-control.... ...The assertion, then, that there is relation between civilization and the proprietary capacities of women is only a form of the truth that

every one of those conquests, the sum of which we call civilization, is the result of curbing some one of the strongest because of the primary impulses of human nature" (*a*). In another place, the same writer says that of all the chapters of the law of persons the most important is that which is concerned with the status of females (*b*). The position which women occupy in Hindu law is not only an index of Hindu civilisation but is also a correct criterion of the culture of the Hindu race. When the woman stands by the side of her husband possessed of full rights, with a free and independent will, restrained only so far as not to amount to undue liberty, not merely the mother of her children but the mistress of the household, not a simple chattel but a companion and friend, only then can it be said that the people amongst whom the relation of the sexes is so developed, is a truly cultured race.

Plan of the thesis.

It remains now to conclude this introductory chapter by describing the plan or arrangement of our thesis. We will deal in the next chapter with the status of females generally. The third chapter will be devoted to the status of wife and the law of marriage.

(*a*) Early History of Institutions, p. 339.

(*b*) Maine's Ancient Law, p. 157 (Edition by Sir Frederick Pollock).

The fourth chapter will deal with the status of widows. The fifth and sixth chapters of this thesis will be devoted to a discussion of the proprietary position of women—the former chapter dealing exclusively with *inheritance*, the latter with *Stridhana*. The seventh chapter will be devoted to a discussion of the status of courtesans and dancing girls, status being there used in the widest sense.

CHAPTER II.

Status of Women Generally.

* In this chapter will be presented a general view of the status of women in Hindu law and the two following chapters will be respectively devoted to the status of wife and the status of widows in particular. The same ground may therefore in a few instances have to be traversed twice over but attempt will be made to avoid needless repetition as much as possible.

Materials for a new theory regarding status of women

A chapter in Jaimini's Mimansa aphorisms offers materials for a new theory regarding the status and proprietary position of women in early Hindu law. That these materials have not been hitherto accessible in an English form is due to the fact that investigators in the field of Hindu law have not been many ; for as Dr. Ghosh said with great force and propriety, not many years ago "legal antiquities ought to engage special attention, as India offers a rich and varied field for such enquiries. The harvest has long been ripening for the sickle, but as yet, to our reproach the reapers are few in number, and that wealth of materials which should be

* Portions of this chapter within asterisks are the result of original research.

our pride is now our disgrace" (*a*). A study of a few Adhikaranas in the first chapter of the sixth book of the said aphorisms will make us modify considerably, if not reverse altogether our generally accepted notions regarding the personal and proprietary capacity of women in the earliest times of which we have any record. Hitherto it has been the accepted creed with the majority of the writers on Hindu law that women were in very ancient times regarded merely as chattels (*b*), that they could be bought and sold and that they were treated like slaves, that they were incapable of holding property and that gradually both their status and proprietary position were elevated by the later Smriti-writers and the commentators. In fact according to the prevailing theroy, the general principle followed with respect to females is, that no right can be clamied by them unless it is supported by express authority.

Gen rally accepted theory.

Jaimini's influence on Hindu Law.

We have already indicated in the introductory chapter what influence Jaimini's Purva Mimansa exercised on Hindu law. The Purva Mimansa teaches the art of reasoning with the express view of aiding

---

(*a*) Dr. Rash Behari Ghose's Law of Mortgage in India, 3rd Edition, Page 5.

(*b*) Mayne on Hindu law, Page 86 (6th Ed.)

the interpretation ol the Vedas which, as we have seen are the primary source of Hindu law. Purely legal treatises like the Mitakshara and the Dayabhaga, the Dattak-Mimansa and the Dattak-Chandrika, the Viramitrodaya and the Vyvahara Mayukha by Nilkantha contain instances of the application of the Mimansa method of reasoning to the discussion and determination of juridical questions. From these and other numerous references in the writings of the commentators to the Mimansa principles of reasoning, it will appear that Hindu law owes a heavy debt to the Mimansa system of philosophy. We will presently discuss the aphorisms which are suggestive of the new theory. Madhavacharjya, in his commentary on Jaimini's Mimansa known as Jaimini's Nyayamala Vistara describes the third Adhikarana of the first chapter of the sixth book as "the aphorisms which negative the view of the personal incapacity of women" (*a*). The sixth book of the Sutras deals with the Adhikarana which relates to Adhikara Vidhis. The word Adhikara according to the Sanskrit grammarian Panini involves the idea of authority with obligation. Adhikara Vidhis would mean rules regarding personal capacities or incapacities. In the commentary of

Aphorisms suggestive of the new theory.

(*a*) तृतीये स्त्रिया अनधिकार निराकरणे सूत्राणि।

Jaimini's Mimansa Darsan by Sabar Swami, the great Vedic Scholar, the said third Adhikarana of the sixth book is headed as "the Adhikarna that deals with the equal rights of men and women in the performance of sacrifices etcetra." We shall see the significance of the word *etcetra* hereafter. Before we enter into a study of the said Adhikarana it is necessary to explain what is signified by the word Adhikarana. An "Adhikarana" is said to consist of five limbs (parts). According to Kumarila Bhatta who has written a gloss on Sabar's commentary of Jaimini's Mimansa, the matter to be considered or discussed, the doubt raised concerning it, the prima facie or wrong view with regard to it, the refutation of the wrong view and the conclusion constitute the five limbs of the Adhikarana (*a*). The verse of Kumarila cited below shows the method of discussion of a theme pursued by Jaimini in his Mimansa aphorisms. To explain the matter more clearly, the sage in dealing with any one topic will first state, in the form of an aphorism, the matter to be considered, and then the doubt which might be raised concer-

Adhikarana explained.

Jaimini's method of dissussion.

(*a*) विषयो विशयश्चैव पूर्व्वपक्ष स्तथोत्तरम्।
निर्णयश्चेति पञ्चाङ्गं शास्त्रेधिकरणं स्मृतं ॥

Kumarila Bhatta cited in तिथितत्त्व by Raghunandana. See also Madhavacharjyas' Nyamala Vistara, page 3.

ning it ; next he will proceed to state the view which is opposed to his own (Purva paksa), then other aphorisms will follow in support of the opposite or wrong view. When the latter becomes plausible or prima facie reasonable the sage will proceed to refute the same, giving reasons to support therefutation and will lastly state his own conclusion, all in the aphoristic form. This is the general method pursued by Jaimini in his Sutras but there are exceptions to the rule (*a*).

This topic or Adhikarana regarding the equal rights of men and women to which reference has just been made turns on a text of the Vedas to the following effect (*b*) :—

"*Darsa Purna Masabhyam Swargakamo yajeta.*" This Vedic text is in the nature of an injunction or command and may be translated thus,—Perform the sacrifice of *Darsa* and *Purnamasa* for the purpose of attain-

---

(*a*) Mr. Colebrooke described this method in the following terms :—It will be observed as has been intimated in speaking of the members of an Adhikarana in the Mimansa, that a case is proposed either specified in Jaimini's text or supplied by his scholiasts, and upon this a doubt or question is raised and a solution of it is suggested which is refuted and a right conclusion established in its stead. Colebrooke's Miscellaneous Essays Vol. I p. 316.

(*b*) दर्शपूर्णमासाभ्याम् स्वर्गकामो यजेत।

ing Heaven (*a*). Now a question is raised whether men alone are competent to perform these sacrifices or women also. We proceed without further consideration to translate the whole Adhikarana with the commentary of Sabar Swami thereon, as it has never been translated before and therefore has not been accessible hitherto to any but Sanskrit scholars. After we have done so, it will be seen that there is much in it that throws light not only on the status of women in early Hindu law, but also on their proprietary position. We have adopted the commentary or Bhasya of Sabar Swami as it is the oldest and the only full commentary in existence on the Mimansa Sutras. This commentary of Sabar Swami has in its turn been commented on by Kumarila Bhatta in his Tantra Vartika, Sloka Vartika and Toop Tika. It may be as well to mention here that amongst the later commentaries on the Mimansa Sutras, Nyamala Vistara by Madhavacharjya, to which reference has already been made, and the Sastradipika by Partha Sarathi Misra have attracted the attention of Sanskrit scholars.

Commentators of Jaimini's Mimansa.

(*a*) This may also be translated as :—

Those who are desirous of attaining heaven should perform the sacrifice of Darsa and Purnamasa.

Sixth Aphorism of Jaimini (Chapter VI, Pada I, Adhikarana III) :—

Translation of the Aphorisms.

As the particular gender is specified it refers to males, so says (the sage) Aitisayana.

Comment of Sabar Swami.

The Vedas say that one who is desirous of attaining Heaven should perform the sacrifices of Darsa and Purnamasa. A doubt is raised viz. whether by the above revealed text a man alone having the desire of attaining Heaven is declared competent to perform sacrifices or no distinction between man and woman in this behalf is indicated. (Let us see) what is reasonable. Aitisayana thinks that man alone is competent to perform (sacrifices) for the masculine affix to the word (Swargakamo) is significant ; Why ? Because gender is specified ; therefore the words Swargakamo yajeta (sacrifice for the purpose of attaining Heaven) refer to man only and not to woman (Purvapaksa).

लिङ्गविशेषनिर्देशात् पुंयुक्तमेतिशायनः ॥ ६ ॥

दर्शपूर्णमासाभ्यां स्वर्गकामो यजेतेत्येवमादि समाम्नायते। तत्र सन्देहः। किं स्वर्गकामं पुमांसमधिकृत्य यजेतेत्येष शब्द उच्चरितः। अथ वाऽनियमः, स्त्रियं पुमांसं च ? इति। किं प्राप्तम्। पुंलिङ्गमधिकृतं मेने ऐतिशायनः। कुतः। लिङ्गविशेषनिर्देशात्। पुंलिङ्गेन विशेषेण निर्देशो भवति, स्वर्गकामो यजेतेति। तस्मात् पुमानुक्तो यजेतेति, न स्त्री ॥ ६ ॥ पूर्व० ॥

Seventh aphorism of Jaimini.

(That competency of man only to perform sacrifices is intended in the Vedas) because it is said therein that (in the case of destruction of the child in embryo whose sex is unknown) sin is committed.

Comment of Sabar.

In the case where the (child in embryo) of a bramhin woman is destroyed before the sex of the child can be ascertained the person causing such destruction is called *Vrunaha* in the Vedas. Vrunaha is the

---

तदुक्तित्वाच्च दोषश्रुतिरविज्ञाते ॥ ७ ॥

अविज्ञाते गर्भे हते भ्रूणहत्यानुवादो भवति। तस्मादविज्ञातेन गर्भेण हतेन भ्रूणहा भवतीति। भ्रूणहा पापकृत्तमः। यश्चीभयीलोक्यीरुपकरोति, तस्य हत्वा भ्रूणहा। यज्ञहत्वा भ्रूणहा। स यज्ञसाधनवधकारी। तस्माद् यज्ञं भ्रूणशब्देन अभिदधाति। स हि बिभर्त्ति वा सर्वं, भूतिं वा आनयति। अतो भ्रूणहा यज्ञवधकारी। स पुंयुक्तत्वादनुवादोऽवकल्प्यते। अविज्ञाते गर्भे हन्यमाने कदाचित् पुमान् हन्येत। तत्र यज्ञाधिकृतस्य हतत्वाद्यज्ञवधी भ्रूणहत्या स्यात्। इतरथा यद्युभयोरधिकारस्तती विज्ञाते चाविज्ञाते च यज्ञवधः स्यात्। तत्र। विज्ञातग्रहणमतन्त्रमिति कल्प्येत। तस्माद्विवक्षिता पुंलिङ्गस्य वाचिका विभक्तिरिति॥ तथा, आत्रेयीं हत्वा भ्रूणहा भवति। आत्रेयीमापन्नगर्भामाहुः। अत्र=कुक्षौ अस्या विद्यते इत्यात्रेयी। तस्मादपि पुंसोऽधिकारी गम्यते। यथा, पशमालभेतेति पुंपशुरेवालभ्यते। लिङ्गविशेषनिर्देशात्। एवमिहापि द्रष्टव्यमिति॥ ७॥ युक्तिः॥

एवं प्राप्ते ब्रूमः—

greatest sinner ; since he destroys one who produces benefit both in this world and in the future. Therefore Vrunaha is one who has destroyed the sacrifice itself by destroying one who might perform sacrifices. Hence by the word Vruna the Vedas mean sacrifice because sacrifice protects (all persons) or produces prosperity. Therefore Vrunaha is one who destroys a sacrifice. This indicates that a person having the capacity of performing sacrifices should be a male and not a female. By killing a child in embryo before the sex of the child can be distinguished sometimes a male child is killed. In that case as one who is competent to perform sacrifices is killed, that destroyer is called Vrunaha. But if both man and woman were competent to perform sacrifices then whether the sex of the child in embryo were known or unknown still a sacrifice will be thwarted or destroyed. It would in that case have been unnecessary to use the qualifying word *Abijnate* (before sex of the child can be distinguished) in the Vedic text. Therefore the masculine affix to the word Swargakamo is significant. So also there is another text :—"Whoever kills a pregnant woman, becomes a vrunaha. The word Atreyi means pregnant woman, being derived from *Atra* (in the womb of whom,

Vidyate lives a being) (*a*). Just as in the case of the text, kill an animal for sacrifice, a male animal is intended because of the specification of the masculine gender similarly in the passage above quoted (Swargakamo yajeta) significance should be given to the gender or masculine affix. (Argument in support of Purbapaksa).

Eighth Aphorism of Jaimini.

Badarayana says that any one (whether man or woman) belonging to the three regenerate classes is entitled to perform sacrifices as there is no class distinction in the word (Swargakamo) therefore woman also is included because the three regenerate classes consist of men and women alike.

(*a*) Although the word *Abijnate* does not occur here still in order to harmonise with the text of the Veda cited above, the word *Abijnate* will have to be read into the text. This is apparently suggested by the exponent of the Purvapaksha. (*Prima facie* or wrong view).

जातिं तु बादरायणोऽविशेषात् तस्मात् स्त्र्यपि प्रतीयेत जात्यर्थस्याविशिष्टत्वात् ॥ ८ ॥

तुशब्दः पक्षं व्यावर्त्तयति । नैतदस्ति, पुंसोऽधिकार इति । जातिं तु बादरायणोऽधिकृतां मन्यते स्म । आह । किमयं स्वर्गकाम इति जातिशब्दः समधिगतः । नेत्याह । कथं तर्हि । यौगिकः, स्वर्गेच्छायोगेन वर्त्तते । कैन तर्हि शब्देन जातिरुक्ता या अधिक्रतेति गम्यते ? नव च वयं ब्रूमो, जातिवचन इह शब्दोऽधिकारक इति । किन्तर्हि । स्वर्गकामशब्देनोभावपि स्त्रीपुंसावधिक्रियेते इति । अतो न विवक्षितं पुंलिङ्गमिति ।

Comment of Sabar.

Here the use of the word (तु—Tu) is intended to show that this aphorism contradicts the view above stated (Purvapaksa.) It can not be that men alone have the capacity to perform sacrifices for Badarayana thinks that any one belonging to the three regenerate classes can perform sacrifices quite irrespective of sex. Here a doubt may be raised viz. whether the word Swargakamo can have ever any possible reference to classes at all. The Purva-paksa answers. "Never." Because the collective compound consisting of the two words Swarga and Kama points to one who possesses the desire of attaining Heaven. Therefore by what word, it is asked, is reference to class indicated? Upon this the Siddhantin (author of the aphorisms) answers: "True there is no word which has direct reference to class but by the word Swarga-

---

कृत:। अविशेषात्। न हि शक्तीत्येषा विभक्ति: स्वर्गकामं लिङ्गेन विशेष्टुम्। कथम्। लक्षणत्वेन श्रवणात्। स्वर्गे कामो यस्य, तमेष लक्षयति शब्द:। तेन लक्षणेनाधिकृतो यजेतेति शब्देन उच्यते। तच्च लक्षणमविशिष्टं स्त्रियां पुंसि च। तस्माच्छब्देनीभावऽपि स्त्रीपुंसावधिकृताविति गम्यते। तत्र कैनाधिकार: स्त्रिया निवर्त्यते। विभक्त्या इति चेत्। तन्न। कस्मात्। पुंवचनत्वात्। स्त्रीनिवृत्तावशक्ति:। पुंसो विभक्त्या पुनर्वचनमनर्थकमिति चेन्न। आनर्थक्येऽपि स्त्रीनिवृत्तेरभाव। परिसङ्ख्यायां स्वार्थहानि: परार्थकल्पना प्राप्नुयाद्वय। न चानर्थकम्। निर्देशार्थत्वात्। तस्मात् स्त्र्यपि प्रतीयेत जात्यर्थस्याविशिष्टत्वात्॥ ८॥ सि०॥

kamo is signified that men and women are entitled alike (to perform sacrifices). Therefore no significance is given to the masculine gender. Why ? Because the masculine affix to the word Swargakama can not restrict the term to males alone ; for emphasis is laid on the qualification alone. This word Swargakamo refers to the person who has the qualification of possessing the desire of attaining Heaven. As soon as the word Yajeta (pray and sacrifice) is uttered, it raises the question as to who is to do the act (of sacrifice). It does not raise any doubt about the sex of the person doing it. Therefore by the word (Swargakamo) it is indicated that both men and women are entitled (to perform sacrifices). Then if it it be said that by the masculine affix to the word (Swargakamo) it is intended that women are excluded from the right of performing sacrifices, the answer is that masculine afflx may refer to males but it does not exclude the females. For in order to exclude females (from the right of sacrifice) three difficulties will have to be faced. In the first place we will have to contemplate that the collective word Swargakamo does not carry its own import (for the word, Swargakamo which means whoever has the desire of attain-

ing Heaven can refer to both sexes). In the second place we will have to assume some other meaning than that contemplated by the text (for we will have to read into the text *men* having desire of of attaining Heaven can perform sacrifices the words *and not women*). In the third place we will have to go against recognized facts. In our view the masculine affix is not without its use for by the use of the affix we are not guilty of breaking the conventional rules of grammar *a*).

Therefore women are included (in the text Swargakamo yajeta) for they are not excluded from the three regenerate classes competent to perform sacrifices. (This is the Siddhanta or the conclusion of the sage Jaimini).

Ninth aphorism.

Because it is enjoined as it is heard.

(*a* According to the Sanskrit grammarians, a word can not be used without an affix (विभक्ति).

चोदितत्वाद् यथाश्रुति ॥ ९ ॥

अथ यदुक्तं, पशुमालभेतेति पुंपशुरालभ्यते। पुंलिङ्गवचनसामर्थ्यात्। एवमिहापि पुंलिङ्गवचनसामर्थ्यात् पुमानधिक्रियते यागवचनेनेति। : तत्परिहर्त्तव्यम्। अत्रोच्यते। नात्र जातिर्द्रव्यस्य लक्षणत्वेन श्रूयते। यदि हि लक्षणत्वेन श्रूयेत, ततः स्त्रिया अपि याग उक्तो न पुंवचनेन विवर्त्येत। इदं तु पशुत्वं यागस्य विशेषणत्वेन श्रूयते। तत्र पशुत्वस्य यागस्य च सम्बन्धी, न द्रव्ययागयोः। यथा पशुत्वं यागसम्बन्धमेवं पुंस्त्वमीकत्वं च। सोऽयम्

Comment of Sabar Swami.

You, the exponent of the opposite view (Purvapaksa) said that just as by the Vedic text "kill an animal for sacrifice" a male animal is intended by reason of the masculine affix to the word "animal" so here in the present case as the word Swargakama ends with a masculine inflection it follows that males alone having the desire of attaining Heaven are entitled to perform sacrifices. But, says the Siddhantwin (author) this view of the opponent is not tenable. Here (in Swargakama) the masculine character of the class does not qualify the individual or person within it. If it was so intended, then notwithstanding the masculine affix the right of women to perform the sacrifice could not be withheld. But in the text *Pashum Alaveta*, the class of animal expressed by the word *Pashum* only (is heard

---

अनेकविशेषणविशिष्टो यागः श्रूयते। स यथाश्रुति एव कर्त्तव्यः। उपादेयत्वेन चोदितत्वात्॥ यत्र दीर्घश्रुतिरविज्ञाते गर्भे हते आर्षेया च पुंयुक्तत्वेनेति तत् परिहर्त्तव्यम्। अत्रोच्यते। अविज्ञातेन गर्भेणेत्यनुवादः प्रशंसार्थः। आर्षेयी च न हन्तव्येति। स्त्र्यं गर्भो न हन्तव्यः। यदऽप्यक्तेनार्थेनस्त्रो भवति। पुंलिङ्गविभक्तिः श्रूयमाणा न शक्नोति स्त्रियं निवर्त्तयितुम्। किमङ्ग पुनरविज्ञातगर्भवचनं लिङ्गम्। तथा गौरवप्रशंसार्थमार्षेया अवधस्तुतिः। न चापन्नसत्त्वा आर्षेयी। गौरेव हि एषत्। न हि अत्र शब्दादयं तद्धित उत्पन्नः। समर्थानां हि तद्धित उत्पद्यते। न च अत्र-शब्दस्य सामर्थ्यमस्ति॥ ९॥ श्रा० नि०॥

to) qualify the performance of sacrifice, that is to say in the text the relation between the class of animal and sacrifice is indicated, not between any thing (which does not belong to the class of animal) and the sacrifice. As the class of animal is connected with the sacrifice so the singular number and the masculine gender of the word *Pashum* also qualifies the sacrifice. Therefore we hear that the sacrifice is circumscribed by many limitations. Therefore the sacrifice should be performed as the text is heard (with many qualifications) because emphasis is laid on every qualification (*a*). (Objections answered).

(*a*) This literal translation of the comment of Sabar is somewhat difficult to understand and therefore the following explanatory note is needed :—

According to Patanjali, the great commentator of Panini, words are divided into four classes : those denoting (*a*) class or concept (*b*) qualification (*c*) actions (*d*) individuals (things). Therefore the word which denotes class can never refer to individuals unless it is restricted by qualification. Here the word "Pashu" belongs to the category of words which denote "class" only. Therefore unless it is qualified by gender and number, in the text *Pashum alaveta* all the animals will have to be destroyed which is impracticable. There is a good deal of difference between the words "Pashum" and "Swargakamo" for the word "Pashum" indicates a certain species or class *viz.* animal whereas the word "Swargakamo" is not limited to the male sex, but refers to any one of

Tenth Aphorism of Jaimini (*a*).

Men alone have right to perform sacrifices because they have capaciiy to possess wealth as is evidenced by the sale and purchase by them of things but women have not the capacity to own wealth as they themselves are treated as chattels (by men.)

---

whatever sex who possesses the desire to attain Heaven. Unless the meaning of "Pashum" is restricted by a gender or number all animals will have to be sacrificed according to the text which seems to be an impractable thing. Therefore according to proper mode of reasoning the word "Pashum" must be restricted to "one animal of the male sex hence the significance of number and gender. But in the case of "Swargakamo" we find no necessity of ascribing any significance to the qualifying affix for it is not impossible to conceive that every one who desires Heaven is entitled to perform sacrifices. The original verse of Patanjali in which this division of words is stated is as follows :—

चतुष्टयी खलु शब्दानाम् प्रवृत्तिः।

जाति गुण: क्रिया द्रव्यचेति ॥

(*a*) This Aphorism of the sage Jaimini again sets forth other objections raised by his opponent with a view to refute the same.

द्रव्यत्वात्तु पुंसां स्याद् द्रव्यसंयुक्तं क्रयविक्रयाभ्याम-
द्रव्यत्वं स्त्रीणां द्रव्यैः समानयोगित्वात् ॥ १० ॥

पुंसां तु स्यादधिकारः। द्रव्यवत्वात्। द्रव्यवन्तौ हि पुमांसौ न स्त्रियः। द्रव्यसंयुक्तं चैतत् कर्म। व्रीहिभिर्यजेत, यवैर्यजेतेत्यवसादि। कथम् अद्रव्यत्वं स्त्रीणाम्। क्रयविक्रयाभ्याम्। क्रयविक्रयसंयुक्ता हि स्त्रियः। पिता विक्रीयन्ते। भर्त्रा क्रीयन्ते। विक्रीतत्वाच्च पितृधनानामनीशिन्यः।

Comment of Sabar Swami.

Males alone are entitled (to perform sacrifices) for males alone and not females possess the requisite means (wealth) necessary for performing sacrifices. Sacrifices can not be performed without wealth..... Women cannot perform sacrifices as they do not possess the capacity of owning property or wealth. Why? Because women are like chattels for they are themselves liable to be bought and sold. They are sold by their fathers; they are bought by their husbands. As they can be sold they can not have any right to their father's estate. As they are purchased they can not have any right over the property of their purchasers (husbands). The Vedas say: let hundred chariots be given to the father or guardian of the bride, (and in the Arsha* form of marriage) let one ox and one cow be given. It is apparent that the gift of the hundred chariots is made with the object of inducing the bride's father to part with his daughter hence the gift can not

---

क्रीतत्वाच्च भर्तृधनानाम्। विक्रयी हि श्रूयते। शतमधिरथं दुहितृमते दद्यात्, आर्षे गोमिथुनमिति। न चैतद् दृष्टार्थं सति आनर्थक्येऽदृष्टार्थं भवितुमर्हति। एवं द्रव्येसमानयोगित्वं स्त्रीणाम् ॥ १० ॥ पूर्व० ॥

* There were eight forms of marriage as we shall see later.

be said to be made for a religious purpose (Purvapaksa) (*a*).

Eleventh Aphorism of Jaimini.

In the same way other evidence is found (to support the opponent's view).

Comment of Sabar Swami.

The text of the Smriti "If any woman being purchased by the husband has sexual intercourse with another":...shows that women could be bought. (Illustration in support of the 10th aphorism).

Twelfth aphorism of Jaimini (*b*).

The act of women which leads to acquisition of wealth conduces to the benefit of her husband (and not to her own).

(*a*) By this process of reasoning the Purvapaksa (exponents of the opposite view) seek to make out that women are on a level with chattels.

(*b*) This aphorism is given in support of the Purvapaksa (opposite view) and meets a doubt raised by way of anticipation—a doubt which the followers of the author (Jaimini) may raise.

तथा चान्यार्थदर्शनम् ॥ ११ ॥

या पत्या क्रीता सत्यन्यैश्चरतीति क्रीततां दर्शयति ॥११॥ उदाहरणम् ॥

तादर्थ्यात् कर्मतादर्थ्यम् ॥ १२ ॥

आह यदनया भक्तीपसर्पणेन वा कर्त्तनेन वा धनमुपार्जितं, तेन यद्यते इति। उच्यते। तदर्थतया न स्वम्। यदा हि साऽन्यस्य स्वभूता, तदा यत् तदीयं तदपि तस्यैव। अपिच, स्वामिनस्तया कर्म कर्त्तव्यम्। न तत्

Comment of Sabar Swami.

If any one objects that a woman may perform sacrifices with wealth which she earns by cooking food for others, or by saving from the food (diet) given, her the answer is that that is not her wealth.

When she herself is another's property the acquisitions belong to that other. Again, whatever she does is intended for the purpose of serving her husband. Leaving the duties (*a*) towards her husband she can not do any thing for herself; whatever is acquired by her by other means belongs to her husband. So we have it in the Smritis "A wife, a son and a slave these three are declared as having no wealth of their own. The wealth which they may earn is the wealth of the man to whom they belong."

Thirteenth aphorism.

The earnestness (of women) for performing sacrifices in order to obtain its fruit is the same as that of men.

परित्यज्य स्वकर्माऽर्हति कर्त्तुम्। श्रुतयाऽन्येन प्रकारिणीपाऽर्ज्यते, तत् पत्युरेव स्वं भवितुमर्हतीति। एवञ्च स्मरति—

भार्य्या दासस्य पुत्रश्च निर्धना: सर्व एव ते।

यत्ते समधिगच्छन्ति, यस्य ते तस्य तद्धनमिति ॥ १२ ॥ आ० नि०।

(*a*) The suggestion probably is that the whole of her time must bo devoted towards serving her husband. She can not call any time her own.

फलोत्साहाविशेषात्तु ॥ १३ ॥

तुशब्दः पक्षं व्यावर्त्तयति। न चेतदस्ति। निर्धना स्त्रीति। द्रव्यवती हि सा। फलोत्साहाविशेषात् स्मृतिप्रामाण्याद् अनया तया भवितव्यं,

Comment of Sabar.

The word तु (tu) in Sanskrit indicates that the objection of the exponents of the Purvapaksa is finished and the answer of Uttarpaksa has commenced. It is not a fact that women have no capacity to possess wealth. They have the capacity of owning wealth. They have the desire and earnestness for obtaining the fruit (attaining the merit) of performing sacrifices (in common with men). According to the Smritis, although (it is conceded) that they (women) have the desire for the fruit of performing sacrifices still whatever they earn belong to those (men) to whom they (women) belong. But according to the Sruti whoever has the desire for obtaining the reward of performing sacrifices can perform them. If you want to make women subordinate to or dependent on others and incapable of possessing wealth according to the text of the Smritis, then there is a conflict between the Sruti and the Smriti. This is not reasonable or just (*a*.

फलार्थिन्यापि। श्रुतिविशेषात् फलार्थिन्या यष्टव्यम्। यदि स्मृतिमनुरुध्यमाना परवशा निर्धना च स्यात्, यजेतेत्युक्ते सति न यजेत। तच्च स्मृत्या श्रुतिर्बाध्येत। न चैतन्याय्यम्। तस्मात् फलार्थिनी सती स्मृतिमप्रमाणीकृत्य द्रव्यं परिगृह्णीयाद् यजेत चेति ॥ १३ ॥ उत्तरम् ॥

(*a*) There is a well known rule of interpretation in Hindu law that in a conflict between the Sruti (revelation) and the Smriti (recorded recollection) the former (Sruti) must prevail.

Therefore women having the desire for the fruits of the act of performing sacrifices must on the strength of the Sruti, and in entire disregard of the Smritis be held capable of possessing wealth and performing sacrifices (Uttarpaksa).

Fourteenth Aphorism.

They (women) are also possessed of wealth.

Comment of Sabar.

But she (woman) has the capacity of owning wealth or property. At the time of marriage when the bride is presented to the bridegroom the father of the bride is required to utter the following :—She (the bride) should not be prevented (by the bridegroom) from acquiring Dharma, performing religious acts, from acquiring wealth and from fulfilling her legal desires. Therefore although the Smritis speak of the incapacity of the wife to possess wealth that is very unjust, because that is opposed to the Sruti. The theory of their dependence can only be

---

अर्थेन च समवेतत्वात् ॥ १४ ॥

अर्थेन चास्याः समवेतत्वं भवति। एवं दानकाले संवादः क्रियते—धर्मे च अर्थे च कामे च नाऽतिचरितव्येति। यत्तूच्यते। भार्याऽदयो निर्धना इति। अर्थमाश्रमपि निर्धनत्वमन्याय्यमेव। श्रुतिविरोधात्। तस्माद् स्वातन्त्र्यमनेन प्रकारिणोच्यते, व्यवहारप्रसिद्ध्यर्थम् ॥ १४ ॥ युक्तिः ॥

supported to the extent necessary to restrict them in their dealings with society (*a*).

Fifteenth Aphorism.

The purchase (of girls) is a religious ceremony.

Comment of Sabar.

As to what was said of the purchase of the girl, it is not a purchase ; it (gift) is merely a religious ceremony made to fulfil the law. For in the case of purchase there is variation of price. The gift of hundred chariots by the father does not vary. It is constant in all cases. Hundred chariots are given in all cases whether the girl is beautiful or not beautiful (ugly) (*a*). The texts of

(*a*) Jaimini does not restrict the liberty of women. The restriction is Sabar's who lived and flourished after the period of the Smritis and was to some extent influenced by the teaching of the Smritis. Besides the restriction suggested would seem to be a restriction to which every man is also subject as member of society.

क्रयस्य धर्म्ममात्रत्वम् ॥ १५ ॥

यत्तु क्रयः श्रूयते । धर्म्ममात्रं तु तत् । नासौ क्रय इति । क्रयो हि उच्चनीचपण्यपणी भवति । नियतं त्विदं दानम् । शतमश्विरथं शोभनाशोभनाच्च कन्यां प्रति । स्मार्त्तं च श्रुतिविरुद्धं विक्रयं नानुभन्यन्ते । तस्माद् अविक्रयोऽयमिति ॥ १५ ॥ आ० नि० ॥

(*a*) The suggestion is that is that if the transaction were a sale, in the case of handsome of beautiful girls the price may be less than in the case of girls that are not handsome. But as the gift is constant in all cases viz 100 chariots it is paid not as price but in pursuance of a custom.

the Smriti about the transaction being a sale are opposed to the Srutis and should be ignored or disregarded. Therefore the conclusion is that girls are not sold.

Sixteenth Aphorism.

Certain Vedic text shows that women have the capacity of owning and possessing wealth.

Comment of Sabar.

(The Vedic text) is as follows :—

The wife is entitled to the wealth given at the time of marriage (Yautuka) and whatever is acquired by the husband is permitted to belong to her. Women are made to perform sacrifices on account of their wealth. Wealth alone is their strength. By virtue of wealth which they possess they are entitled to govern another's (their husband's) household. Thus ends the Adhikarana which deal with the equal rights of men and women to perform sacrifices.

(*a*) It is to be noticed here that Jaimini makes no distinction between wealth acquired by inheritance and wealth acquired in other ways.

स्ववत्तामपि दर्शयति ॥ १६ ॥

पत्नी वै पारिणय्यस्य ईष्टे पत्यैव शतमनुसतं क्रियते। तया भसदा पत्नीः संयाजयन्ति। भसद्दीया हि पत्नयः। भसदा वा एताः परस्ताद्गाणा-मेश्वर्यमवरुन्धते इति ॥ १६ ॥ युक्तिः ॥ यागादिषु स्त्रीपुंसयोरुभयोरधि-कारोधिकरणम् ॥ ३ ॥

The next topic or (Adhikarana) deals with the rights of husband and wife to perform sacrifices jointly. We now proceed to translate this Adhikarana also as we think that it contains much useful information regarding the Status of women in early Hindu Law. But before we do so it is necessary to state that in this Adhikarana which we are going presently to translate, Jaimini has departed from the usual method of discussion followed by him in his Mimansa Sutras. We have seen already that usually Jaimini states the view opposed to his own (Purvapaksa) in the form of an aphorism then he states the reasons supporting the opposite view and lastly he stated his own conclusion (Sidhwanta) But in this topic about the rights of men and women to perform sacrifices jointly he reverses the usual mode and states his own conclusion first.

Seventeenth aphorism of Jaimini.

By virtue of (Vedic) texts, the husband and wife while both are capable of possessing wealth should perform sacrifices jointly.

स्वतोस्तु वचनादैककर्म्यं स्यात् ॥ १७ ॥

स्वन्तावुभावपि दम्पती इत्येवं तावत् स्थितम्। तत्र सन्देहः। किं पृथक् पत्नी यजेत, पृथग् यजमानः? उत सम्भूय यजेयातामिति। किं प्राप्तम्। पृथक्त्वेन। कुतः। एकवचनस्य विवक्षितत्वात्। उपादेयत्वेन कर्त्ता यजेतेति श्रूयते। तस्मादेकवचनं विवक्ष्यते। यथा न द्वौ पुरुषौ सम्भूय

Comment of Sabar.

It has been established that both husband and wife have the capacity of owning or holding wealth (property). Now a doubt is raised whether they are to perform sacrifices jointly or separately. Let us see which of these alternatives is prima-facie reasonable. The former (i.e. separately) seems reasonable. Why? Because the singular number is significant and

---

यजेयातां, तथाऽत्रापि द्रष्टव्यम्॥ एवं प्राप्ते ब्रूमः। स्ववतोस्तु वचनादेककर्म स्यात्। वचनात्त्रयोः सङ्क्रिया। एवं हि स्मरन्ति, धर्मे चार्थे च कामे च नातिचरितव्येति। तथा सहधर्मश्चरितव्यः सहापत्यमुत्पादयितव्यमिति। उच्यते। स्मृतिवचनेन न श्रुतिवचनं युक्तं बाधितुम्। नेति ब्रूमः इह किञ्चित् कर्म स्त्रीपुंसकर्तृकमेव। यथा दर्शपूर्णमासौ ज्योतिष्टोम इति। यत्र पत्न्यवेक्षितेन यजमानावेक्षितेन चाज्येन होमं उच्यते, तत्रान्यतराऽभावे वैगुण्यम्।

ननु पुंसो यजमानस्य यजमानावेक्षितमाज्यं, स्त्रिया यजमानायाः पत्न्यवेक्षितं भविष्यतीति। नेत्याह। न अयमीक्षितसंस्कारः। ईक्षितः संस्कारो यदि, तदैवं स्यात्। आज्यसंस्कारश्चायम्। गुणभूतौ ईक्षितारौ। तत्रान्यतरापाये नियतं वैगुण्यम्। सर्वाङ्गापसंहारी च प्रयोगवचनः। तत्रैतत् स्यात्। स्त्री यजमाना पुमांसं परिक्रीयाज्यस्येक्षितारं, पुमांश्च स्त्रियञ्चवेक्षितारौमिति। तन्न। पत्नीति हि यज्ञस्य स्वामिनीत्युच्यते, न क्रीता। पत्नीति सम्बन्धिशब्दोऽयम्। यजमान इति च स्वामी, न क्रीतः। तस्मात् स्त्रीपुंसयोरेकमेवज्ञातीयकं कर्मेति॥ तत्र श्रुतिसामर्थ्याद् यः कश्चिद् यया कयाचित् सह सम्भूय यजेतेति प्राप्ते, इदमुच्यते—यस्त्वया कश्चिद् धर्मः कयाचित् सह कर्त्तव्यः, सोऽनया सहेति। तेन न श्रुतिविरोधः स्मृतेरिति गम्यते। अथ यदुक्तं, कैवल्यं पुंसोऽधिकारः, कैवल्यायाः स्त्रियाः। यजेतेत्येकवचने विवक्षिते, कथं षोड़शभिर्ऋत्विग्भिः सह यागी भवतीति।

emphasis is laid on the act of performing sacrifice. Just as two men can not jointly perform a sacrifice similarly a man and a woman can not jointly perform a sacrifice. This view being primafacie reasonable, a refutation becomes necessary. The refutation of this view is embodied in the 17th Aphorism. It is distinctly mentioned in the Vedas that they (husband and wife) must perform sacrifices together. According to the Smritis the wife is not to be prevented by her husband from performing religious acts, from acquiring wealth and from fulfilling her legal desires. She must perform religious acts jointly with her husband. Both must join in the duty of raising

---

एवमुच्यते, प्रतिकारकं क्रियाभेदः। यजमानानेव पदार्थान् परिक्रयादीन् कुर्वन्, यजते इत्युच्यते यजमानः। आध्वर्यवानेव कुर्वन् अध्वर्युर्यजतीत्येवमुच्यते। यथा सम्भरणमेव कुर्वती स्थाली पङ्क्तिं करोतीत्युच्यते। यस्य च कारकस्य य आत्मीयो व्यापारः, स एकवचने विवक्षिते एकेन कर्त्तव्यो भवतीति। एवं चेद् यावान् व्यापारो यजमानस्य स तावान्, न सभूय कर्त्तव्यः। एकैनैको याजमानोऽपरेणापरः। दादश वा अत एकेन षट्पञ्चाशत्, अपरेणापि षट्पञ्चाशदिति। इह तु पत्नीव्यापारोऽन्य एव। न तव पत्नी प्रवर्त्तमाना यजमानस्यैकत्वं विहन्ति। यद्याऽध्वर्युराध्वर्यवेषु प्रवर्त्तमानीऽवश्यं च सह पत्न्या यष्टव्यम्। मध्यकं ह्येतद् दम्पत्योर्धनम्। तव यागोऽवश्यं सह पत्न्या कर्त्तव्यः। इतरथाऽन्यतरानिच्छायां त्याग एव न संवर्त्तेत। तथा हि द्वितीयया पत्न्या विना त्यागो नैवावकल्पते। यस्य द्वितीया पत्नास्ति, तव क्रत्वर्थान् एका करिष्यति। कर्त्तृसंस्कारार्थेषु नैव दोषः। सम्भवन्ति हि तानि सर्वत्रेति॥ १७॥ सि०॥

issues. But then it is said that the texts of Smriti can not override the texts of Sruti which indicate that the doer of the act of sacrifice is a single person as the word "Swargakamo" ends with the inflexion indicative of singular number. This can not be said for there are certain acts which must be done by both husband and wife, for instance the sacrifices of *Darsa Paurnamasi and Jyotistoma.* In these sacrifices (it is essential that) both the husband and wife must (view) the *Ajya* (clarified butter) which is to be poured into the sacrificial fire. If this condition of the clarified butter being seen by both husband and wife is not fulfilled, then the sacrifice must be regarded as improperly done. Then again it may be said that the text refers to different cases e.g. when the husband is the performer of the sacrifice the wife is required to see the clarified butter and *vice versa*, when the wife is the performer of sacrifice (yajamana) then the husband is to see the clarified butter. But you can not say so. It (condition of being seen) is not a qualification of person seeing. (It is of the essence of the sacrifice) that the *Ajya* which is to be used in the sacrifice must have been seen by both husband and wife conjointly. Therefore if only one of them sees the *Ajya*

the sacrifice is improperly done, Every one of the expressions used in Vedic texts is obligatory, Then it may be said that where a woman is the performer of sacrifice, she may ask a man to see the clarified butter by paying him a price for his labour and trouble, and similarly *vice versa*, where a man is the performer of sacrifices he may ask a woman to see the clarified butter by paying her something for her trouble. But even this can not be. *Patni*, the legally married wife is the principal female factor in this sacrifice and not a woman who has been bought. The word *(patni)* is a correlative word ; (it means a woman who has a right to perform sacrifices jointly with her husband). So also the Yajmana must be a person who has a right to perform a sacrifice. He can not be a person bought by the wife for the purpose of joining in the sacrifice. He must be the husband of the woman. The command of the Sruti is that the sacrifice is to be performed by a man in company with a woman. The Smriti does not contradict the Sruti but says that that woman must be no other person than the wife. Although the Sruti (Veda) does not use the word *Patni* i.e, wife but uses the word *Stri* (woman) generally, still (the word Stri) must be taken to mean the wife as the

Smriti explains. Therefore what was said before that a man or a woman has each saparately a right to perform sacrifices, on account of the word *Yajeta* being indicative of the singular number must be abandoned as untenable. I should ask a question, to those who hold the opposite view. If in your opinion the word *Yajeta* indicates that the performer of the act of sacrifice must be a single person, how is it that the sacrifice is performed by sixten *Rittiks* (priests). It is to be said that there would be as many different acts as there are persons to perform those acts. When we say that a *Yajamana* is performing a sacrifice we mean he is doing the act peculiar to the performer (*Yajmana*), which consists in the appointment of priests to perform the sacrifice. In the same manner when we say that *Adhyarju* (a priest who is appointed to perform the acts specifically indicated in the Yajur Veda) is performing a sacrifice, we mean he is doing his duty as such priest. So when we say that the vessel is cooking food we mean that it contains the food which is being cooked (*a*). Where the singular

(*a*) It is doing its own peculiar act of holding the food which is being cooked.

According to the sanskrit grammarians the same verbs bear different meaning when applied to different subjects or things.

number is specified there the doer of the act must be a single person. He must do alone the duties peculiar to himself. He cannot perform part of his duties and leave the remaining part to be done by another. For example one of the duties of the *Yajaman* is that he must make a gift of 112 cows to the priest as his fee or remuneration. It will not do for him to give away 100 cows leaving another to make a gift of the remaining twelve. Neither will it do for him to give away 56 leaving another to make a gift of the remaining fifty six. In the present case the duties of wife are different from those of the husband. Therefore if she perform her own special part in the sacrifice, that cannot affect the single character of the act of the husband *viz.* the performance of the sacrifice.

Therefore notwithstanding the joining by the wife in the act of sacrifice, the *Yajaman* or performer of sacrifice is a single person. In the same way the fact of the *Adhyarju* performing the duties of priest does not destroy the single character of the act of the *Yajaman*. Therefore the sacrifice must be done in company with the wife. Because the wealth belongs to both husband and wife jointly. The wife is entitled to wealth earned by the husband and *vice versa*. Hence sacrifice must be performed

by both jointly because if one of them is unwilling to perform it, the gift cannot be valid. Therefore gift of money even earned by the husband is invalid if the wife's consent is not obtained. In case of there being two wives, the gift cannot be valid unless the consent of the second wife is also obtained.

Therefore where some acts are required to be done by the wife as her peculiar duty, those acts must be divided between the two wives. Therefore if several wives join in the sacrifice, the single character of the act of the performer of sacrifice (husband) is not destroyed. (Conclusion of the author.)

Eighteenth aphorism.

There are certain Smriti texts indicative or suggestive of the opinion just expressed.

Comment of Sabar.

There are Smriti texts in support of the view just expressed viz. By a thread the wife should be united with the husband. In one sacrifice both husband and wife should be

---

लिङ्गदर्शनाच्च ॥ १८ ॥

लिङ्गं खल्वपि दृश्यते। यौक्षेण पत्नीं सन्नह्यति मेखलया यजमानं मिथुनत्वायेति। यदि स्त्रीपुंसावेकस्य, योक्त्रस्य मेखलायाश्च विभागो वाक्याद् गम्यते। मिथुनसंसवय। तदेतत् स्त्रीपुंससाधनके कर्मण्युपपद्यते, नान्यत्र॥ १८॥ युक्तिः॥

united by a thread. The wife is to be tied with the *Yoktra* (thread of kusa grass used for tying animals), the husband or the *Yajamana* is to be tied with the *Mekhala* (thread tied round the waist of women) and both are to be united. Although the husband and wife are united together yet by the use of the two words *Yoktra* and *Mekhala*, it would seem that there is distinction between the two. But these two expressions are in praise of the act of uniting the couple. For that reason, the Vedic text about joining of husband and wife must refer to acts required to be performed by husband and wife together and not to other acts. (Reasons in support of the above Aphorism.)

Nineteenth aphorism.

The husband has full control over the wife as she is purchased or bought.

Comment of Sabar.

Having so far established his own conclusions, the author now states the opposite

---

क्रीतत्वात्तु भर्त्या स्वामित्वमुच्यते ॥ १९ ॥

स्थितादुत्तरमुच्यते। तुशब्दः पक्षं व्यावर्त्तयति। नैतदस्ति। यदुक्तं स्वत्वतो स्रीति। क्रीता हि सा। इष्टार्थलाभाधिरथगतदानस्य। अतो यदस्याः स्वामित्वमुच्यते, तद् भर्त्या। यथा, पूर्णकोऽस्माकं बलीवर्दानामीष्टे इति। एवं पत्न्यपि पारिशेष्यस्य ईष्टे इति ॥ १९ ॥ पूर्व० ॥

view. The word *Tu* shows the change of *Paksa*. It is not right to say as has been said by the *Uttarpaksa* that woman has the the capacity to own wealth. She can be purchased or bought. As we have seen in popular practice she is purchased for a price of one hundred chariots. Therefore her ownership of wealth is apparent and not real. Her ownership of wealth is on behalf of her husband. Just as our cowherd is the master of our oxen, in the same sense has the wife ownership over her husband's wealth. The wife's proprietary rights extend over wealth acquired during her marriage and not over other wealth. (Purvapaksa).

Twentieth Aphorism.

She is the real owner of wealth as she has the desire for obtaining the fruit of actions.

Comment of Sabar Swami.

That (she is not the real owner but merely apparent owner as stated by the Purvapaksa) is not tenable, because she possesses the desire for obtaining the fruits of actions. The Smriti should be disregarded, for it conflicts with the *Sruti*. The Smriti says

---

फलार्थित्वात्तु स्वामित्वेनाभिसम्बन्धः ॥ २० ॥

नैतदस्ति। कथं सुख्यौ, गौणं स्वामित्वमिति। फलार्थिनी हि सा, स्मृतिर्नादरिष्यते। श्रुत्यनुरोधादस्या स्यात्। स्मृतौ श्रुत्यनुरोधात् ॥२०॥

that she has not the capacity to own wealth. But according to the *Sruti* she has such capacity.

Twenty-first Aphorism.

It (Sruti) shows that she is entitled to earn the fruits (rewards) of her acts.

Comment of Sabar.

Sabar quotes the following Vedic text: "Let the wife unite with the husband in (sharing) fruits of sacrifice. Let both the husband and wife join in taking the burden of performing the sacrifice. Let them knowingly abandon the enemies. Let them commence brilliant and imperishable life in Heaven." This shows the (ultimate) effect of a married life. Therefore it is settled that both are entitled to perform the sacrifice (Uttarpaksa). Thus ends the Adhikarana which deals with right of husband and wife jointly to perform the sacrifice.

Conclusion from Jaimini's Aphorisms.

The foregoing Adhikaranas of Jaimini, read in the light of the comments of Sabar Swami lead to the broad conclusion that men and women have equal rights in respect

---

फलवत्तां च दर्शयति ॥ २१ ॥

सं पत्नी पत्या सृजतेन गच्छतां यज्ञस्य धुर्या युजावमृताम् सचानौ विजहीताम् । अरातौर्दिवि ज्योतिरजरमारभेतामिति दम्पत्योः फलं दर्शयति । तस्मादप्युभौ अधिक्रताविति सिद्धम् ॥ २१ ॥ उत्तरम् ॥ यागे दम्पत्योः सहाधिकाराधिकरणम् ॥ ४ ॥

of the performance of Vedic sacrifices ; or in other words both the sexes are equally competent to perform the sacrifices and that there is no difference in this behalf arising out of the difference in sex between them. It follows further from the said Adhikaranas that in respect of rights to perform one of the Vedic commands, women are on a level with men. But this injunction or command which is the pivot on which the Vedic law hinges, is taken as illustrative. The way in which this Adhikarana is described by Sabar Swami and Madhavacharya shows that the text of the Vedas *Swargakamo yajeta* is a typical command, so that all rights which men have under the Vedic law are in Jamini's view equally shared by women. The word *etcetra* which follow the word *Sacrifices* in Sabar's commentary lends corroboration to this view. Partha Sarathi Misra in his Sastra Dipika takes the same view. It follows from all this that the rights of men and women are equal in respect of all commands contained in the Vedas. In fact Madhavacharya in his Nyamala Vistara contends that according to the first of the two Adhikarans translated above a girl of the twice born classes has as much right to be initiated at the age of eight years as boys of the same age and is entitled equally with

Right of women to *Upanayana* and to study the Vedas.

Equal right of men and women in sacrifices.

them to study the Vedas (*a*). The spiritual significance of the initiation is the right to study the Veda and specially to recite the most sacred of prayers, the Sabitri. According to the sage Jaimini the personal status of women is generally on a par with that of men and their equal rights in this behalf can only be curtailed by express prohibitions which may form exceptions to the general rule.

Legal importance of Jaimini's conclusion.

Jaimini was laying down rules for the interpretation of the Vedic law which deals mostly with religious precepts. What it may be asked, notwithstanding what has been said before, has the discussion about the equal rights of men and women in respect of the performance of Vedic sacrifices to do with the determination of their respective rights relating to juridical matters, which form part of the law contained in the Smritis. The answer is that the law in the Smritis has evolved out of the law contained in the Sruti (Vedas), for the theory is that the Smritis are merely recollection handed down by tradition and must have a corresponding Sruti text to support it. In other words, Hindu law is primarily based on the Vedas

---

(*a*) अस्त्येवाधिकारस्यानुसारिण अष्टवर्षं ब्राह्मणमुपनीयत तमध्यापयीत इत्यत्रापि स्त्रियाऽप्यधिकारः।

Nyamala Vistara, (Bombay Edition) p. 335.