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INTENDED FOR
TAGORE LAW LECTURES, 1930

THE
HISTORY OF HINDU LAW

- I. In the Vedic Age
and
- II. In the Post Vedic Times
down to
- III. The Institutes of Manu.

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April, 1929.

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Lecture. I.

INTRODUCTION.

I. The Subject.

The subject is a very comprehensive one. It comprises the history of Hindu Law from the earliest time down to the time of Manu-Smriti. When we speak of the earliest time of India we go back to the Vedic Age, behind which we cannot expect any history whatsoever. Broadly speaking, therefore, we get two periods : the Vedic Age and the Post-Vedic period. The latter period extending to the time of the Institutes of Manu will present to us no less than five divisions of time of the greatest importance :—1. Brahmanic or Epic Age, 2. Sutra period, 3. Kautilya period, 4. Buddhistic period, and 5. The time of Manu Smriti. The result is that we shall have to collect the history of Hindu Law for no less than six periods. To study the works of the different periods, to collect materials from them for the fulfilment of the desired object by producing a systematic history of Hindu law for such an unusually long period is an arduous task which many a brilliant scholar would hesitate to undertake.

The subject was selected by the University of Calcutta for several years, and during this time many candidates including the present writer produced the synopsis of their proposed lectures before the University authorities, but to no effect. If self-confidence gives way to modest and moderate consideration, the failure may well be accounted for mainly for the following reasons :—1. Want of mastery over the subjects

due to want of proper study of the numerous works of the periods, the result being insufficient and inadequate materials on which the Thesis is based; II. Want of study of the works of distinguished European scholars on the Subject; III. Not paying proper attention to the writings of Hindu writers of celebrity, quite acquainted with the original texts and with the manners, customs and traditions of the people; IV. Want of proper and methodical arrangement of the materials selected and in some cases there being unnecessary and tedious repetitions; and V. The difficulty of properly producing a work of this nature in a foreign language. There may be other reasons best known to the University authorities. The present writer fairly confesses that if his present attempt is a little better than his past ones, it is due to the fact that the subject owing to its difficulty and importance has been allowed to continue for some years, giving ample opportunity to a defeated but persevering and industrious candidate to perceive his defects and to improve his writings in the best way possible. Even those that have not tried yet will have the opportunity of seeing the writings (which are published each year) of past candidates and their defects will be of some use to them.

II. Aryan Hindus.

A pastoral people while wandering about by the necessity of a precarious existence in search of some better land to be secured at any cost happen to be assembled on the banks of the Indus. Attracted by the fertile soil all round they penetrate into the plains of the Punjab and begin to fix permanent habitation there. A life of ease and comfort is all that they desire and no further material prosperity is aimed at. The sacredness of the land at once consecrates them, its flowing streams purge away all impurities, its pleasant seasons cheer them all round the year, its chanting birds teach them

to pour forth the sublime hymns of the Vedas, and the natural sceneries, noble and grand evoke all lofty and pure sentiments. A life of meditation inspires religion, awakens a flow of poetry and creates transcendental philosophy.

Reality is intermixed with mysticism and a revealed religion comes into existence. With the birth of a new spirit various ideas take firm hold of the mind of the people. A belief in God first manifests itself. He is the real entity ; the rest are unreal. The struggle between the flesh and the spirit begins, and ultimately the latter triumphs. Spiritual perfection with salvation in the end becomes the chief aim of life.

The people who thus came to India and settled themselves on the banks of the Indus came in time to be called the Aryan Hindus.

It is the jurisprudence of this people, we are called upon to discuss. It is a people quite unique in the history of the world - a people quite peculiar in every respect, peculiar in habits, manners, customs and traditions. It is not easy to trace the original source from which they took their rise, when and how they became settled in this country, but when we find them actually settled here, we notice the peculiarities—the distinctive marks which characterize and distinguish them from the other settlers of the habitable globe.

In India these Aryan settlers, the Aryan Hindus, were distinguished from others, who were called the Ashuras. They gradually increased in number and at first formed into four divisions according to the different pursuits or avocations of life. No caste system was at first established. In course of time it was really formed and various mixed castes sprang up and they spread all over India from the Indus to the Irawadi and from the Himalayas to the Cape Comoria.

The people now flourished in material prosperity. Agriculture received a new impetus in their hands. Towns, cities and villages began to spring up. A System of Government with the King at its head came into existence from the beginning. There were law courts and administration of justice became necessary. As the people were essentially religious in their nature, religion became to a great extent mixed with law. It is the law of this people from the time of the Vedic Age and the Post Vedic period down to the time of the Institutes of Manu is to be considered in this Thesis prescribed by the University of Calcutta.

III. (a) Different Periods of Hindu Law

&

(b) Sources of Hindu Law.

There are six periods of Hindu Law :—

I. Vedic age, II. In the Post Vedic period we have the Epic or Brahmanic Period, III the Sutra Period, IV the Kautilya Period, V. the Buddhistic Period and VI the Period of the Institutes of Manu.

We now proceed to consider the six periods in details, mentioning at the same time the principal works of Law in each period.

I. Vedic Age.

(a) Vedic works :—

Originally there were three Vedas :—Rig, Syama and Yaju (black and white). Afterwards the Atharva Veda came into force and formed a part of the other three Vedas, making a total of four Vedas. To these may be added the six Vedangas or appendages to the Vedas, and the Upanishadas.

(Trevelyan's Hindu Law—p 10)

Along with these may be mentioned the opinions and observations of Indian and foreign scholars that throw great light on the original works. Rules of law may well be deduced from them.

(b) In an attempt to produce the History of the Hindu Law in the Vedic Age, our attention should be drawn to ascertain the time of the creation of the Vedas, or rather the time when we have first a clear glimpse of their introduction in India.

Here we notice several differences of opinion of several distinguished scholars. 1. Professor Max Muller fixes 1500 B. C. as the period of the final compilation of the Vedas. This is believed to be a correct calculation.

2. Colebrooke was of opinion that the Vedas were finally arranged in the 14th century B. C. Elphinstone is of the same opinion.

3. Professor Whitney and Martin Haug came to the conclusion that the Vedas were finally arranged between 2000 to 1500 B. C.

4. Sir William Jones, in his preface to Manu, says :—
 “The Vedas must have been written about 300 years before these institutes, and 600 years before the Puranas, which, I am fully convinced, were not the production of Vyasa, so that if the son of Parasara committed the traditional Vedas to writing in the Sanskrit of his father’s time, the original of the book must have received its present form about 880 years before Christ’s birth.” Again in the same preface he says the highest age of the Yajur Veda to be 1580 years before the birth of Christ. “The poets of Indian Vedas lived about 3000 or 4000 years before Sayana Acharya who assembled the ancient Commentaries upon the Rig Veda. Sayana Acharya lived about 1400 A. D.”

5. By astronomical calculation the period of the Vedas was fixed far earlier, but that calculation is not accepted by modern scholars.

6. Mr. Tilak's and Jacobi's dates are not accepted and rejected as unscientific.

7. According to Christian idea the origin of the human race dates from 4004 B. C., so that the Vedas must have a subsequent origin and can on no account have an origin of more than 2000 years. The differences are pointed out. At any rate, we may take 1500 B. C. as the period of the compilation of the Vedas.

II. Epic or Brahmanic Period.

We now come to the 2nd period which extends from 1400 to 1000 B. C.

1. The supremacy of the Brahmanic class was completely established in this period. The principal works of this period from which an idea of Hindu Law may be formed are two celebrated Epics—the Ramayana and the Mahabharata. It is believed that they preceded Manusmriti. Another noticeable point of this period is the compilation of the Vedas by Vedavyasa who flourished during the time of the Kuru-Pandava war. This we gather from tradition as well as from the Epic itself.

2. Tradition has it that when the Vedas were compiled the position of the solstitial point was observed and recorded to mark the date. The observation was in the third-century before Christ recorded in a work on Jyotisha and has been found by Bentley and Archdeacon Pratt after careful calculation to have been made in 1181 B. C. Though much has been written against the value of this discovery in Europe, America and India, the genuineness of the astronomical obser-

vation has not been shaken at all and the date of the compilation of the Vedas may well be taken as established

3. The annals of Magadha would show that 35 kings reigned between Kuru Pandava war and the time of Buddha who lived in the sixth Century B. C. Now allowing 20 years on an average to each king, this would place the war and the compilation of the Vedas in the 13th Century B. C.

4. We know from coins that Abhimanyu, the successor of Kanishka reigned in Kashmira towards the end of the 1st Century A. D. The historian of Kashmira informs us that 52 kings reigned for 1266 years from the time of the Great War to the time of Abhimanyu, and this would place the war and the compilation of the Vedas in the 12th Century B. C.

5. Certain facts may be incidentally mentioned. The ascendancy of the Brahmanas gave a new tone to the existing law. The doctrine of spiritual benefit was now fully explained and various modes began to be devised to secure it. The simple Pitriyajna of Rig Veda was now amplified into the various rituals of the Sraddha. Various changes came inevitably to be introduced into the matters of marriage, succession, administration, justice, criminal law, etc. As great kingdom and principalities arose, the powers of the king became enlarged. But the administration of Justice was mainly placed in the hands of the Brahmanas, who by reason of their great piety and learning were thought eminently fit to discharge this sacred task.

III, Sutra Period.

(a) The third period of this treatise the Sutra period is the period which preceded the Buddhistic epoch.

1. It is now believed both by Indian and European scholars that before the present Manu-smriti there

were Sutras, in other words, there was a period called the Sutra period which preceded the Smritis.

2. Professor Max Muller made the first suggestion in his letter to Mr. Morley in 1819 that in general the Sutras are the chief sources of the metrical law codes and that there must have been a Dharma Sutra appertaining to the black Yajur-Veda from which the Dharmasutras were afterwards deduced.

3. Professors Weber and Stenzler entertained the same views quite independently.

4. Dr. Johaentgen holds that there were originally Sutras which bore the name of Manava and that the said name has not been derived from Manu. The Sutras preceded the Smritis, i. e., the latter have been deduced from the former.

5. Professor E. W. Hopkins maintains that the present Manusmriti is a collection of moral precepts, floating aphorisms, etc. probably current as "Manu's laws" together with laws of Manava Sect or School.

6. Dr. Burnell in the introduction to his translation of the Manavadharma Shastra in 1884 has accepted the theories.

7. Dr. Jolly in his Tagore Lectures delivered in 1814 wavers from the generally accepted theory that Manava Dharma Sutra was the basis of the Manusmriti and maintains that the principal Maitrayaniya Manava works do not shew any resemblance, in point of style or contents with the Code of Manu. He notices, however, one fact that the Visnu-Smriti is a recast of the ancient Dharma Sutra and as there is much resemblance between it and the Manu-

Smriti, it is far from improbable that the latter is connected with the Vedic School studying the Yajur-Veda.

8. Professor L. Von Schroeder maintains the same theory.

9. Professor George Buhler completely supports the view of Professor Max Muller and shews largely from internal evidence that the Manava Dharma Shastra is based on Manava-Dharma Sutra.

10. It was in this period that the Upanishadas were composed about 1000 B. C. Janaka the king of Videhas gave a start to the Upanishadas. It was about this period, according to Dr. Buhler that the Sutras of Gautama, Baudhayana, and Apastambha were composed.

The Vedas, Sutras and Smritis are so inseparably connected with each other that the knowledge of the one can be considerably derived from that of the other. There is one uniform stream that flows from the past through the present to the distant future. There is no beginning and no end. Inspired with this belief the orthodox Hindu cares very little for chronology. "From the present," says he, "I can look back and look forward and can tell you all about the past and the future." We owe entirely our knowledge of chronology to European scholars. They may not be precise, they may indulge in conjectures, and may in some cases really prove nothing, but they have pointed out the importance of it, and have attracted and invited many a Hindu writer to pay attention to the same direction.

(b) The works of this period are fully mentioned by Mr. Sarvadhikari in his Tagore Law Lectures (1880) 2nd Edition at p 160. They are also mentioned in Dr. Jolly's work.

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|----------------|--------------|
| 1. Gautama. | 5. Harita. |
| 2. Baudhayana. | 6. Yama. |
| 3. Apastambha. | 7. Sankha. |
| 4. Vasishtha. | 8. Parasara. |

IV. Kautilya Period.

1. The importance of this period in the History of Hindu Law has been variously estimated. The author of Arthashastra appears in Sanskrit literature under various names, such as Kautilya, Chanakya and Vishnu-Gupta.

He is better known by his familiar name Chanakya (vide Mudra-Rakshasa). He flourished in the time of Chandra Gupta, in the very time when Megasthenes visited India in the fourth century before Christ. He was thus the contemporary of Aristotle.

2. Dr. Jolly observes: "A flood of light has been thrown on the political condition of India in the very time when Megasthenes visited it by the recent discovery of the Kautilya Arthashastra."

3. A considerable amount of information is supplied by the Buddhist and Jaina Sutras, the Jatackas, Milanda, Panha and other religious works of the two sects.

4. It is sometimes doubted as to whether the Arthashastra was the work of Chanakya himself or a School founded by him.

5. Professor Hillebrandt holds the latter view, while Professor Jacobi by weighty arguments supports the former view.

6. The Arthashastra, or Kautilya-Shastra has been translated by Mr. R. Shamasastri, who "deserves the highest praise for his disinterested and most valuable labours."

We derive much useful information as to Hindu Law from his work. The researches of German scholars, especially those of A. Hillebrandt and Professor Dr. Jolly have clearly established the importance of Arthashastra as an ancient work furnishing ample materials both to the historian and the lawyer. Well has Mr. Smith said :—“The treatise will continue to give occupation to scholars for a long time to come from many points of view.”

V. Buddhistic Period.

1. The Jataka or birth stories and other books of the Buddhistic period throw considerable light on the history of the laws of the Hindus in the fifth and sixth centuries B. C. Much useful information is derived from those works as to the political condition of India of that period, though the works come into existence afterwards.

2. The earliest Hindu laws were considerably modified by the Buddhistic influence. Goutama Buddha, the founder of Buddhism, was a contemporary of Ajatasatru, King of Magadh, who ascended the throne about 502 or 500 B. C. Buddha died about the year 487 B. C.

3. Another of Buddha's contemporary was Vardhamana Mahavira, who was the founder of Jainism. He was a near relative of the mother of Ajatasatru. He predeceased Buddha towards the close of the reign of Bimbasera, the father of Ajatasatru. Both Buddhism and Jainism played an important part in the matter of Hindu Law. The revolt brought about by them was followed by Gupta imperialism and later Brahmanic revival embodied in Manavadharma Shastra.

(The Early History of India by Vincent A. Smith 3rd Edition, p 152.)

4. Mr. Sarvadhikari in his Tagore Law Lectures—1880—2nd Edition at pages 120-123 notices the changes brought about in this period. Equality was preached. Social progress destroyed the priestly ascendancy. “Buddha opened wide his arms and proclaimed equality. Individual happiness, he said, was not the true object of life ; to improve society, and to increase the sum total of human happiness should be the aim of every man. You are all equals, but you owe duties to each other. Thus taught Buddha, and millions obeyed his call. The people came to know their rights, and the Brahmanic influence was greatly weakened.” (p. 121).

But the rules of inheritance remained the same with the Hindus and the Buddhists.

5. Dr. Jolly in his work on Hindu Law and Custom at p. 89-95 enumerates the Buddhistic Law books :—

(a) Buddhist law books recording the legal usages of Non-Aryan peoples are not mentioned.

(b) “Buddhist peoples out side India,—particularly in Burma—in consequence of the installation of Indian law among them—remarkable traces of Indian legal views and expressions are found which are interesting as the reflex of same and supplements there to.”

(c) Indian law outside India—in Burma, Siam, Java and Bali but not in Ceylon.

(d) Work of European scholars in the field of Burmese law founded on Indian law.

(1) Damsat.

(2) Damathat or the laws of Menoo.

(3) Manusara composed in Pali and about its relation with Manu.

(4) Buddhist law was officialy prescribed for the Buddhists in Burma by an act of 1875.

- (5) Notes on Buddhist Law by J. Jardine in 1882.
- (6) Law books of the Talaings.
- (7) Dhammavilas composed in 1174.
- (8) Dhammasattham by King Wagaru.

6. To the above mentioned books may be added the following :—

(1) the Mantras, (2) the Brahmans, (3) the Epics, (4) the Dharmasutras, (5) the Arthashastra, (6) the Jatakas, and the other Buddhistic works that had preceded the Institutes of Manu.

7. The works mentioned in the aforesaid para 5 and 6 furnish the different sources of ancient Hindu Law in the case of the Buddhist.

VI. The Period of the Institutes of Manu.

1. The age of Manu-Smriti is now to be ascertained.

Sir William Jones has fixed the age of Bhrigu at 1280 B.C.

2. Cherry and Deslongchanpes fix the date of Manu-Smriti in the 13th century before Christ. The latter professes to have come to the conclusion by a close examination of the Code itself.

3. Schlegel fixes the date about a thousand years before Christ. He is decidedly of opinion that the laws of Manu were promulgated in India as early as the seventh century before Alexander the Great. He places the date of the Ramayana about the same time.

4. Elphinstone places the date of Manu Smriti half way between Alexander in the fourth century and the Vedas in the fourteenth century before Christ. He is of opinion that a considerable period had elapsed between the promulgation of

Manu's law and the invasion of India by Alexander. The inference is deduced by him by comparing the differences between the laws of manners as depicted in Manu and those of the modern time.

5. Professor Wilson thinks that Ramayana is more ancient than the Institutes of Manu. He fixes the date of the latter about the end of the third or the commencement of the second century before Christ.

6. Dr. Buhler places the date of Manu-Smriti not earlier than the first century before Christ.

We thus see that from the time of Rig-Veda to the time of Manu Smriti, it covers a period of 15 centuries, if not more, for which a History of Hindu Law is to be composed. It will be a matter of interesting study, if the attempt is even partially successful.

VII. Commentaries.

1. It may be said that all Sanskrit works of importance are followed by Commentaries. They do not pretend to create any law, but they explain and expound the laws that were or are in existence. They had at one time the same effect as the decisions of our Courts. In reading and interpreting the laws of the six period mentioned above, these Commentaries by distinguished scholars cannot be ignored. In fact their usefulness cannot be denied. Different interpretations of the laws by different commentators have given rise to different schools of law among the Hindus in different parts of India. The Commentaries should therefore be taken as essential parts of Hindu Law and should therefore be classed along with the laws themselves.

IV. Customary Law. (Synopsis. Briefly dealt with.)

Customary Law has played an important part in India in all ages. It is usual and natural that people should seek their

own convenience, consult the tendency of their mind, act according to dire necessity and thus choose for themselves any particular mode of action. If it is approved and sanctioned by their own society without any interference on the part of the administrators of justice, and if it continues unopposed for a great length of time, it becomes a Customary law, which cannot but be given effect to. All variations, anomalies, etc. are entirely supported by such law. Examples may be cited from the laws of the six periods.

1. Dr. Jolly in his work on Hindu Law and Custom at pages 95-101 has fully dealt with the Customary Law of India and European treatment of it.

2. Primogeniture and any variation from the general and actual Law are entirely dependent on Customary Law.

3. Customary law should not be opposed to morality or should not be illegal.

4. Customary Law plays an important part in marriages, succession, adoption, etc.

5. Customary Law has been in force from the Vedic period even down to the present period.

6. Custom of conquered country should be upheld.

Manu VII, 203.

7. Custom—source of the law.

Manu II, 6, 12, 18 ; VIII—41—42, 46.

8. Customs and usages. (Dr. Jolly—p 320—341)

The following points are noted :—

(a) The Brahman student and the householder.

(b) The four stages of life.

(c) Detailed rules about the conduct of Brahmocharis.

(d) Daily life of the Brahmocharin.

(e) Daily duties of the householder.

- (f) Various kinds of forest dwellers. Rules common to all.
- (g) The forty sacraments of life.
- (h) Extensive literature on Sraddhas.
- (i) The motive of the Sraddha.
- (j) Evolution of Sraddhas from older institutions.

V. Caste System. (Synopsis. Briefly dealt with).

1. The caste system is a special peculiarity among the Hindus of India. Its baneful effect is admitted on all hands among the educated Hindus who do not belong to the orthodox class of Brahmins. For the purpose of this treatise it is important to consider the subject in an historical point of view.

2. Was caste system known in the Vedic Age ?

(a) Mr. Sarvadhikari in his *Togore Law Lectures*, 1880—2nd edition p 112 bottom distinctly shows that caste system was unknown in Vedic age.

(b) Professor Max Muller is of opinion that there were no four castes or any castes in the Vedic period. There were no doubt priests, warriors, farmers, craftsmen and traders, and the menial class, but there was no sharply defined demarcation, such as was afterwards laid. He quotes the instances of Kakshiban and Kabash. The former was a Kshatriya, i.e. belonging to the military class, and he yet composed some Suktas in the 9th Mundle of the Rig Veda. He is further reported to have accepted from King Swanay presents which were the legitimate claim of a Brahman or a priest. Again he cites the case of Kabash, who, he says, was a Sudra and yet at the same time he composed several Mantras in the 10th Mundle of the Rig Veda. He has quoted texts from Aitereya Brahmana and Kausitaki Brahman to prove that Kabash was a Sudra. Now, if a Kshatriya or a Sudra could with perfect impunity do what was within the peculiar province of a Brahman, there would

remain no such difference as a strict caste system would otherwise demand. The Professor accordingly observes :—"It can hardly be belived that the different castes and their respective duties should have been established as strictly as in later times."

3. The matter is fully dealt with in Macdonell's Vedic Digest Vol. II, p 247-270.

4. The opinions on the point are divided but the present writer by reviewing the authorities is of opinion that caste system as understood now was not in existence in the Vedic Age.

5. Mention is made of the four classes of men and they might be called under the names now used but there was no such rigour, strict difference, or disqualification as came into existence in later times in the Brahmanic, Sutra or Smriti period.

6. The doctrine of spiritual benefit, the performance of Sraddhas, and other religious matters introduced through Brahmanic influence required the help of Brahman priests, and other castes could not take part in them. Thus grew up the disqualifications of the other castes. The superiority of the Brahmans and the inferiority of the other castes was a natural result of this.

7. The treatment accorded to the Sudras was very harsh and severe, but it was the unpleasant result of the caste system.

8. The appearance of Buddha, the founder of Buddhism, relaxed the rigour of the caste system and considerably diminished the influence of the Brahmans. The Vedic Age in a manner was restored and the lower castes were relieved to a considerable extent.

9. With the decline of Buddhism in India the Brahmanic influence reappeared in all its former force, and the caste system began to operate with renewed vigour. This appears clearly from the texts of the Institutes of Manu.

10. The original four castes were now transformed into various mixed castes by intermarriages. A man of a superior caste could marry a woman of a lower caste. In Manu we meet with various classes of mixed castes.

11. At the present moment intermarriages are socially prohibited, though the Legislature has interfered in the matter. A reaction is going on and there are reformers who want to abolish the caste system altogether just as it was in the Vedic Age and in the Buddhistic period. Attempts are also being made to introduce into the pale of Hindu Society people of other castes and religion, who are not Hindus at all or who being once Hindus have become converts to other religions. All these efforts point out the baneful effect of the introduction of caste system among the Hindus, diminishing their number by conversion into other religions and owing to the distressed condition of the people of the inferior castes.

VI. Slavery. (Synopsis. Briefly noticed).

Slavery was in force in all the six periods dealt with in this treatise. Slaves were the property of their master. Their wives and children were not in a better position. They could be sold and even killed if occasion so required. The particulars of the different periods are mentioned below :—

I. VEDIC AGE.

1. The particulars of slavery are noticed in Macdonell's Vedic Index.

Vol I. pages 357, 359 and 366.

Vol II. pages 267, 388-392.

2. Sir Thomas Strange in his work on Hindu Law devotes a full chapter being Chapter V pages 107-119 on the subject of slavery.

3. Dasa - Dasya—Meaning—

(a) In the Rig Veda it means enemy of a demoniac character. It also means a human foe of the Aryans. (Vol 1 p. 356).

(b) Since the Dasas were in many cases reduced to slavery, the word Dasa has the sense of 'slave' in several passages of the Rig Veda. (VII, 86, 7; VIII, 56, 3; X, 62, 10)

Digest Vol. 1 p 357.

Dasi, the feminine, has always this sense from the Atharva Veda onwards.

Aboriginal women were, no doubt, the usual slaves, for on their husbands being slain in battle they would naturally have been taken as servants or concubines.

'Dasya' occurs once in the Brihadaranyaka Upanishada (IV, 2, 30) in the sense of slavery.

(c) A Sudra was sometimes called a slave. It was unknown in the Rig Veda where the word Dasa occurs. A person belonging to the aboriginal tribe, when conquered, became the slave of the conqueror. In the Purusa Sukta such a conquered person was called a Sudra and a Slave. The Sudra was continuously opposed to the Aryan.

(d) A slave being himself the property of his master could not acquire any for himself. It would all go to his master. *A Slave was debarred from the personal rights and privileges.*

II. BRAHMANIC AGE.

1. The condition of a slave became gradually worse. His position was that of a Sudra. "The Mohabharata says

out and out that a Sudra has no property." There is greater reason that a slave should have no property.

Digest Vol II p 389.

III. OTHER PERIODS.

1. The condition of a slave remained the same as before.

IV. MANUSMRITI PERIOD.

1. There were seven kinds of slaves.

Manu VIII, 415.

2. But there were 15 classes of slaves according to Narada.

3. Slavery is illegal in the inverse order of the tribes. Exceptions.

Colebrooke's Digest Vol. II, 370.

4. Slavery of a Brahmana is illegal.
5. Disqualifications of a slave :—
 - (1) To earn property.
 - (2) To be a witness—Exception.
 - (3) To borrow money.
6. Servitude of a slave is hereditary.
7. Kind treatment of slaves in India, especially in the case of female slaves.

Manu VIII. 363.

8. Comparison of the condition of the slaves of India with that of the slaves at Rome.

9. Causes of slavery :—

Capture, by birth, children of slave girls begotten by males of higher castes.

VII. Spiritual Benefit.

The doctrine of spiritual benefit underlies Hindu jurisprudence to such an extent that it can safely be asserted that religion forms its essential part. It was this inseparable connection between law and religion that deterred the Sovereign from intermeddling in the matter. Like religion, law was the special study of the Brahmanas, who as Rishis revealed the laws to the people, or as learned jurists expounded them, or as priests exhorted the people to observe them in actual practice. Hindu law in no period has been able to shake off religion and Brahmanic influence. The sovereign for the time being either bowed down to both or did not mind any interference or considered all interference a frail and futile attempt which would be regarded by the people as a sacrilege.

The doctrine of spiritual benefit is condemned by some as an outcome of the selfishness of the priests, who are supposed to have invented it as a means of subsistence and self-aggrandisement. Unless the very Hindu religion can be condemned, the priests cannot by any means be condemned. The priests are as old as the Vedas. They simply carry out the injunctions of religion. They are themselves *bonafide* believers in religion, and in their own case they do exactly what they are asked to do for others. Their very mode of life is opposed to material gain and prosperity. Their gain by priestcraft is so very trifling, and the priests generally are so very simple and good-natured that one that knows them thoroughly and watches their movements cannot justly condemn them. They live from hand to mouth and are quite contented if they are not starved. To compare them with the priests of the western world and to involve them in the general condemnation is not at all justifiable.

No, the doctrine of spiritual benefit was not invented for selfish purpose or to commit a fraud on the people. It

may be condemned as a superstitious belief but then it is a *belief* which a Hindu cherishes in all seriousness and solemnity as a part of his religion.

In the Sraddha ceremonies one may discern ancestorworship which, as such, may be admired as the result of natural love and reverence and gratitude to ancestors. This sort of explanation very liberal in its way when coming from a foreigner does not at all represent the real state of things. To a Hindu it is not a mere question of sentiment but a matter of absolute necessity. If you reduce it to a question of sentiment, it loses all its obligatory force and it may be replaced by other methods more poetical and graceful. A Sraddha cannot be replaced and improved upon by another method invented by lofty imagination and high aesthetic culture. The spiritual welfare of the deceased may be promoted by various means, which, however desirable, may not be deemed indispensable but the performance of the Sraddha is a necessity, as it rescues the departed from the region of torment and ultimately elevates him to the Pitriloka. It secures reembodiment of the soul, association with the manes of ancestors, elevation to heaven, eternal beauty, and other blessings entirely dependent on pindas. It is not for ordinary mortals to predict what happens after death ; it is a matter of belief instilled into our mind by revealed religion, it is this belief real and earnest apart from the question of airy sentiment that compels a Hindu to perform the various Sraddhas for the relief and welfare of his deceased relation. The subject has been fully dealt with by Mr. Sarvadhikari in the Introductory Lecture of his Tagore Law Lectures of 1880.

VIII. Hindu Polity.

Hindu theory of the origin of Kingship.

1. Aryan political Government was civic and not military. It was not despotic but constitutional.

2. It was more of a democratic or rather aristocratic nature.

3. In later times the King was the head of the executive but not of the legislative. The legislation rested with 'men learned in the law' : and this juristic law secured the unity of legal administration amidst a congeries of states, and kept up the cultural and national unit of the Hindus, inspite of the division of Hindu India into a very large number of small states—which was the normal state of things.

4. The King was not the law-giver. He did not make the law but simply administered it. He could not alter or amend it in any way.

5. The real form of Government was Theocracy. Its useful results.

6. Brahmanical influence. Religious culture.

7. Royal power increased in course of time. Even Rama, Yudhisthir, etc, could not and did not make laws. The Hindu idea in the matter is expressed by Kalidas speaking of the royal power of the kings of Raghu's line "बेनामात्रमपि" etc. (Raghu I, 17)

8. Chanakya, for the first time, tried to invest the King with legislative function, but he failed. And, further, it is not quite free from doubt whether his "राजशासनम्" is really law or mere administrative orders. But some of Asoka's edicts are real 'laws' promulgated by the sovereign, though more or less of moral or religious nature.

9. Forms of Government in different periods. Special characteristics.

10 The king was not at first a judge. It was afterwards that he became a judge (*Atharva Veda*).

Social Organisation.

1. Social organisation democratic in spirit.
2. Spirituality aimed at. Tendency to shun society, to despise material prosperity and to lead a lonely and solitary life.
3. Four stages or four *Asrams*.
4. Family and not individual—unity. Joint family—its structure. Individual right merged in family.
5. Right of members by birth. Survivorship—
6. Ancestor worship, *Sraddhas* etc.
7. Caste system. Theoretical and practical. Hereditary professions under the heads religious, military and social. Its peculiar features. No civil rupture but perfect union and harmony. Reasons for this state of things.
8. Influence of Buddhism.
9. To admit the aboriginal tribes into the pale of Hindu Society.
10. Foreigners are incorporated in Hindu Society.
11. A brief survey of the history of the Aryan Hindus in their political, social and religious lives.

Hindu Conception of Law.

1. *Dharma*—Law. Explanation.*
2. Positive Laws—commands of sovereign, Austinian theory of laws
3. Divine origin of all ancient laws. King not a law-giver. Law regarded as *Vedic* command.

**Vedic* Index of Names and Subjects by Mr. Macdonell, Vol. I, p. 390. References from the *Vedas* are quoted there.

4. Law is transcendental—binding as much on the sovereign as on his subjects.

5. The Brahmanas were the law-givers. They never pretended to create the laws, but they delivered that they brought them down from Heaven by inspiration.

6. Punishments to which Kings were subjected for violating laws and properly administering them.

7. General punishments for infringement of laws. Corporal punishment and penances. Fines. Punishments—social.

8. Laws—ethical positive and religious. All are equally binding. Intermixture of the three elements. But “positive law” or Vyavahara emerges quite clearly out of the homogeneity before the time of the present Manu Smriti.

9. A comparative view of Hindu, Greek and Roman Laws.

Hence springs the idea of laws. The *Vedic* Text translated by Sir Willam Jones stands thus *

“God having created the four classes, had not yet completed his work ; but in addition to it, lest the royal and military classes should become insupportable through power and ferocity, he produced the transcendent body of law ; since law is the king of kings, far more powerful and rigid than they, nothing can be mightier than law, by whose aid, as by that of the highest monarch even the weak may prevail over the strong.

Law is called the voice of the Deity. † Its ultimate object is not general happiness but spiritual welfare. Whatever is conducive to this ultimate end becomes fit subject for a law. Law does not emanate from King but from the King of all Kings. Its divine origin invests it with all sacred and moral

* Colebrook's Digest, Vol. I. Preface p. xi.

† Narada

grandeur before which even the mightiest monarch fell in prostration.

Law or *Dharma* is thus defined in the *Vaiseshika* philosophy of Kanad:—

যত্যাভ্যাদয় নিঃশ্রয়স সিদ্ধি স ধর্মঃ

তদ্বচনাং আশ্রয়স্য প্রামাণ্যম্ ।

১ অধ্যায়, ১ অধিক ।

That which is the cause of bliss and of emancipation from sorrow is *Dharma*.

Jaimini in this *Mimansa* defines *Dharma* to the said effect:—

চোদনা লক্ষণার্থো ধর্মঃ ।

তস্য নিমিত্ত পরীষ্টিঃ ॥

Dharma is the text to the *Veda* which guides to action, by which attainment of desires and avoidance of sorrows are accomplished. "As all law is subject to the divine regulation, so the state, the family, the social structure conform to a ritual." *Darma* thus acquires the several meanings of the just, or of the customary or of conformity to standards and usage. Specifically *Dharma* becomes the sum total of pious duties. The four commandments, together with five injunctions form the code of Aryan ethics. The four commandments read: Thou shalt honour the Gods ; Thou shalt honour thy country ; Thou shalt honour thy parents ; Thou shalt honour the guest especially when he stands in need of protection. To these are added the five injunctions:—Thou shalt keep thyself clean ; Thou shalt hold thy senses in check in particular, nor violate ; Thou shalt not kill ; Thou shalt not steal ; Thou shalt not lie. Such commands are directed primarily to the head of family as its representative, who exercises authority to judge and punish within the circles of the home. *Dharma* thus

acquires the meanings of what is just and customary in conduct. *

In the complex human life new desires and new sorrows spring up and so law is to grapple with them. It is thus a progressive science which is developed and embellished by *সদাচার Sadachar*, † *i.e.*, what is practised by righteous men and also by the virtuous persons of the three regenerate castes and also by the law enacted by the King and by valid customs. ‡ Manu says that besides the laws embodied in written texts new laws may be propounded by *sikshita* Brahamanas, *i. e.*, Brahamanas who, in accordance with the sacred law have studied the *Veda* together with its appendages, and are to adduce proofs perceptible by the senses from the revealed texts.

The laws as it stood before the time of *Manusmriti* has thus developed in its present state and will continue to develop further as time goes on. The fact is the original source being ascribed not to any human caprice or idiosyncrasy but to divine dispensation, it is, from its very nature, susceptible of expansion in the hands of jurists competent to interpret the original divine laws. In course of time the sacred writings came to be considered as comprising three parts—the *Achar* or ritual, the *Vyavahara* or civil acts and rules, and the *Prayaschitta* or expiation. The three were blended together. The religious element could not be dispensed with. A crime would also be a sin. The delinquent would be punished by the King for his crime, and he would also be required to perform certain expiatory ceremonies for his sin. In marriage, adoption and various other civil matters certain religious ceremonies were held as essential. In the matter of trial by ordeals, the religious element was the chief factor. The judges believed fervently

* The Modern Legal Philosophy, Series II. page 38.

† Manu VII. 46.

‡ Manu XII. 108, 109.

that they were commissioned from him to administer justice. The sentiment of religion inspired them and created seriousness and solemnity and a sacred sense of responsibility too grand and imposing for mundane affairs.

IX. Mimansa or Rules of Interpretation.

References—Babu Kisori Lal Sarker's Tagore Law Lectures for 1905 and other works.

1. The two Mimansas are the Purva and the Uttara Mimansas.

2. Jaimini's apporisms. *manu's main precept*

3. Sastras are based on altruistic principles, so altruism is the principal guide of interpretation.

4. Certain terms of interpretation explained:—Vidhi, Niyam and Parisankhya according to the degree of obligatory force.

Utpathi Vidhi, Viniyoga Vidhi, Proyoga Vidhi, Adhikar Vidhi etc., Arthavada and Namadheya, Vikalpa and Anarthakya. Naya means head note of a case, embodying the result of a discussion pro and con on a given point.

5. General principles of interpretation: Sruti, Linga, Vakya, Prakarana or Upalakshya.

6. Seven principles of construction of Smriti and usage law:—

(1) Vedic origin of Smritis, so Smriti is presumed to be authoritative and binding.

(2) In case of conflict between Sruti and Smriti, the former prevails.

(3) A Smriti text based on perverse motive is not binding.

(4) An usage if not originated in any perverse motive has the force of law.

(5) In the event of a conflict between two usages, that which is conformable to the Shastra is to prevail.

(6) Any matter expressed in a foreign language should be understood in the sense in which the language is understood by those who use it. Foreign words must be taken in their foreign sense.

(7) An usage or Smriti must be reduced to the short, simple and general form of a Vedic Vidhi.

7. Certain controversial points :—

(1) (a) Customs are only recognised by the Smritis when they do not contravene divine laws.

(b) Clear proof of usages outweighs written texts of law.

(12 Moore I. A. 397—435).

(2) In Hindu Law religious and temporal aspects are wholly inseparable.

Justice Dwarkanath Mitter's view in *Raja Upendra Lal Roy v. Srimati Rani Prosonnomoyi* (1868).

(3) 'Stare decisis'—'Communis error facit jus'. How far applicable in Hindu Law ?

(4) Factum valet how far applicable in Hindu Law ?

8. The following are some of the maxims of interpretation according to Hindu Law :—

(1) The principle rule is to find out unity in diversity. It is not proper to assume too many Vedic texts. Every rule

of law presupposes a corresponding Vedic text, and if the text be not known or found, then the existence of a text may be assumed to clear up all difficulties.

(2) There is presumption against superfluity.

(Anarthakya)

No word of the text should be considered superfluous, void or insignificant.

(3) There is presumption against contradiction. (Vikalpa)

In cases of apparent contradictions, the rules may be deemed optional or they may be held to be applicable to the events or people of different ages. In fact reconciliation is the rule.

(4) In a case of conflict between two passages of the Smṛiti, reconciliation based on usage must prevail : but the rule is that the sacred books on law are more weighty than sacred books on politics.

Yajnavalkya, II, 21.

(5) When there is a conflict between the Sruti, the Smṛiti, and the Purana, the Sruti must prevail : but in a case of a conflict between the latter two, the Smṛiti must prevail.

Vyasaśāhita.

(6) Arguments from analogy are allowed,

(Atidesha)

but remote analogies are not allowed.

(Ati Atidesha)

(7) In case of several reasons, the last one is to be regarded as the author's opinion.

(Sadhaka or additional reason)

(8) In cases of several alternatives none is to be accepted as valid reason.

(9) All precepts supported by the assignment of a reason are to be taken as recommendations only.

(10) The precepts contained in the writings of Manu, Vasishtha and Saunake are beyond dispute, but their meaning is open to various interpretations, which must be determined by ordinary processes of reason.

(11) The mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void ; it raises the question what kind of condemnation is meant.

(12) Sruti serves to explain other passages.

(13) Superiority of Sruti over Linga and Vakya, of Linga over Vakya, and of Vakya over Prakarana.

(14) Niyama is only a directory rule.

(15) The same word must not have several senses.

(16) The sense of a vague word is to be gathered from the context.

(17) The singular number includes the plural.

(18) Preference is to be given to literal construction.

(19) The subordinate merge in the principal.

(Arthavada maxim)

(20) All imperative texts are not Dharmo or Vidhi.

(21) There are differences between :—

(a) illegality and irregularity,

(b) patent and latent ambiguity,

(c) application of texts as distinguished from the interpretation of texts.

(22) In all disputes relating to property the posterior transaction prevails, but in the case of a mortgage, a gift, or a sale the prior transaction prevails. (Yajnavalkya)

(23) An accepted sense, being once admitted, excludes the derivative sense, but when proposed, it is inadmissible, if the derivative sense oppose it. Nor should it be said, that there should be admitted a secondary sense without losing the literal signification ; for that cannot be received unless there be some objection to the obvious meaning.

(Colebrooke Vol. II, p. 336).

The Hindu system of Interpretation has Vedic origin and has always been regarded with respect by all commentators of Hindu law. It has thus formed an essential part of Hindu jurisprudence. A knowledge of the Mimansa is a necessary qualification of assessors. It is the keynote to all difficulties that may arise in all questions relating to our Dharmoshastras. Even at the present time in our British Indian Courts, the rules of Mimansa are sometimes taken into account. The Judicial committee of the Privy Council considered the rules in the celebrated case of *Sri Balusu v. Sri Balusu*.

Synopsis

Lecture II.

Family Relations.

Marriage.

Certain anomalies or abnormalities.

(1) Promiscuity

The legend of Svetaketu in the Mahabharat shews that there was a time, very ancient no doubt, when chastity was very loose, and ^{not restricted} promiscuous intercourse even with a married woman was not prohibited. Sveta- ketu saw this in the case of his mother, and prohibited it for ever by his exertion and influence. The looseness of marriage tie was discovered among the Gundhara Bra- hmans of the Punjab (a) But Dr. Jolly points out that the statement has now turned out to be an interpolation. (Hindu Law & Custom— p. 106). He goes on saying :— “Adulterous connctions frequently come into play in Vedic rituals.....Prostitution is frequently referred to in the Vedas and in the Smritis it is a legalised insti- tution protected by law.” The case of Debadasis *i. e.*, temple servants and the story of Basantasena are also referred to. (Pages 104—105). “The unfavourable opinion about the conjugal faith of women of the eastern coun- tries is perhaps based upon old acounts about Tibetan and Further Indian tribes among whom even now the married life is very lax.” (p. 107) An ancient Gatha in Ap 2, 13, 7 and Baidh 2,3,34 contains an allusion to the little value on the conjugal faith of a woman. The

(a) Mayne's Hindu Law—8th Edition—p. 80.

lower classes in Orissa & Midnapore speak of senior uncle as senior father and junior uncle as junior father.

2. Polyandry. *Plurality of husbands*

It is common among the non-Aryan races of India, particularly among the Hill tribes. The Nairs (b), the Teehurs of Oudh, Western Kallans of Madura, the Kannuvans of Madura, the Todas of the Nilgiris as in Thibet, the Tiyars of Malabar and Travancore, the low caste Malyalis of Cochin, the monks of Lahul, the Tottiyars of of Madura etc., are people among whom polyandry is still common. (c)

Polyandry was not common among the Aryans. The only instance is that of Draupady who was married to the five Pandava brothers. This marriage was condemned by her own father. In the case of Rama and Sita in the Ramayon—Aranya Kanda—Chapter II the Rakshasa Biradha expressed his moral indignation at finding an instance of polyandry upon an erroneous assumption that Sita was the common wife of Rama and Lakshmana. This is noted by Wheeler in his History of India II, 241 and noticed in Mayne's Hindu Law p. 79. The object of quoting the passage was to shew that polyandry was condemned even by a non-Aryan Rakshasa, and it could not be common among the Aryans. Mr V. N. Mandlik (p. 397) says that the original passage contains nothing to shew that the giant accused the brothers of having a joint wife. The writer of this Thesis has gone through the original and submits that the translation by Wheeler and his observation are quite correct

(b) A summary of the Roman Civil Law by Colquhoun Vol. I p. —488 s—575.

(c) Mayne's Hindu Law—8th Editor—p. 74—76.

“যুবাং জটাচীরধরৌ সভার্ষৌ ক্ষীণজীবিতৌ ।
 প্রবিত্তৌ দণ্ডকারণ্যং শরচাপাসি পাণিনৌ ॥
 কথং তাপসয়োবীক্ষ বাসঃ প্রমদয়া সহ ।
 অধর্ষচারিণৌ পাপৌ কৌ যুবাং মুনি দুষকৌ ॥

Oh little dwarfs,— why do you come with your wife into the forest of Dandaka, clad in the habit of devotees and armed with arrows, bow and scimitar? Why do you two devotees remain with one woman? Why are you, oh profligate wretches, corrupting the devout sages. The word সভার্ষৌ is significant. That means two males having one wife.

Dr. Jolly in his work on Hindu Law and Custom of 1928 at p. 104 thus observes:— “In order to explain away the contradiction between these rude usages and the idealistic and lofty views of the Brahmans, polyandry has been declared “Non-Aryan”. In fact, it is seen at the present day principally among the Non-Aryans, particularly among Dravidian and Tibetan tribes. Yet it cannot be proved that the polyandry of the ancient times was confined among the Non-Aryan tribes”.

It is curious to notice that Meyer (Das Weih in altendischen Epos, p. 82) says that polyandry must have been a purely Non-Aryan practice, and *the Pandavas were certainly Non-Aryans*.

In Macdonell's Vedic Index Vol I at p, 479 the following passage occurs :

“On the other hand, polyandry is not Vedic. There is no passage containing any clear reference to such

a custom The most that can be said is that in the Rig Veda (X. 85, 37, 38) and the Atharvaveda (XIVI, 44—52, 61; 2, 14, 27) verses are occasionally found in which husbands are mentioned in relation to a single wife. It is difficult to be certain of the correct explanation of each separate instance of this mode of expression; but even if Weber's view that the plural is here used majestatis cause, is not accepted, Delbruck's explanation by mythology is probably right. In other passages the plural is simply generic."

It must be noted here that the Niyoga or condemned sexual intercourse has nothing to do with polyandry.

3. Polygamy. *Plurality of wives*

A Vedic Indian could have more than one wife. Many passages in the Rig Veda prove this (Re—I-62-11; 71, 1; 104, 3; 105, 8; 112, 19; 186, 7; VI, 53, 4, VII. 8; 112, 19; 186, 7; VI, 53, 4; VII. 18, 2; 26, 3; X. 43, 1;) But in time polygamy died out and monogamy was developed from it. According to Weber polygamy is secondary, a view that is supported by more recent anthropology.

Macdonell—Vedic Index Vol I-p. 478.

In hot climates the wants of mankind are fewer, consequently the expense of supporting a plurality of wives and children less. Males exceed in Europe and females in Asia. Hence monogamy in one, and polygamy in the other, is in some measure a natural result,

Before the preaching of Mahommed, the pagan Arabs indulged in an unlimited number of wives. This was limited to four. Polygamy was legalized in Rome. It was never generally practised and was abrogated by Theodosius and by Justinian. Polygamy was practised by the Jews but Justinian forbade it. It was penal by the old German law and also by the English law. It was forbidden in France.

A summary of the Indian Civil Law Vol I p. 487-489, Sections 575, 576, 577 & 578.

Sir Gurudas Banerjee in his work on Hindu Law of Marriage and Stridhan—3rd edition—p. 26 & 27 explains the reasons of the introduction of polyandry and polygamy. Babu Gopal Chandra Shastri refers to the subject at p. 117 of his Hindu Law 4th Edition. In India, however, polygamy is legal according to Hindu Law. - But monogamy is the general rule.

4. Niyoga.

(1) The origin was due to the dread of dying without a son and the consequent assignment to the hell Put.

(2) In the Rig Veda the practice of getting sons in irregular ways is condemned. The practice was condemned by Aupajanghani, a Rishi of the White Yajur Veda. He was supported by King Janaka of the Videhas. The practice was condemned, just as Svetaketu prohibited promiscuous intercourse by introducing the regular institution of Marriage.

(3) It originated in the reign of the godless King Vena (Manu IX, 63)

(4) The Dharma Sastras quote a gatha sung by the god Vayu condemning the practice of Niyoga. It is prohibited by Manu (IX, 64, 65)

(5) Permitted in some cases with only certain relatives. (Manu IX) But even this was interdicted in the Vrihat Naradi Puran, where the procreation of a son on a woman by her husband's younger brother is prohibited. This shews that all sorts of appointments were prohibited.

(6) It was an Indo-European custom.

(7) No longer necessary as there is the law of adoption.

(8) The adopted boy must bear the reflection of a son—this passage has no reference to Niyoga.

(9) Mayne's Hindu Law 8th Edition.

The following points are noted :

(a) Nature & Origin—p, 84

(b) The levirate is only a single instance—p.85

(c) Rules & restrictions—p. 85.

(d) Not a survival of polyandry—p.86.

(e) Differs from marriage with brother's widow
p. 87.

(f) Analogy between Niyoga and adoption p. 153
158.

(g) Its influence in forwarding widow's succession
p. 733.

It may be stated here that promiscuity, polyandry and Niyoga must be distinguished. If there is a practice that younger brothers may cohabit with the wife of an

elder brother, it is promiscuity and adultery. If a younger brother is appointed to beget a child to a childless elder brother it is Niyoga. If all the brothers marry a common wife (as in the case of the Pandavas) it is polyandry. If a younger brother marries the widow of a senior brother, it is a widow marriage.

5. Divorce.

(1). Marriage being a sacrament, and the union being an eternal one, no absolute dissolution of marriage is possible. The very idea of a Hindu marriage precludes any such supposition.

Manu X, 101-102,

Manu 1X, 45,46,

(2). The following texts may be considered as indicating complete dissolution of marriage:-

Parasara 1V. 28.

Narada XI, 97—100.

The above texts are explained away by orthodox Hindus

3. But though the question of Divorce is a controversial point, it is clear that there could be separation between the husband and wife.

(a) Desertion of the wife

Manu 1X, 79.

(b) Desertion of the husband

Manu 1X, 80.

Devala, Colebrooke Vol II, 529.

(c) Fraudulent marriage, unchastity, incurable disease, etc.

Manu IX, 73

(4) Mayne in his Hindu Law 8th Edition-p. 112, 114 says :—

- (a) Divorce was permitted in early law.
- (b) It is still recognised by local usage.

5. Different forms not allowed by Hindu Law. Allowed by custom. On what grounds in Western India and in Southern India. Allowed among Gosavis and Santhals.

Sir Gurudas Banerjee's Hindu Law of Marriage and Stridhan 3rd Edition, Pages 133, 187, 189, 248, 257, 260 & 245.

(6) Dr. Gour in his Hindu Code-p. 245—248 says :—

- (a) Hindu Law does not recognise Divorce.
- (b) It is recognised by custom.
- (c) Native Convert's Marriage Dissolution Act of 1866.

7. Babu Shayma Charan Sarker in his Vyavastha-darpan, Vol. I—P. 207 states-para 241 "Marriage properly contracted by the performance of the nuptial rites, is indissoluble, and the reciprocal relation of the married-pair endures even after the natural death of one or both of them.

8. Marriage can be dissolved in extreme and exceptional cases—Vyavastha—242.

6. Remarriage of Hindu Widows.

1. In Macdonnel's Vedic Index—Vol I—p. 489 the author says—"The re-marriage of widows, whether prohibited or allowed in the texts is proof that there were widows who could be remarried."

Notes No. 146.

Re: I. 124, 7, as explained by Yaska Nirukta III, 5: Geldner Rigveda, Kommentar, 22.

At the p. 476 the marriage of a widow to the younger brother of her deceased husband is referred to. There are texts in the Rigveda [X-18-8] This was where the husband was issueless.

2. Dr. Gour at p. 247 says—

"The re-marriage of widows was at one time not only customary but even obligatory. The practice fell into disuse afterwards. The Vedic and Shastric tenets remained confined to the twice-born, and amongst them to a few,"

Widow remarriage is now legalized by Act XV of 1856.

Civil Marriages Act III of 1872.

3. Strange in his Hindu Law part II page 241 strongly condemns the prohibition to women of second marriage.

4. In the sacred texts which refer to marriage, the remarriage of widows is no where prescribed in the rules concerning marriage,

Manu IX 71

5. In great calamity and distress she, while a widow, may conceive a child by her connection with certain relation (the younger brother of the deceased

husband is preferred), but widow marriage is not sanctioned by Manu. She may marry, though she is already betrothed. The case of levirate where the girl was a virgin widow is an exception, Manu, IX 60, 70 Mayne's Hindu Law 8th Edition p 87.

Levirate is still common in many parts of India.

It was common amongst the ancient Hebrews.

6, It is only in Parashara & Narada that we come across texts sanctioning widow-marriage.

Parasara IV, 28

Narada XII, 97—100

7. Babu Golap Chandra Sarkar Shastri in his Hindu Law—4th Edition page 116, from a pure Hindu standard of view, justifies the rule against widow marriage.

7. The Practice of Suttee or Sati

1. The Hindu wife is an emblem of purity and chastity. The typical instances are those of Savitri, Sakuntala, Damayanti and many others of historical fame.

2. The idea of widowhood is abhorrent to her nature. Death is preferred a thousand times to widowhood.

3. This idea gave rise to the practice of Suttee. At the present moment no body will desire the introduction of the practice. It has been justly repealed by British Legislation. We justly view with horror this most absurd and cruel practice. But there was one

feature of it, which shewed the ardour and magnitude of her love towards her husband.

4, The first question is—Was Sati—the burning of a widow on the funeral pile or pyre of her husband—known in the ancient Vedic period ?

Different conclusions are arrived at from the following Vedic text.

ইমা নারীরবিষবাঃ সুপত্নীরাং, জনেন সপিযাসংবিশন্ত
অনশ্রবো হনমীবাঃ সুরভা আরোহন্ত জনয়োযোনিমগ্রে । ঝ ১০ম ১৮শু ৭ঝ ।

Griffith's translation :—

Let these unwidowed dames with noble husbands adorn themselves with fragrant balm and unguent. Decked with fair jewels, tearless, free from sorrow, first let the dames go up to *where he lieth*.

Syanacharya's commentary is to that effect.

Those who contend that the practice of Suttee or Sati was in vogue in the Vedic age read the last word of the Rik as অগ্রে (before fire) and not অগ্রে (before him *i. e.* husband). In the one case the meaning would be that the married women entered the fire ; in the other case the house of their husband.

The introduction of the word অগ্রে (before fire) for অগ্রে (before him) is totally disapproved by professor Max Muller who gets indignant at such an absurd reading. He holds that the practice was unknown in the Vedic Age

Selected Essays, Vol 1 P 335

5, The practice not mentioned by Manu

6. Mentioned by Angira, Vyasa and other Rishis of later times.

7. Its origin from the doctrine of spiritual benefit, aversion to remarriage, insecurity of a widow's condition of life being one of entire subjection, notion of chastity, sentiment of love, and other reasons discussed.

8. In Macdonell's Digest Vol I p 488 we have the following passage:—

“On the death of her husband, in some cases the widow burned herself or was burned by her relations. This is clearly implied in the reference to this ancient custom in the Atharvaveda. On the other hand the Rig-Veda does not contemplate the custom anywhere, but on the contrary considers the widow as married apparently to the brother of the dead man. The custom of Sutte would therefore appear during the Vedic age to have been in abeyance, at least as a general rule. At all times the practice seems to have been mainly usual among families of the warrior class, to judge from the other Indo-Germanic parallels. In other classes the survival of wives was more necessary, and the remarriage of widow, whether prohibited or allowed in the texts, is proof that there were widows who could be remarried.”

9. Dr. Jolly says that widow burning is hardly ever mentioned in the Vedic & Sutra literature.

The principal smritis are silent about Sati. Only the latest smritis speak of Sati. It was merely an option at the least. In certain cases, particularly if widow is pregnant or has a little child she could not be Sati. Widow burning was not a special Brahmanical institution. Sati mentioned in the Rajtarangini and Harsacharita. Sati mentioned by Greek writers. Sati was abolished by Lord Bentinck in 1829. Widow burning was practised only among the royal families.

10. Herbert Cowell in his work on the Hindu Law (Tagore Law Lecture of 1870) in Lecture VIII at page 182 refers to the saying of Angiras about Sati. It is not sanctioned by all the sages and is opposed to the teaching of the earlier sages. The writer adds—"The practice of Suttee was based upon the principle of the entire subjection of the wife to the husband, which runs through the whole of Hindu law, custom and feeling. It was probably in the first instance due to that horror of remarriage which dates from the time of Manu and pervaded the whole people."

11. Sir Thomas Strange in his work on Hindu Law Vol I—Chapter X p. 237 is disgusted with the scandalous superstition relating to Sati. He adds—"To this tyrannic instance of marital selfishness must be added the prohibition to women of second marriages and that this should apply, as it does, even to virgin widows is an abomination surpassed only, if at all, by the practice that has just been denounced." The moral indignation of the writer ought to be fully appreciated and admired. But in a question of sentiment the matter ought to be considered in all its aspects. If a young widower refuses to marry again, we admire him for the tenderness of his heart and his devotion to his departed wife. In the case of Aja and Indumati, the former died shortly after, out of grief, for the death of his wife Indumati.

If a widow refuses to remarry and dies out of grief shortly after the death of her husband, we may deplore the weakness of her heart but is there not a silent and steady admiration for her? In some cases of Sati though rare they may be, the widow did not mind any opposition but ran directly into the fire to be burnt with her husband. Her passed character, her devotion to her

husband all taken together would paint her in a different manner. The Hindu widow aimed to appear in this character. Severe criticisms may be just but should not be too severe.

Normal Marriage

A

Vedic Period.

1. Forms of Marriage:— The state of society revealed in the Vedic Age seems to point to considerable freedom on the part of both man and woman in selecting a wife or husband. The parents arranged a suitable match, but they never controlled it.

Macdonell—Vedic Index 1—p. 482.

Child marriage was almost unknown in the early Vedic period—p 474,

Rv. I, 117, 7; II—17,7 X, 39, 3 ; 40, 5.

Girls married after attainment of puberty.

Rig Veda-10-10-9.

2. Limitation on marriage.

Marriage was allowed in the third or fourth generation. (Satapath Brahman I, 8, 3, 6). The prohibition of marriage within the Gotra did not then exist, though marriages outside the Gotra were frequent.

Similarity of caste was also not an essential of marriage.

It was considered proper that the younger brothers and sisters should not anticipate their elders by marrying before them. Hypergamy was prohibited.

Macdonell—Index—Vol—I p. 474&476.

(3) Wedding ceremony—From the said Volume p 483—the following passage is quoted :—

“In normal marriages the bridal was celebrated by an elaborate ceremony which bears in essentials and details the strongest resemblance to the form observed by other Indo-Germanic as well as Non-Indo-Germanic peoples, and which was destined to secure the stability and fruitfulness of the union. The ceremony commenced at the bride’s house, to which the bridegroom with his friends and relations repaired, and in which he met the friends and relations of the bride. A cow or cows were slain for the entertainment of the Guests. (Rv. X, 85, 13). The bridegroom having caused the bride to mount a stone, formally grasped her hand, and led her round the household fire. This act constituted the marriage, the husband hence being called ‘he who takes by the hand’ (hasta-grabha—X, 18, 8). The festivities being over, the bridegroom took the bride to his home on a car in a marriage procession, all to the accompaniment of suitable stanzas. Then followed co-habitation. (Rv. X. 85. 28-30, 35)’.

The main object of a woman’s marriage was the production of children. (Rv. 1, 91, 20, 92, 13; III. 1, 23, X 85, 25, 41—42, 45).

Husband was not the absolute master of the wife—had no power to sell her. Sending wife to another—story of Yama—refers to obsolete practice. Dowries were not infrequently given, especially when damsels suffered from bodily defects. Rig VI. 28, 5. X. 27, 12. Av V. 17, 12 A generous brother gave his sister a dowry in order to get her a husband. Hopkins, Journal of the American Oriental Society, 13, 345; Muir Sanskrit Texts 5, 459.

'Anudeyi' may mean dowry—Rv. X, 85, 6. Macdonell's Vedic Digest Vol. 1—p. 482

B.

Post-Vedic Period—Marriage.

(a) Brahmanic or Epic Age.

1. Influence and supremacy of the priests. The short and simple rules of the Vedic period were now amplified and simplicity gave place to complexity; and what was natural became artificial. Religious rites were performed to give importance and solemnity to the occasion.

2. There were only four castes, and the mixed castes had not yet sprung up.

3. Intermarriage between castes allowed. Marriage with sudras prevalent; but Protiloma marriage—the marriage of a bride of a higher caste with a bridegroom of a lower caste—was condemned.

4. The exalted position of women as gathered from the two Epics.

5. Marriage among blood relations to the third or fourth generation allowed. Marriage with daughter of mother's brother or son of father's sister allowed in south, but not daughter of mother's sister or son of father's brother.

6. Celibacy as before was not encouraged.

7. A wife was not a property and was regarded to have a separate entity. This was contended for by Drupadi in her defence against the claim of Durjodhan, who had defeated her husband in the game at which her liberty was at stake. Her defence succeeded and was given effect to.

(b) Sutra Period

1. In the Gobhila Grihya Sutra (III, 4, 5) and the Dharmo Sutras (Apastamba Dharmo Sutra II 5, 15, 16 etc) are found prohibitions against marriage in the Gotra (family) or within six degrees on the mother's or father's side.

Macdonell's Digest—Vol. 1. p. 475.

2. Similarity of caste was also not an essential to marriage, as hypergamy was permitted even by the Dharmo Sutras, so that a Brahman could marry wives of any lower caste, a Khatriya wives of the two lowest castes as well as of his own caste, a Vaisya a Sudra as well as a Vaisya, although the Sudra marriages were later disproved in toto. Instances of such marriage are common in the Epic and are viewed as normal in the Brahddevati.

Macdonell's Digest Vol. I—p. 476.

Gautama Dharmo Sutra, IV. 16,

Baudhayana Dharmo Sutra I—16, 2—5,

Vasistha Dharmo Sutra I, 24, 25

Paraskara Grihya Sutra I, 4 etc.

Risley, People of India 156.

3. Girls eligible not of the same Probara. Child marriage encouraged.

4. Certain essential ceremonies were required to be performed. (Baudhayana and Asvalayana). Non-performance does not render marriage invalid but entails degradation.

5. Different forms of marriage.

Brahmo the earliest form of marriage—other forms due to the influence of non-Aryans.

(a) Eight forms according to Asvalayana, Baudhayana and Gautama.

(b) Six forms according to Apastamba, and Vasishta, Difference in status as between sons of different forms of marriage. Forms classified according to caste.

6. The position of women during this period. It was much degenerated from that of the Vedic and the Brahmanic period.

7. The binding form of Arsha marriage was a sale. The price was virtually a dowry, the origin of which was thus traceable. (Apastamba II, VI, 13). Mayne's Hindu Law 8th Edition p 97.

Mayr 155—who compares the Roman *Comptio* and the German *Frankauf*.

(C). Kautilya and Buddhistic Period

1. Marriage Contracts.

(a). Betrothal is a mere promise as to marriage. It can be disregarded without any prejudice to the parties.

(b). *Pangrahana* is necessary to complete marriage in the case of the twice born. In the case of the Sudras certain other rites were performed (Kautilya III—XV)

2. Eight kinds of marriage as enumerated in Manu. The first four are valid if approved by the father, the last four, if approved by both the parents.

3. *Sulka* or the brides' price is due to the parents. After their death it is due to the female.

4. Polygamy allowable in certain cases, and penalized in other cases.

Kautilya BK III

5. Abandonment and divorce in certain cases: They are enumerated.

Kautilya III 2.

6. Control of the husband over his wife :—

A wife is forbidden to engage herself in amorous sports, in wandering out at will, in holding private conversation with another man, in leaving the house at night or going elsewhere without the husband's permission or against his wish.

7. Niyoga allowed in particular cases.

8. Intermarriages allowed among the three twice-born but not with the Sudras.

9. Remarriage of a widow was allowed.

Buddhistic period.

1. Three modes of marriage laid down in the *Manu Kray Dalammathat*.

2. Parent's right to dispose of children in marriage, subject to qualifications.

3. Minor parties cannot marry unless with parent's consent; a minor girl can contract valid marriage: even without the parent's consent after three elopements.

4. Persons whose consent is necessary—father, mother, elder brothers, and sisters, with whom the girl is living, nearest relatives,

5. Prohibited degrees—not so restricted as among Hindus, almost the same as under English law.

6. Divorce recognised: Marriage more easily dissolved than it is contracted.

7. Different grounds of divorce.

(D) The Institutes of Manu

1. (a) Suitable age of men for marriage.

(1) Life as a student and as a bachelor for 36 years, or 18 years, or 9 years.

For each Veda (Atharva Veda is not taken into account) the period of study is 12, 6, or 3 years.

Manu III—I.

(2) He should marry after returning home with the permission of his teacher.

Manu III—IV.

(3) A man, aged 30 years, shall marry a maiden of twelve and a man of twenty four a girl of eight years.

Manu IX 94

(b) Suitable age of women for marriage.

(1) Before she attains puberty.

Manu IX, 89.

(2) Eight or twelve years.

Manu IX, 94.

(3) Child marriage if suitable bridgroom is forthcoming.

Manu IX, 88.

(4) No marriage where no suitable bridegroom is forthcoming.

Manu IX, 89

(c) Qualifications of the bride :—

1. Handsome, junior, having a brother alive, of good health.

Manu, III, 4, 6, 10, 11.

2. Defects—Manu III, 7, 8, 9.

(d) Prohibited degrees—

1. Seven degrees both on the mother's and the father's side.

Manu III, 5 ; V, 60.

2. She must be of the same caste, not having the same gotra and provara.

Manu III—5.

3. Certain relations not be married.

Manu XI 173.

(e) Eight kinds of marriage and their nature ; Brahma, Daiva, Arsha, Prajapatya, Asura, Gandharba, Rakshasa and Paisacha.

Manu III, 21, 27—34

(f) Fraud legalized by Hindu Law

Macnaghten's view.

Criticized by Sir G. Banerjee

Marriage and Stridhana

3rd Edition p. 87

(g) Guardianship in marriage.

(1) Certain relations are to act as guardian.

Manu V, 151

(2) The girl may wait for three years and then herself marry.

Manu IX, 90, 91, 93.

(h) Intermarriages.

(1) Marriages between persons of the same caste are recommended.

Manu III., 41, 42, 43

(2) Marriage between persons of different castes.

Manu III 12-19, 44, 64.

(3) Intermarriage prohibited in the Kali Juga.

(i) The rituals of marriage.

(1) Marriage—a sacrament,
religious element.

Manu II, 67.

(2) Saptapadigaman

Manu VIII 227

(3) Modern rituals mostly based on custom.

(j) Duties of husband and wife—Manu IX

(k) Sale of wife an offence—Manu IX, 46 ; XI, 62,

But the wife may be beaten—VIII 299—300

(l) Dowry was known.

Manu III 54.

Mayr 157.

Mayne p 97.

Lecture III.

Sonship.

A

Vedic Period.

1. Why was a son longed for in the primitive age ?
This question has been fully answered by Mr. Rajkumar Sarvadhikari in his Hindu Law of Inheritance (Tagore Law Lectures, 1880) 2nd Edition at page 171. The author observes—"The natural craving to have a son, in whom our affections could be centred, and who would bear our name and perpetuate our memory, was carried to its utmost length by the Aryan settlers of Hindustan. It is instructive to observe the feelings with which a son was regarded both in ancient and in mediæval India. In the hymns of the Rig-Veda a son was the delight of his father, and his birth was earnestly desired to continue the line of his progenitors. The religious element had not yet so fully entered into the conception of a son. The family would be destroyed, and the mundane existence of a long continued line of ancestors would be obliterated, if no son were born in the family."

2. It cannot be said that the spiritual necessity of the son was wholly unknown in the Vedic period. It was partially recognised in the later Vedic period.

(Aitereya Brahman. VII. 3, I)

Mr. Sarvadikary's work mentioned above
page 172.

3: The Aryans prayed for male issue of their own body. (Rig Veda VI—33; Aitereya Brahman 33 ch 1 kh.)

4. Sons were required to perform Pitriyagna mentioned in the Vedas. Ancestorworship.

5. Patria Potestas.

(1) The father is not only the begetter but also the protector of the child. The father in the Rig Veda stands for all that is good and kind. Hence Agni is compared with a father (Rv. X, 7, 3), while Indra is even dearer than a father. (Rv. VII, 32, 19 ; VIII, 1, 6.)

Macdonell's Digest of Vedic Law Vol. I—p 526.

(2) Compare the Hindu patria potestas with that of Rome. Similarity is noticed.

In the Hindu Law even when the son attains majority he lives jointly with his father and under his control. A Roman son would live separate, forming a separate family. He could then be emancipated.

(3) Dr. Jolly shews, "There are clear traces, both in old and modern times, of a despotic control of the family by the father even after his sons grew up, provided only that he was physically able to control them. The same state of affairs seems proved for English early law, as it is beyond question for Roman law. In Greece also, which is sometimes contrasted with Rome, there is the clearest trace of both a real patria potestas, and of the absolute ownership of the land by the father as against the son, especially in the archaic laws of Gortyn."

Macdonell's Digest Vol I—p 529—Notes.

(4) The daughter would remain under the potestas of her father until her marriage.

(5) The Hindu father had absolute power over the children. He could kill, sell and give them in adoption.

Rig Veda. I, 116—16 Aitereya Brahman, 23—3.

(6) The story of Sunasepa forms a Vedic precedent. His father Ajigartha sold him to King Harish Chandra under pinch of poverty and he was afterwards adopted by Visvamitra.

Dr. Jolly mentions it in his Hindu Law & custom at p 161.

(7) Reference is made in the Rig Veda (Rv II, 29, 5) to a father's chastising his son for gambling, and Rjrasva is said to have been blinded by his father.

(Rv. I, 116, 16 ; 117, 17.) Macdonel Vol. I p 526.

(8) In Yajur Veda we find Rishi Atei gave away all his children to the son of Urva.

Vrisaketu was offered as a sacrifice by his father Karna.

Sir Henry Maine's view is supported.

(9) We meet with the following seven kinds of sons. Twelve kinds were not then known.

(1) Aurasha,

(2) Khetraja (Rig Veda VIII 47, 8 183—3)

(3) Kanina--Kumariputra (Rig Veda VIII, 49—21, 24)

(4) Putrikaputra—the son of an appointed daughter (Rig Veda III, 31, I—2)

Dr. Wilson's Veda—Preface to Vol. III.

(5) Sahorha—the son acquired by purchase or capture (Rig Veda VI—25, 4.) His position was next to the Harasha.

(6) Artificial creation of blood relationship by a sort of adoption.

(7) Sons of women marrying a second time. Widow marriage sanctioned. Atharva Veda IX. 5, 27. Taittiriya Aranyaka—Preface.

Mr. Survadhikary's Tagore Lectures p. 170.

10. A son born in wedlock but begotten before was not held illegitimate.

(Rig Veda X—85-38, and 41, 111, 282).

The abnormal importance to the sons mentioned in (2) to (4) was based originally on an economic motive—to get for the family as many powerful workers as possible.

Dr. Jolly. page 156.

B

Post Vedic Period.

(a) Brahmanic or Epic age (Ramayana and Mahabharat).

1. An aurasha son was always desired and preferred in all ages.

2. The child belongs to the husband of the woman, whoever may beget it. The seed and the field—the owner of the field is the owner of the crops grown by another.

3. Different kinds of sons:—Aurasha—legitimate son, Khetraja, Kanina, Putrikaputra, Swayamdatta.

Difference in status not yet recognised. The Pandavas were Khetraja sons of Pandu. Karna was a Kanina son of Kunti, *i. e.* born in her maidenhood. A Putrikaputra is the son of an appointed daughter. He is treated as the son of her father. The appointed daughter by giving birth to a son acts the part of a son. A Swayamdatta son (self given son) is a sort of an adopted son.

4. The doctrine of spiritual benefit began to be developed. The story of Jaratkaru Rishi in the Mahabharat shews that he married in old age only to have a son to benefit his ancestors.

5. Sradha ceremonies elaborated. The son by performing Sradhas offered spiritual benefit to the manes of ancestors in the Pitriloka.

6. Patria Potestas—The stringency of the doctrine was now somewhat diminished. The father could not sell his son except in cases of absolute necessity. He could not sell the eldest or the only son. The consent of the mother of the child was necessary.

(b) Sutra Period.

1. In the Sutra period a man could marry a girl of his own caste or of an inferior caste, but not a girl of superior caste. Mixed castes grew up. A son born of a mother of a superior caste was condemned.

2. Different sort of sons:—

(1) The aurasha or the legitimate son. He is placed in the highest rank in all ages.

(2) Putrikaputra—the son of an appointed daughter. Gautama Harita does not place him in a high rank as in the Veda and by Baudhayana. He places him in the category of kinsmen and in the second group. Vrihaspati discards him;—Mr. Sarvadhikary. p, 192.

(3) Khetraja—the son begotten on the wife by Niyoga.

(4) Gudhaja—the son born secretly.

(5) Kanina—the damsel's or maiden's son.

(6) Sahodha—the son conceived before marriage but born after marriage.

(7) Paunarbhava—the son of a twice married woman. Levirate—the marriage between a man and a childless brother's widow even now common in India; Mayne-p. 87,

(a) Nishada—the son by a sudra waman.

(b) Parasava -the son by a concubine.

(8) Dattaka—adopted son.

(9) Kritrima—the son made.

(10) Kritaka—the son bought.

(11) Apavidha—the son cast off.

(12) Svayamdattaka—the son self given,

Mayne's Hindu Law, 8th Edition, p. 81.

Mr. Sarvadhikari—Tagore Law Lectures of 1880—2nd Edition—p. 188—190.

Babu Gopal Chandra Sarkar Shastri—Hindu Law—4th Edition page 122.

See Gautama and Vasistha.

3. The status of the different kinds of sons. It varied according to the castes of the parents, Different position of the above mentioned sons should be discussed.

4. The doctrine of spiritual benefit was gradually developed. It accounts for so many classes of sons.

5. Patria potestas was still in force. No severity but perfect peace and harmony.

(c) Kautilya & Buddhistic Period

1. The differences in the two periods are very slight. They may be taken together,

2. Necessary information can be had from the

books of the period mentioned in the Introductory Lecture

3. Dr. Jolly in his work on Hindu Law and Custom at page 157 thus states—"A list of 12 sons differing a good deal from the ordinary list is found in Mahavarata I, 120, 32, an enumeration of 5 sons in Mahavarata I, 74, 99 and another of 3 sons is found in Buddhistic works."

4. Dr. Jolly in another part of his work at p. 160 thus states :—

"In most of the enumerations of the 12 sons (also in the Mahabharat) they are divided into two groups of six each and only the first six are recognised as heirs, and the latter six only as relations but not as heirs to their legal father—a distinction which has been taken over into the Burmese law, (we may call it as well the Buddhistic law) along with the institution of the 12 sons'".

The latter group of six sons has only to offer sacrifices to the manes and formerly had to set fire to the pyre of a Sati in the absence of a son and heir to do it.

(d) The Institutes of Manu

1. The doctrine of spiritual benefit is fully developed. The birth of a son saves the father from the hell Put. It perpetuates his lineage and confers benefit in this as well as in the next world.

2. The son performs the srádha and thereby secure benefit to the ancestors in the Pitriloka.

3. Manu has described twelve kinds of sons. Of these six become affiliated or members of the Gotra and

coparceners, and the other six become affiliated or members of the Gotra but not coparceners.

- (1) Aurasa or true legitimate son.
- (2) Khetraja—the son begotten in the wife by another by the appointment or permission of her husband.
- (3) Dattak—adopted son.
- (4) Kritrim—son made.
- (5) Gurhotpanna—the secretly begotten son of the wife.
- (6) Apabidha—the son deserted.
- (7) Kanina—the damsel's or maiden's son.
- (8) Sahorah—the pregnant bride's son.
- (9) Krita—the purchased son
- (10) Paunorbhaba—the twice married woman's son
- (11) Swayamdatta—the self-given son.
- (12) Saudra—the son by a Sudra wife.

Manu IX, 153—160

The son of an appointed daughter—two meanings explained by commentators.

Manu III, II, IX, 127, 130.

4. The doctrine of spiritual benefit explains the following:—

(a) Plurality of sons, (b) Niyoga, (c) Putrikaputra, (d) Poligamy, (e) Adoption, (f) Difference between sons and daughters.

5. Power of parents over children—

(a) Reverence towards father.

Manu II, 145—148, 225—237 ; IV—162, 179—180, 182.

(b) The son has no property.

Manu VIII, 416, Exceptions—IX, 206.

(c) The son may be beaten.

Manu V, 164 ; VIII, 299, 300.

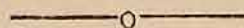
(d) Quarrels with parents forbidden.

Manu IV, 180, 184.

(e) Sale of children forbidden.

Manu XI, 62 ; III, 51—52.

It may be stated that at the present time only Aurasha, Dattak and Kritrim sons are legally recognized.



Lecture IV.

Adoption.

A

Vedic Period

1. There are instances of adoption in the Vedic period. System of adoption older than Manu. Instances Vedas, Mandlik p, 400.

(a) Sunasepa was adopted by Visvamitra

Aitareya Brahmana, VII, 17,

Saukhayana srauta sutra XV, 17.

(b) Atri gave his children to the son of Urva, who longed for a son. After adoption, he became helpless and repented. But it was too late and could not be cancelled. Others followed this example and thus came into existence the origin of adoption.

Taittiriya Sanhita [7—1—8]

Mr, Sarvadikary's Lectures—pages, 175, 196

2. Adoption was not always in high favour: it may be accidental or not that a hymn of the Vasishta book of the Rig Veda condemns the usage—VII, 4, 7, 8

3. The practice is referred to in Rig Veda III, 31, I Macdonell's Digest—Vol I—p 528

4. What was the motive of adoption in the primitive age?

(a) Dr Jolly in his Hindu Law and Custom at page 156 thus observes:—

“The twelve kinds of sonship which to some extent are based on the illicit connections of the mother and for the greater part have nothing to do with the blood-relationship of the son with the father, are probably the most striking feature of Indian family law. The cause of this abnormal importance being attached to male issue is to be sought, according to the Smritis, in the offering of sacrifices to the manes which depends upon the male issue, yet however originally an economic motive was perhaps a more important factor in it—to get for the family as many powerful workers as possible.”

(b) In Mayne's Hindu Law—8th Edition, pages 8 and 129—the author alludes to the secular and religious aspects of the question. The secular aspects are prominent—the advantages of having a son to assist a father in his life, to protect him in his old age, and to step into his property after his death. These considerations are felt by other races. The Sudras practise adoption. The inhabitants of the Punjab and North West Provinces, whether Hindus proper, Jains, Jats, Sikhs or even Mahommedans, the Tamils in Ceylon practise adoption for no religious purposes. The celebration of the name and the perpetuation of the lineage are main objects. Even daughters were adopted in ancient time and are adopted by the Bheels and the Tamils of Ceylon at the present day. No religious element can be ascribed to such cases.

(c) Babu Golap Chandra Sarkar Shastri in his Hindu Law, 4th Edition—p. 124. Says—“The hankering after sons, proved by the recognition of the different kinds of sons, appears to have owed its origin to the exigencies of primitive society composed of families gov-

erned by patriarchal chiefs. In the unsettled state of tribal Government in early times, the number of male members capable of bearing arms was of special importance; and the same cause that enhanced the value of sons operated to lower the position of women as well as of men labouring under bodily disability or infirmity such as blindness".

The author adds that the law of adoption is not based on the doctrine of spiritual benefit. Many of the twelve sons are the result of adultery, seduction and lust, and no religion, specially Hindu religion, based on asceticism can countenance it.

The religious element introduced by the Brahmins in the Smritis gradually displaced all such scandalous sons and recognised only the Aurasha, adopted and Kritrima sons. Then the spiritual element came into full play.

5. The Vedic passage from Aitereya Brahmana not properly translated by Mr Sutherland (Mandlik p 459)

6. No restriction as to age or number. The person to be adopted should be Sadrisa (Similar)—Mandlik.

7. It is not clear that adoption from one caste into another was possible, for there is no good evidence that Visvamitra was, as Weber holds, a Khatriya who adopted a Brahmana.

Macdonel's Vedic Digest Vol I —p 528

8. The adopted son did not inherit the property of the adoptive father, but that of his natural father. (Aitereya Brahmana VII, 18)

9. The story of Angiras and Navanedisto shews that the real heir could not be excluded from inheritance

Rig Veda X 61 and 62 of Aitereya Brahmana

B

Post Vedic period.

(a) Brahmanic or Epic Age.

(Ramayana and Mahabharata)

1. Daughters were given in adoption. Dasarath's daughter was adopted by Lomapada. Basudeva's daughter Pritha was taken in adoption by Kuntrinoja.

2. An eldest son or an only son could not be given in adoption.

3. Restrictions not yet introduced.

4. Ceremonies introduced.

5. Adoption irrevocable.

(b) Sutra Period

1. Mr Sarvadhikary in his Tagore Law Lectures fully deals with the Dharmo Sutras on Adoption in pages 139, 142—143. Much information can be gathered from his writing.

2. The Sutras recognise adoption.

3. The sutras of Vasishtha, Baudhayana, Gautama, Aposthambha are of special importance.

4. An only son or the eldest son could not be adopted.

5. The mother could not sell or give away a son without the father's consent.

6. A widowed mother could sell or give away a son.

(Baudhayana I1—3—20)

7. According to Gautama Sutra an adopted son was an heir (दास्य); but Vasishtha classes him among the persons who could not be heirs.

8. Certain formalities were necessary.

9. The preference of an after-born Aurasha son or legitimate son over the adopted son is of later origin.

10. Comparative view. (Strange's Hindu Law Vol I, p 103)

11. Miscellaneous matters relating to adoption.

(c) The Kautilya & Buddhistic Periods

1. No special differences are noticed.

2. The law of the Sutra period was followed.

3. Though mention is made of 12 sons, only six are recognised. The adopted son is one of the recognised sons.

4. Though the supremacy of the Hindus was diminished—the law was little affected by the change. Law was held to be devine, and changes were not aimed at.

(d) The Institutes of Manu.

1, माता पिता वा दद्यातां यमद्विः पुत्रमापदि
 सदृशं प्रीतिं संयुक्तं सज्जेयोदत्रिमः-सुतः ।

Definition—Manu IX, 168.

(a) Father or mother can give a son in adoption, "The father or mother with her husband's assent etc, etc,"

Explained by Kulluckbhatta.

(b) आपदि—Apadi—in distress,

Explained by Kulluckbhatta.

The donee being in distress, *i.e.*, sonless Vijnanesvara explains : - the distress must be of the giver and not of the receiver.

(c) सदृशः—Sadrisam—the boy is to be of the same class.

Explained by Kulluckvatta, Medhathithi, and Vijnanesvara.

Discussion in Mayukha.

(d) Confirming the gift by pouring water. Certain ceremonies are performed.

2. The system of adoption is older than Manu, References in the Veda, Epic period & Sutra period.

3. Twofold object in adoption :—

(a) Funeral oblations, libations of water, and obsequial rites.

(b) Celebrity of name.

4. The adopted son is entitled to take the inheritance.

Manu IX, 141, 142, 159.

Yajnavalkya says very little about adoption, Even Manu is scanty. The other smritis and commentaries fully discuss the question.

—:—

Lecture V.

Hindu Family.

A

Vedic age.

I. Kula—As an un-compounded word, kula does not occur before the period of the Brahmanas, (Satapatha Brahmana. I, I, 2, 20 ; II. 14, 4 ; 4—I—14 ; XI, 5, 3II ; 8, I, 3 ; XIII, 4, 2, 17). It denotes the home or house of the family and by metonymy the family itself, as connected with the home. The word kulapa—chief of the family—occurs in the Rig Veda (X, 179, 2.) It implies a system of individual families, each consisting of several members under the headship of the father or eldest brother, whose kula the dwelling is. The word Gotra has a wider and kula a limited significance.

Macdonell's Vedic Digest Vol I—p 171.

2. Family—the first unit of law.

A corporate body. Evolution tends to individualisation.

(Sir Henry Maine's View)

3. Patriarchal family—Grihapati of the Vedic age—consisting of father with one or more wives and their offsprings and other dependent persons including slaves. Father absolute owner of wives, children and property.

Strange (p 62)

4. Family develops gradually into clans, tribes and civil communities,

5. Modern view of the origin of human families. Patriarchal family was not the beginning of the society. At the beginning there was a horde, the members of which were not considered as children of certain persons, but rather as children of all the father's and mother's in the community. Institution of marriage introduced patriarchal family. Patriarchy was of latter growth.

6. In the Vedic age we find patriarchy. The Aryans had, therefore, advanced a great deal from the primitive state.

7. Household duties as laid down in the Rig and Yajur Vedas—shew the state of the family and the power of the Grihapati.

Pundit Dayananda Saraswati's work p, 280—282

8. Members of the family:—

(a). Husband and wife united by religion, ancestorworship, household duties and love. A man without a wife could not partake of Soma juice (Aitareya Brahman) celibacy was condemned (XXXII, 8). Power over wife was less than over children. The wife could not be killed or sold away. No divorce so long as the husband lived. (Rig Veda X, 39, 14 ; X, 85, 13).

9. Collaterals such as brothers, cousins, nephews. The eldest member usually became the head of the family.

10. Mayne points out the anomalies in the family law of the Hindus. In chapter IV page 73 of his work on Hindu Law, 8th Edition he points out—"No part of the Hindu Law is more anomalous than that which governs the family relations. Not only does there appear to be a complete break of continuity between the

ancient system and that which now prevails, but the different parts of the ancient system appear in this respect to be in direct conflict with each other. We find a law of inheritance, which assumes the possibility of tracing male ancestors in an unbroken pedigree extending to fourteen generations, while coupled with it is a family law, in which several admitted forms of marriage are only euphemisms for seduction and rape, and in which twelve sorts of sons are recognised, the majority of whom have no blood relationship to their own father. I am not aware that any attempt has hitherto been made to harmonise, or to account for, these apparent inconsistencies.”

It may be submitted here that the ancient Hindu feeling was too delicate and tender to call most of the marriages as no marriage, and most of the children as illegitimate. But when the question of inheritance arose the difference was observed so that the claim of real heirs could not be prejudiced. Of the twelve kinds of sons, six could inherit and the rest could not. They were all necessary in the primitive state of society for prestige and self preservation. Numerical strength was felt a great necessity in the patriarchal family. The Brahmanic influence introduced purity and the doctrine of spiritual benefit could be expected in the end from only three kinds of sons—Aurasha, Dattak and Kritrima. All other sons were not recognised. They were maintained out of pity and tenderness, but the law of inheritance remained intact on fixed principles. Village community was distinct from Hindu joint family. It was not a landholding institution and the family was a land owning unit.

Arrested expansion of the Patriarchal family. Its origin and nature.

Mayne p, 304—305.

Different forms of corporate bodies—the Patriarchal family, the Joint family and the Village Community are considered, Mayne p 298.

11. Herbert Cowell in his Tagore Law Lectures of 1870—Lecture V, p 107—108 says that the Hindu Joint family is a corporate body. The family was, and even now to a great extent, the unit of Hindu Society, just as in western nations, the individual is the legally recognised unit. The Kanta is not invested by the shastras with despotic power. “Neither the term partner, nor principal, nor agent, nor even coparcener, will strictly apply. He is in fact a sort of representative owner, his independent rights being limited on all sides by the correlative rights of others, and burdened with a liability coextensive with his ownership, to provide for the maintenance of the family”.

12. Mr. Sarvadhikari in his Tagore Law Lectures of 1880—2nd Edition—explains clearly that the family was the unit of social organism (p 50), severance of individual from the family (p 51) political aspect of the patriarchal family (p 168), numerical strength was a great necessity in the patriarchal family (p 169), there was elasticity in the family law in early times (p 168)

13. Much useful information can be had from Dr. Jolly’s work on Hindu Law and Custom ff 22—pages 166—176.

14. Joint family—joint living, joint worship, joint possession of property, peace and harmony.

B.

Brahmanic Period.

1. The patriarchal system still continued. The power of the Grihapati was fully recognised.

2. Society became close and compact. The four castes were established. The Brahmanic or the priestly caste became supreme.

3. Government was also well established. The Kshatriyas began to flourish.

4. Patria potestas extended even in the case of adult sons. Implicit obedience to the head of the family was the chief characteristic.

(a) Rama went to exile at the behest of his father.

(b) Parasurama killed his mother under the order of his father.

(c) The union of the Pandavas under the leadership of their brother Yudhishthir was characteristic, shewing the nature of joint family.

5. Religion became gradually artificial and complicated. It permeated through families deeply influencing the social and the political life of the people. Ceremonies of various kinds brought together various relations, and strengthened the family ties. Joint worship kept up joint family.

6. Ancestorworship of a pure and simple type was, in this period, developed into various ceremonials.

7. The influence of females in a family.

They enjoyed rights and could take part in all

religious ceremonies. They were the mistresses of the household, and the children were dependent on them.

In the Sutra, Kautilya and the Buddhistic periods we find nothing special. The doctrine of spiritual benefit, various religious ceremonies well marked the families of the first period, whereas in the other two periods, political developments caused some changes in external matters, but the rules of law allied with the religious instincts of the people kept up a striking uniformity and stability for ages together.

Period of Manu Smriti

1. Duty of begetting a son. Hence celibacy is condemned and marriage recommended. The three debts are paid by the birth of a son.

(Manu II, 28)

2. Through a son a man conquers the worlds, through a grandson he obtains immortality, but through his great grandson he gains the world of the Sun.

A son delivers his father from hell.

Manu IX, 137, 138.

From this idea springs a family of which the father is the head. Reverence towards parents keeps the family intact.

Manu II, 145—148 ; 225—237 ; IV, 162, 170—180, 182.

3. A patriarchal family. Father's power :—

(a) Power of control and management.

(b) In case of inability a competent son can manage,

(c) Father gives daughters in marriage.

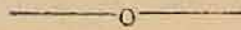
Manu V, 151 ; IX, 88-89.

If not given in marriage at proper time, the father loses power, and the daughter is free to act. (Manu IX, 90, 93)

4. Who are the members of a family :—

- (a) Males from common ancestor.
- (b) Their wives and maiden daughters.
- (c) Poor dependants and slaves, and the illegitimate son.

Joint family—a normal condition.



Lecture. VI.

Minority and Guardianship

A.

Vedic Period.

1. Patria potestas absolute in India. The father is the guardian of the child whether major or minor, Parental relationship a derivate of the conjugal.

The origin of guardianship—a corollary to patria potestas.

2. History of guardianship in Greece, Rome, Germany compared with that of ancient India.

A Summary of the Roman Civil Law Vol I Colquhoun
p. 575—580.

(a) Legal tutor, parents, etc etc.

(b) In India.

(1) The sovereign is the universal guardian in the absence of any other legal guardian.

(2) Parents both legal and natural guardians.

(3) The agnates are preferred to the cognates.

Vyavastha Darpan—Vol 1, p. 598.

Strange—Hindu Law Vol I—p. 71.

Modern Legal Philosophy Series Chapter XX,
p. 712—720.

Colebrook's Digest Vol. III p. 542.

3. (a) In the matter of majority completion of the 15th year in the case of Hindus.

(b) In Germany the Roman Law is generally followed, and 25 is the age fixed for majority; in France it is 21; in Holland, 25; in Spain and Italy, 25; in Denmark 25; and in Russia, 21 but at 18 a party may receive revenue or estates. The South American States follow in this respect the law of the original settlers.

By the law of England—a male at 12 years old may take the oath of allegiance, at 14 is at years of discretion, and therefore may consent or disagree to marriage—may choose his guardian, and, if his discretion be actually proved may make a will as regards his personal estate; at 17 may be an executor; and at 21 is at his own disposal, and may alienate his lands, goods, and chattels.

Different periods are provided for females.

The same author Colquhoun on a summary of the Roman Civil Law Vol I p 357—358—Sections 365 & 366.

4. In the matter of marriage, the girls after attaining puberty would generally select their husbands. If consent of any body was needed, it was of the parents and of the brother after the death of the parents.

(Rig Veda X, 27, 12; X, 83, 9; VIII, 1, 6; I—24—7)

5. Instances of marriage by free choice, as in the cases of Sabitri, Sakuntola etc,

B.

Post Vedic period.

1. In the matter of marriage the power of

guardians increased, The girls especially if they were minors could be given in marriage only by their guardians.

2. In the matter of marriage, the girls instead of being an active agent became gradually a passive agent.

3. Even in the case of adult girls, they were guided by the resolution of their parents, as in cases where girls could be married by winners of stakes. Illustrations: Sita, Draupadi, etc.

4. The different kinds of marriage shew the influence of guardians. In Asura form of marriage the girl was virtually sold by the guardian to the person who became her husband.

5. Child marriages made the position of girls worse and invested guardians with considerable power.

6. Position of women gradually degenerated into perpetual tutelage.

7. Persons though not minors were treated as such. Disqualified persons such as idiots, lunatics were treated as minors. Differences between them.

8. Minority lasted until the completion of the fifteenth year.

(a) Sir Gurudas Banerjee in his work on Hindu Law of Marriage and Stridhana, 3rd Edition—p 37.

“Marriage being one of the matters not affected by the provisions of the Indian Majority Act (IX of 1875), for the purposes of marriage, a Hindu attains majority on completing his fifteenth year.”

Colebrooke's Digest Book I ch V, 188; Book II ch IV, 15.

(b) Mayne in his Hindu Law 8th Edition, p 138 states :—"In general, the Hindu Law books speak of the age of discretion and majority as convertible terms and treat each period as being attained at the sixteenth year. But a further subdivision is stated, viz, infancy to the end of the fourth year, boyhood to the end of the ninth, and adolescence to the end of the fifteenth."

(c) Again the author at page 275 points out the difference of opinion as to whether the age of majority was attained at the beginning, or at the end of the sixteenth year. "The Hindu writers seem to take the former view, and this was always held to be the law in Bengal. The latter limit is stated to be the rule in Mithila and Benares, and was followed in Southern India and apparently in Bombay."

The Institutes of Manu.

1. Disqualifications of an infant.

(a) A child that is less than two years of age is not burnt at death but buried.

Manu V, 68-69.

(b) Incompetent to be a witness,

Manu VIII, 66.

Exceptions—Manu, VIII. 70-71.

(c) Incompetent to perform sacrifice or to recite the Vedas.

Manu II, 171-172 ; XI, 36, 37.

(d) Incompetent to enter into contracts,

Manu VIII, 163.

2. (a) A minor is protected by the king, who acts as the guardian.

Manu VIII, 27

(b) No limitation in his case.

Manu VIII, 148, 149

3. A minor is not punished for committing a nuisance on the king's high road, except that he is reprimanded and directed to remove the nuisance.

Manu IX, 283.

4. A minor is under the care and control of his teacher, Guru and father and other natural guardian. But the chief guardian is the king. On adoption the guardianship ceases.

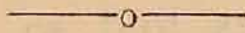
5. A maiden is under the guardianship of her father, who can give her in marriage. If not given in marriage in proper time she may act independently of her father, and choose a husband for her.

Manu IX, 88, 89, 90, 93.

6. A female is never independent. A son, a wife and a slave are never independent. Exceptions.

Manu V, 147—149,

IX, 2—3; VIII, 416; IX 206



Lecture VII.

Law of Property.

A

Vedic Period.

1. In considering the law of property three elements strike us at the outset :—the Patriarchal family, the Joint family and the Village Community. In the Punjab and in southern India among the Tamil race the system of Village Community still exists. In Bengal the systems have long broken up. The right of a Village Community may still arise in the case of a common pasturage, a common village tank or pathway and in the matter of settling boundary disputes between villages.

Mayne—Hindu Law—8th Edition, p. 298 & 312.

2. In the matter of family and village ownership the laws of ownership would decide it.

Rig-Veda X, 62, 71 ; X, 107, 5.

3. Laws of property not simple, when the social relations were so complex and so varied. There are no continuous treatises of law in the Vedic writings. Difficulty of exactly determining the state of law in the Vedic period. This is due to the absence of continuous treatises on law. Other matters relating to the patriarchal age.

Mr. Sarvadhikari's Lecture

2nd Edition—p p. 165—167.

4. Dr. Jolly in his work on Hindu Law and

Custom relating to Law of Property at p 196—201 deals with the questions of possession, ownership and prescription. Various ways of gaining ownership, partial ownership by bringing under plough a piece of land lying fallow for sometime, various means of livelihood, possession cannot prove ownership and various other matters are dealt with. Much information on the subject can be had from his writings.

In this case the following reference from the Rig-Veda may be useful.

Rig-Veda VI, 25, 6 ; V, 125, 4 ; X, 62, 11.

5. The Aryans in the Vedic period were much advanced. Agriculture was much resorted to and hence much value was set on lands. Krishi—ploughing was much known to the Indians before they separated from the Iranians. The expressions for ploughing occur mainly in the first and tenth books of the Rig Veda.

Rig Veda I, 23, 15 ; 176, 2.

Rig Veda X, 34, 13 ; 117, 7.

Many other references may be quoted.

Macdonell's Vedic Digest Vol I, 181.

6. Mode of acquisition of property.

Strange's Hindu Law, p. 13—14.

7. Sir Henry Maine's views—

(1) Natural modes of acquisition—occupation or occupancy—Possession.

(2) Capture in war—conquest.

(3) Finder of things.

There are other modes of acquisition:—Inheritance, Gain, Purchase (Rig Veda VIII—32—20), Usury, By labour,

Gift and Acceptance—(Rig Veda I—125, 126), Possession of *res nullius* (Rig Veda X, 155—3).

8. Divine origin of wealth. How secured by worship.

9. Agriculture and not commerce and manufacture is the chief aim of the Indian people from the earliest time. Land was the chief property.

10. Various kinds of property:—

(a) Family property.

(b) Private or separate property.

(c) *Stridhana* or woman's property.

(d) Property of religious institutions.

(e) Property partaking of the nature of *Juera regalia*.

(Strange's Hindu Law p. 17)

(f) Joint ownership of moveables and land.

(Rig Veda, V—25, 6 ; I25, 4)

(g) No individual ownership by members of a family. Individual ownership in homestead lands recognised.

(h) Slaves regarded as property. Impertible nature of a woman slave. Slaves regarded like moveable property.

(Rig Veda VI—25, 6 ; I—92, 7)

(i) Children were also regarded as the property of the father.

(Rig Veda V, I25, 4)

II. In the Rig Veda mention is made of several classes of property:—

(X, 107—7—11 ; VII, 54—3 ; VI—25, 4).

12. Possession of another's property was held wrongful. Prescriptive right how far recognised.

(Rig Veda X—86, 18)

13. The non-Aryans could not claim any right to property. Not so in the case of the Aryans.

(Rig Veda III—53, 14)

B.

Post Vedic Period,

(a) Brahmanic Period.

1. The king was now regarded as the owner of all lands.

2. Grants of lands were made by the king to the family. Even grants to an individual enured to the benefit of the family.

4. Village Community. Interest in land belonged to the whole community. Even the king could not make a grant of land to any one without the approval of the community or the clansmen.

4. The word Kula does not occur before the period of the Brahmanas.

Satapath Brahman, I, 1, 2, 22;

II, 1, 4, 4; 4, 1, 14; XI. 5, 3, 11; 8, 1, 3;

XIII, 4, 2, 17;

The Kulapa—chief of the family is mentioned in the Rig Veda (X, 179, 2). His position in the family is considerable. Dependant member's position is insignificant.

Even the Kulapa could use the land excepting for the purpose of cultivation.

He was the owner of all family property and the dependant members simply enjoyed it without any claim of ownership.

5. The story Rohita and its significance.
6. In the case of Kshatriyas, individual right in property was claimed by conquest. The king could certainly claim by conquest.
7. Gifts of property for religious purposes were very much encouraged.
8. Women had not yet any right of property.
9. Sudras could not have lands. Women had not yet any right of property.
10. In this period we see the rise both of the Brahmanas and the Kshatriyas. The result was that there was ample provision for the protection of property.

(b) Sutra Period

I. Self-acquisition is clearly recognised in this period. Self-acquisition—in capacity of adhayadhinas for ownership—right to self-acquisition gradually recognised.

Absolute ownership in self-acquisition.

(Gautama and Vasishtha)

2. (a) Division of property in equal shares.
- (b) Development of the law coeval with the emancipation of the individual from the family thralldom
- (c) Hostile doctrine in the Taittiriya Sanhita and the Brahmana.
- (d) Possibility of their co-existence.
- (e) Changes in the law of division of property.
- (f) Gautama, Baudhayana, Apastambha, Basishtha etc. are cited.

Mr. Sarvadhikari's Tagore Law Lecture of 1880—
2nd Revised Edition p. 176—180.

3. Land not transferable except for sacrificial fee.
4. Special modes of acquisition by the four castes:—
 - (1) Protigraha or acceptance by the Brahmana.
 - (2) Conquest by the Kshatriyas.
 - (3) Cultivation or trade by the Vaisyas.
 - (4) Service by the Sudras.
5. General modes of acquisition:—

Inheritance, Gift, Purchase, Partition, Seizure or finding.

(Gautama X)

6. Right by adverse possession—prescriptive right—is well recognised.

Gautama & Vasishtha Sutras

7. Possession, right and limitation as understood by ancient Hindu Law.

8. Hindu family property. Its management by the corporate body, and on the decay of the communal system, by the Karta. The position of the Karta discussed.

9. Women's right in property recognised.

10. Other matters relating to property in ancient India concerning partition, alienation impartible property, charge for family maintenance.

(c) **Kautilya Period**

1. All lands belong to the king, just as in the Brahmanic period. The divine origin and acquisition by worship are mentioned in the Vedic period.

(**Kautilya II—1**)

2. Grant of land by the king. Heritability was well established. Grants temporary or permanent.

Great delicacy was felt in the matter of ejection especially of homestead lands.

3. The king had the power to resume the lands and revoke the grants under certain circumstances.

(Kautilya II—1)

4. What is due to the king is either rent or military service.

(Kautilya II—6 VIII-4)

5. Land used mainly for cultivation.

6. Property not lost by adverse possession of a wrong doer. (Kautilya III-10,16).

7. Status of women much improved. Stridhana property recognised.

8. Joint family property and Self acquired property. Differences pointed out both in the matter of right and enjoyment. Both sorts of property are recognised by Kautilya.

9. All mines and treasure trove belong to the king. The private owner has right to the surface of the demised land.

(Kautilya II-12, IV-1)

10. Right of pre-emption is allowed in particular cases. The following order is preserved—kinsman, neighbour, and creditor.

11. Village system is recognised. The kingdom is divided into districts, which are subdivided into villages.

12. Full records of lands are kept, and transfers are also recorded.

(Kautilya II-35)

13. The power of the husband over the stridhana of his wife. How she forfeits her right to property.

14. The widow has no title to her husband's property. She is entitled to enjoy it if she lives a pious life and remains chaste even though she may be barren.

(d) **Buddhistic period.**

1. No testamentary power.
2. Husband and wife are heirs to each other.
3. Inheritance never ascends to parents or older relatives, when descendants are in existence.

4. Other noticeable features peculiar to Dharma that :—

(a) The right of the eldest child to a share in the inheritance on the death of one of the parents.

(b) The nature of the widow's or widower's estate.

(c) The right of representation by heirs of deceased children.

(d) The partition of property amongst children of the same parents and of two or more successive marriages.

(e) The twelve classes of children. Six of them are entitled to inheritance and the other six are excluded.

(f) The causes of exclusion from inheritance.

(g) The inheritance by a stranger.

(e) **The Institutes of Manu.**

1. Among the eighteen titles of litigation mentioned by Manu the dispute regarding boundaries is one. This shews that ownership of landed property was fully known.

2. Individual property and corporate property were both known in the time of Manu.

3. Corporate property was held by the patriarchal family, the joint family or the village community. The patriarchal family was the ancient type. There was also the village-community. The joint family was a later production, which was dissolved into individuals. Property was held by the patriarch, or the village community, or the head of the joint family for the family and lastly by the individual.

Mayne—Hindu Law-Chapter VII.

4. Acquisition of property by occupancy a field, by clearing away the time, and in the case of a deer by first wounding it.

Manu IX, 47.

5. Seven lawful modes of acquisition of property.

Manu X, 115.

6. Individual property well-known.

7. Self acquired by father (Manu IX, 209).

8. Separate property of sons, Gains of science, etc,

Manu IX, 206.

9. Ornaments of women—their separate property,

Manu IX, 200.

10. Stolen property to be restored to the owner by the king.

Manu VIII, 40.

11. Property found if not claimed within 3 years goes to the king.

(Manu VIII, 30)

12. For boundary disputes :—(Manu VIII, 245, 246)

13. Various kinds of property :—

(a) Movable, immovable and Nibandha.

- (b) Obstructed and unobstructed heritage.
- (c) Joint and reunited and separate property.
- (d) Partible and impartible property.
- (e) Public and endowed property.
- (f) Stridhana property.

14. Ancestral debts. Son and grandson liable. Great grandson not liable. Debts incurred for immoral or illegal purposes. Nonliability of sons and grandsons.

Manu VIII, 156, 166.

15. Alienation by father :—

(a) Alienation of immovable property prohibited in Smriti texts.

(b) Property lost but recovered by the father belongs to him.

Manu IX, 209.

16. Partition :—

(a) During the father's life time the sons have no claim to partition. But he can proceed under IX, 215.

Manu IX, 104.

(b) After the death of the father the sons may divide. Separation is meritorious.

Manu IX, 104—111.

(c) The eldest son may take the whole paternal estate, the others shall live under him as they did under their father.

Manu IX, 105.

(d) The eldest son occupies a high position and is superior to the rest. Hence Manu consider him as de-

servicing of the whole parental estate. Even if division is allowed, the eldest gets special shares.

(Manu IX, 112—117, 119)

There may be unequal distribution.

Manu II, 116.

(e) If the father divided or if the sons divide, the wives or the mothers get a share equal to that of a son provided they got no stridhana. Sisters should get one-fourth share.

Manu IX, 148.

(f) Partition between different persons according to Manu. Chapter IX.

17. Impartible property :—

(a) A single goat or sheep or a beast having cloven hoofs—not divisible. They are taken by the eldest son alone.

Manu IX, 119.

(b) Primogeniture—The eldest son inherits alone on account of his excellence.

(c) Sale of wife and children forbidden.

Manu XI, 62 ; IX, 46.

(d) Sale of garden, tank, etc, is prohibited.

Manu XI, 62.

18. Women's Estate :—

(a) Sixfold property of a woman.

Manu IX, 194.

(b) Father's gifts other than nuptial presents.

Manu IX, 198.

Interpretations of the text by Jimuta Vahan, Sri-krishna and other authorities.

Lecture VIII.

Laws of Inheritance and Succession.

A

Vedic Period.

1. "The word *Daya* occurs in the Rig veda (X, 114, 10) only in the sense of 'reward' of exertion (*Srama*), but later it means inheritance. The passages all negative the idea that the property of the family was legally family property, and thus it was the property of the head of the house, usually the father, and the other members had no legal but moral claims upon it which the father could ignore, though he might be coerced by his sons if they were physically stronger".

Macdonell's Digest Vol I p 351.

2. The strict doctrine of *patria potestas* was opposed to the legal claims of sons as against their father. Gift by father to his sons was operative.

(Rig Veda III, 45, 4)

3. The heir is called *Dayada*—receiver of inheritance. (*Satapatha Brahmana* XII, 4, 3, 9; *Nirukta* III, 4.)

4. The word *Pitris* occurs in the Rig Veda. It simply meant ancestor. It is always used in the plural.

(a) Solemn sacrifices in honour of the dead formed no part of the Vedic ritual at first.

(b) The term *pitris* in the Rik hymns applicable to ancestors in general.

(c) Its limitation to the first three ancestors in the White Yajur Veda.

(d) Later classification into cognates, agnates and gentiles.

(e) Intimate connection between ancestorworship and rules of inheritance. Inheritance is mixed up with religion.

(f) Sraddhas are not mentioned in the Vedic hymns. They are distinguished from Vedic ancestral sacrifice.

(g) Sraddhas were developed in the Sutra period.

The above points are fully dealt with by Mr. Sarvadhikari in his Tagore Lecture of 1880—2nd Edition—pages 24, 25, 29, 31, 36.

5. The following persons were heires in the Vedic Age :—

(a) Son. The Rig Veda expressly indicates the succession of a son to his father's estate (70—5, 73—1, 9 : II, 25, 2 ; VII, 67, 6; 97, 2 ; VIII 96, 11 ; X, 32—3).

(b) An adopted son did not inherit his adoptive father's property.

(c) No preference to the eldest son. In the Veda there is a passage that Manu divided his property among his sons in equal shares. (Taittiriya Samhita III, 1, 9, 4).

See also Muir, Sanskrit Texts—191 -194.

More than one Smriti text declares that in case of partition among the brothers, the eldest brother is to get a larger share than the younger. In this conflict the Veda has prevailed and equality is the rule of law.

(Rig Veda VII, 2, 34)

Tagore Law Lecture of 1905 p 214.

(d) The father by partition could distribute his estates among his sons.

(1) (Rig Veda III, 154 ; X 61).

(2) Grandsons—(Rig Veda VII, 67, 9)

(3) Widow—(Rig Veda—X, 102, 11).

(4) Daughters—(Rig Veda III, 31—2).

(5) Daughter's son—(Rig Veda, III, 31—1).

(6) Collateral relations, who were called Dayadas *i. e.* heires.

6. Instances of succession :—

Swayambhuba Mauu.

Satarupa son of Birata.

Sons Priyabrata and Uttampada.

Sons of Priyabrata— Agnidhar and others.

Father's paternal kingdom divided among seven sons.

7. Kings could disinherit the legal heirs and give away the kingdom freely. Jayati gave away his kingdom to his youngest son.

8. Immovable property not divisible, movables divisible.

9. Primogeniture :—

Upon the death of the head of the family the eldest son succeeds.

(The Vedic Aryans—series II, p. 37.)

10. Inheritance and succession were gradually affected by the subsequent caste-system and the development of the doctrine of spiritual benefit.

11. Status of illegitimate children.

12. Other matters relating to the subject.

13. The law of heirship is discussed by Dr. Jolly at p. 184—185 of his work on Hindu Law and Custom.

B

Post Vedic Period

(a) The Brahmanic Period

1. No material change in the law of succession. The doctrine of spiritual benefit was being gradually developed.

2. The eldest son in the matter of inheritance had no superior right. But in religious matters his superior position was acknowledged.

3. The eldest son after the death of the father became the head of the joint family.

4. Primogeniture in the case of kingdoms and principalities. But the king had the power to give away the kingdom to a younger son. King Dasarath gave away his kingdom to his second son Bharat for 14 years to the exclusion of Rama the eldest son. The question was disputed, but Rama quietly submitted and there the matter ended. As regards Ramchandra himself he gave away a portion of his kingdom to his sons and the rest to his youngest brother and nephews. The king could disregard the law of primogeniture. If Pandu excluded his elder brother Dritarashtra, it was on a different ground i. e. exclusion for blindness.

5. Joint family broke up on account of discord and disunion and by partition.

6. It is said that the priestly caste encouraged the break up of joint families for greater gains—statement criticized. It is taking a very low idea of the

dignified and pure character of the Brahmins. A similar view ascribing the introduction of Sraddhas etc to the Bengali Brahmins is criticized by Mr. Sarvadhikari in his Tagore Lectures at p. 243.

(b) Sutra Period.

1. Detailed rules of inheritance appear in the sutras. Inheritance is also alluded to in the Aitareya Brahmana (VII. 17).

Sankhayana Sranta sutra (XV. 27,3). Satapatha Brahmana (I. 7, 2, 22; III, 2, 1, 18).

2. Spiritual benefit—Oblations, Parvana Sraddha, and Pindas. It is the criterion of the right of inheritance. Sraddhas were developed in this period.

Mr. Sarvadhikari's work. The pages are noted below :—

- (a) Gautama-his precepts on Sraddha p. 37.
 His interpretation of Sapinda—p. 40—41.
 On administration of law—p. 123—124.
 On division of property amongst sons p. 178—179.
 On succession, sons failing—200, 204—205.
 His mention of widow as heir—p, 210.
- (b) Apastambha—a puritan and revolutionist.
 His attempt to overthrow Baudhayana's conservatism—p. 136, 137.
 On the laws of division p. 180.
 On eldest son's right—p. 185.
 On succession—p. 200, 207.
 His views compared with those of Vasishtha—p. 207.
 On exclusion of women as heirs p. 207.
 Mentions daughters as heirs p. 209—211.

(c) Baudhayana—

Agrees with Apastambha—p. 135.

Difference between them—p. 136, 137.

Followed Gautama—p. 136.

On illegitimate sons—p. 141.

On succession—p. 200, 205, 206.

On exclusion of women from inheritance
p. 208.

On Sapinda—p. 205.

(d) Vasishtha—

Defends Baudayana's doctrines against Apastambha.

Advocates ancient institutions p. 140.

On division amongst sons—p. 180.

Special proportions are reserved for different sons.

On different classes of sons—p. 189-190.

On succession—p. 201, 207.

On women—p. 208.

On bandhus—p. 222.

The exhaustive notes on the writers of the Sutra period in the pages noted above can hardly be expected from any other writers. Much useful information can be derived from those pages of the work.

3. Inheritance and succession were gradually affected by caste and intermarriages giving rise to various mixed castes.

4. The heirs are Sapindas, Sakulyas and Samanodokas. The Sapindas are those who partake of undivided oblations, the Sakulyas partake of divided oblations, and the Samanodokas are those who share in libations of water. The terms are defined by the Sutra writers.

5. Putrika and her son are deprived of the right enjoyed before.

6. Succession to Stridhana property according to Gautama Dharma Sutra. Special rules of succession.

7. Status of illegitimate children to inheritance and maintenance.

8. Law of heirship—The Pinda decides the heir. But this rule is not universal.

Dr. Jolly—p. 184.

9. The rules determining the right of succession to the property of hermits or ascetics. Their heirs are preceptor, the virtuous pupil, and the spiritual brother.

(c) **Kautilya Period.**

1. See the synopsis regarding the Law of Property (c) Kautilya Period.

2. Joint family and individuals composed of it. Right of individuals recognized. Selfacquisition of a particular individual is recognized.

(**Kautilya III, 5.**)

3. A woman's right to her stridhana property is recognized. Though her condition in this period was much improved, she could not assert her freedom against her husband, who had right to control her free use of her special property.

(**Kautilya III, 2**)

4. Inheritance is based on Pinda theory.

(**Kautilya III, 5**)

5. Order of succession—descendants, ascendants and collaterals. The Sapinda or Sakulya succeeds,

6. Self-acquired property is distinguished from ancestral property. A son may have his self-acquired property if it is acquired without any help from the parental fund.

7. A son gets a double share if the ancestral property is considerably improved.

8. The eldest son has special claim over some property at the time of partition. Even an impotent eldest son will get one third of the special share due to a competent son.

9. Unequal division is prohibited.

10. Sons born of marriage according to religious rites are preferred to those born of marriages performed without such rites.

11. Rules of succession applicable to sons born of mothers of different castes :—

(a) The lower is the caste of the mother, the less is the share of her son.

(b) A son by a Brahmana on a Sudra woman takes a third share.

(c) Sons born of wives of next lower castes have equal shares in the property inherited.

12. The law of primogeniture is decided by birth. It is the result of customary law.

(Kautilya III, 6)

13. Succession to stridhana property :—

(a) Sons and daughters divide equally.

(b) If there are no sons, the daughters take the whole.

(c) In their default, the husband takes what he has given her.

(d) The relations take back their gifts.

14. Succession to the property of hermits is regulated in the following order :--

(a) Preceptors, (b) Disciples, (c) Brethren or class-fellows.

(d) **Buddhistic Period.**

1. No testamentary power.

2. Husband and wife—heirs to each other.

3. Other noticeable features peculiar to the Dharma and mentioned in the Buddhistic works enumerated in the Introductory Lecture.

4. The right of representation by heirs of deceased children.

5. The twelve classes of children. Six of them are entitled to inheritance and the other six are excluded.

6. The causes of exclusion from inheritance. See the Chapter VIII on Exclusion.

7. Inheritance by a stranger.

8. Alienation of ancestral property originally restricted.

9. Law of pre-emption.

(e) **The Institutes of Manu.**

1. The doctrine of spiritual benefit was fully developed in the Sutra period. Sraddhas were also introduced. By the laws of Manu they were fully supported. The religious aspect of the question was prominently noticed.

2. The necessity for connecting inheritance with pinda was duly felt. The doctrine of pinda was made applicable to cases of disputed succession. It is traceable to mediæval legislators. It is wrongly supposed that the doctrine is a later innovation on the part of the Bengali Brahmins. There are numerous texts in the Sruti and Smriti works which fully repudiate the gratuitous assumption that the theory of spiritual benefits was a myth in Hindu Law, and a figment of the Brahmanic brain in Bengal.

Mr. Sarvadhikary's Tagore Law Lectures of 1880—2nd Edition—p. 243.

In this connection may be noticed the observations of Mayne & Sir Thomas Strange to the effect that the selfish character of the priests giving rise to various sacrifices, worship etc, as a means of their livelihood. The priests followed the injunctions of the shastras contained in the Sruti and Smriti works in force for centuries. No selfish motive can be ascribed to them.

3. Of the 18 titles of litigation enumerated by Manu, the present lecture deals with the seventeenth title Bibhaga (Partition), which includes inheritance and adoption.

(a) The principal text of Manu on this point. "To three must libations of water be offered, to three must pinda or oblation of food be given; the fourth descendant is the giver of these pindas, the fifth has no concern with them. To the nearest Sapinda the inheritance next belongs. After him the Sakulya is the heir, then the preceptor or a pupil. On failure of all these heirs, a Brahmana versed in the three Vedas, pure and a subduer of passions becomes the heir and lastly the king except in the case of the estate of a deceased Brahmana.

(Manu IX, 186—189)

(b) Various interpretations have been put on the above texts :—

(1) Meaning of Sapinda in the matter of marriage, inheritance, and mourning.

(2) The term 'three' and 'pinda'. The doctrine of spritual benefit explained.

(3) Bombay school—"To the nearest Sapinda, male or female, the inheritance next belongs. This is due to the translation of the passage by Sir William Jones.

(4) Madras school—The passage is differently translated.

(5) Dayabhaga and Mitakshara on the passage.

(c) Succession to a male :—

(1) Eldest son, preference shewn to him.

Manu IX 105, 108.

(2) Sons take equally. IX, 104, 156 to 158,

(3) Adopted son—IX, 141, 142.

(4) Son of appointed wife or widow.

IX, 120—121, 145—146, 190—191.

(5) Among the six kinds of subsidiary sons, each better one inherits before the rest. IX, 158, 165, 184.

(6) Son born after partition IX, 216.

(7) Illegitimate son of a sudra—IX, 179.

(8) Unmarried daughter inherits one-fourth share IX, 118.

(9) Appointed daughter IX—130.

- (10) Son of appointed daughter, IX, 131, 134, 136.
- (11) Husband of appointed daughter IX, 135.
- (12) Son of daughter not appointed, IX, 136, 139.
- (13) Father and brothers—IX, 185.
- (14) Mother and paternal grandmother. IX, 217.
- (15) Sapindas, Sakulyas, teacher & pupil. IX, 187.
- (16) Brahman as pure in character and versed in the the Vedas IX, 188—189.
- 17) The king. But he is not an heir to a Brahmana.

(18) Children of eunuch etc,—IX, 203.

(d) Succession to female ;—

- (1) Son, daughter—IX, 104, 192, 195.
- (2) Unmarried daughter—IX, 131.
- (3) Daughter of a Brahman wife—IX, 198.
- (4) Daughter's daughter—IX 193.
- (5) Husband—IX 196
- (6) Mother and father—IX, 197
- (7) Succession or reunited co-possessor IX, Sixfold property :—IX, 210,—212.
- (8) Succession varies accordingly as the marriage is in the approved or disapproved forms, as the property was given at the marriage or before or after marriage.
- (9) The meaning of "Brahmani damsel." Two meanings. The expression Kanya—whether it means a daughter or a maiden daughter.

4. Certain persons are excluded from inheritance.

Manu Chapter 9 IX & XI.

See Lecture VIII, of this Thesis.

Lecture IX.

Exclusion from Inheritance.

A.

Vedic Period.

1. (a) The strict rule of *patria potestas* of the father is inconsistent with the view that the sons were legally owners with their father. The property of the family was not legally family property: it was the property of the head of the house, usually the father, and that the other members of the family only had moral claims upon it which the father could ignore, though he might be coerced by his sons if they were physically stronger.

(b) After the death of the father the elder son was usually preferred. (Taittiriya Samhita II, 5, 2, 7). During the father's life time another might be preferred (Pancavimsa Brahmana XVI, 4, 4).

(c) Women were excluded from partition or inheritance (Satapatha Brahmana IV, 4, 2, 13 and Nirukta III, 4.)

(d) The exact legal position of daughters is not clear enough. The Rig Veda, however shews that in the place of a father the brother was looked to for aid that brotherless maidens were apt to be ruined.

(Rig Veda 1, 124, 7)

Moreover women could not take an inheritance and were not independent persons in the eyes of the law, whether married or not.

(Taittiriya Samhita, VI, 5, 8, 2; Maitrayani Samhita IV. 6, 4; Satapatha Brahmana IV. 4, 2, 13; Nirukta III. 4)

Macdonell's Vedic Digest Vol. 1—p. 351—352, Vol II p. 485—486.

2. (a) Rights of women to inheritance considered. Women are powerless and do not succeed to the heritage (Black Yaju VI. 3, 8, 2).

(b) Vedic text and its interpretation by commentators considered.

Mr. Sarvadhikari—Tagore Law Lectures—2nd Edition—p. 353.

3. The following work of distinguished Jurists may be consulted :—

(a) The authors named above.

(b) Mayne's Hindu Law—8th Edition—Chapter XIX,

(c) Dr. Jolly's work on Hindu Law & Custom Pages 152 and 159.

(d) Strange—Hindu Law (1830) part II Chapter VII—p 152.

(e) Shastri Golap Chandra Sarker's Hindu Law—Chapter—X

(f) Various original works mentioned in the Introductory Lecture.

B.

Post Vedic Period.

Before Manu Smriti.

1. Reason for exclusion :—

(a) Incompetency to perform religious rites conducive to the welfare of the deceased.

(b) Unfitness for proper management of property.

(c) Disqualification to claim the lands of the deceased under the rules of Hindu Law at different periods in different parts of India as explained by the commentators.

(d) Customary Laws proving disqualification and exclusion.

2. The following persons are excluded from Inheritance :—

- (a) Blindness.
- (b) Deafness and dumbness.
- (c) Impotency.
- (d) Lameness.
- (e) Idiocy.
- (f) Insanity.
- (g) Incurable disease.
- (h) Leprosy.
- (i) Elephantiasis.
- (j) Loss of caste.
- (k) A murderer has no right to inherit the the murdered persons' property.
- (l) Females are also excluded for similar reasons.
- (m) Adopted son of a disqualified person.
- (n) After-born son of a disqualified heir.
- (o) Dharma sutras on the doctrine of general exclusion of women from inheritance.
- (p) Different views of different commentators on the subject.

- (q) Of the 12 kinds of sons, six are heirs and the other six are excluded from inheritance.
- (r) Sons of disapproved forms of marriage are excluded.

The aforesaid points have been fully discussed by Mr. Sarvadhikary in his Tagore Lectures of 1880—2nd Edition.

3. According to the rules laid down by Gautama, Vasishtha and Apastambha only the insane, the kliba and the patit or outcast for grave sins were excluded.

4. According to Burmese Manu p 285, 286 kliba does not include every impotent person. It denotes a hermaphrodite. The Burmese Manu lays down that one having a severe disease, being unable to walk or stuttering or being dumb shall be excluded from inheritance and shall be under the care and mercy of his relations. If he be blind or deaf but perfect in his intellect he will not be deprived of his proper share. As mad, dumb, and lame person and those that have disease in their eyes may be relieved by medicine, their share should be reserved for them.

5. According to Apastambha—all co-heirs who are endued with religion are entitled to the property; but he who dissipates wealth by his vices, should be debarred from participation, even though he is the first born. So, of one who has been excommunicated the heritable right and connection through oblations of food and libations of water become extinct. G. C. Shastri—Chapter X

C.

Manu Sriti.

1. Manu IX, 203 has been differently interpreted. Medhatithi and Vachaspati Misra are of opinion

that persons who are excluded from Vedic as well as Smarta ceremonies and are thus incapable of marrying are excluded from inheritance. The Saraswati-Vilas says :—The inner meaning is, that deformed persons, if they are entitled to marry, are shareholders. If a person becomes impotent after marriage, or marries in ignorance of his infirmity, his sons natural born or Kshetraja are entitled to his share.

2. Eunuchs and outcasts, persons born blind or deaf, mad men, idiots, the dumb, and such as are deficient in any organ are excluded from a share of the heritage.

Manu IX 201.

3. The son of a wife not appointed, and the product of lust though in a case of appointment and even a male child begotten in violation of the rules of appointment are disqualified heirs.

Manu XI, 143, 144.

4. An eldest brother depriving younger ones through avarice, and all brothers who habitually commit forbidden acts are unworthy of a share—Manu IX 113, 214.

5. Outcasts and person associating with them are not entitled to any share.

Manu XI, 185—186.

6. Entrance into religious order.

Lecture X.

Maintenance.

A.

Vedic Period.

1. It is not until the Sutra and the Smriti periods that we get full particulars of the Hindu Law on Maintenance. The scanty materials on the subject are mentioned below.

(a) Under the influence of patria potestas, many persons who would expect to be heirs might be disinherited and strangers might come in as heirs. The former would naturally expect to be maintained by the latter.

(b) Females for the most part were excluded from inheritance. Usually they were maintained.

(c) Some instances are quoted here.

(1) If the father was dead or feeble, the sister was dependent on her brother and on his wife. (Rig Veda X, 85, 46—compare IX 96, 22; Aitereya Brahmana—III, 37, 5).

Macdonell's Vedic Digest Vol. II, 496.

(2) Women were excluded from partition or inheritance, according to the Satapatha Brahmana (IV, 4, 2, 13) and the Nirukta (III, 4). They were, no doubt, supported by their brothers.

Macdonell's Vedic Index Vol 1—p 353.

(3) "Of the exact legal position of daughters

the notices are few and meagre. The Rig Veda, (I, 124, 7 ; AV. 1, 14, 2, 17, T) shews that in the place of a father, the brother was looked to for aid and that brotherless maidens were apt to be ruined, though religious terrors were believed to await the man who took advantage of their defencelessness (Rv, IV, 5, 5). Moreover, women could not take an inheritance and were not independent persons in the eyes of the law, whether married or not. Presumably before marriage they lived on their parents or brothers, and after that on their husbands, while in the event of their husbands predeceasing them, their relatives took the property, burdened with the necessity of maintaining the wife."

Macdonell's Vedic Digest Vol II—p. 486.

(4) Generally speaking the sons though not minors, lives jointly with their father in the same homestead. In his old age the sons might divide their father's property, or he might divide it amongst them, and that when the father-in-law became aged he fell under the control of his son's wife. Under such circumstances he would be supported by his sons

(Rig Veda X, 85, 46 ; Taittiriya Sanhita

III, 1, 9, 4—6)

Macdonell's Vedic Digest Vol I p. 527

2. In the case of a Brahmachari, we find that the expression does not occur before the late Brahmana period (Satapatha Brahmana, V. 1, 5, 17). He is a religious student. The technical sense is first found in the last Mandal of the Rig Veda. The practise of studentship doubtless developed, and was more strictly regulated by custom as time went on, but it is regularly assumed and discussed in the latter Vedic literature, being obviously a necessary part of Vedic society. The

student lives in the house of his teacher ; he begs, looks after the sacrificial fires, and tends the house, normally for 12 years but sometimes even for 32 years. He is supported by his teacher, though usually he supports himself by begging.

In the Kautilya & Budhistic periods there were monasteries where students used to live for the purpose of necessary education. Burmese boys of all classes now pass sometimes in a monastery as students.

Macdonell's Vedic Digest Vol. II p. 74—76.

3. The householder had to maintain guests. Hospitality in all ages has been held to be a pious duty. A hymn of the Atharva Veda (IX, 6) celebrates in detail the merits of hospitality. The guest should be fed before the host eats, water should be offered to him, and so forth. The guest is described as the deity of the householder.

Macdonell's Vedic Digest Vol. I p. 15. Vol. II p. 145.

B.

Post Vedic Period Before Manu Smriti.

1. The following books throw much light on the subject. Important materials can be gathered therefrom :—

- (a) Mayne—8th Edition, Chapter XIV—p. 618,
- (b) Dr. Jolly—p. 184—190.
- (c) Strange—p. 171.
- (d) Cowell—Lecture VI—p. 731.
- (e) Syama Charan Sarker's Vyavasthadarpana
Vol. I, p. 147.
- (f) Shastri G. C. Sarker's Hindu Law 4th Edition
—Chapter XI p. 375.

(g) Dr. Gaur's Hindu Law—p, 421.

(h) The works mentioned in the Introductory Lecture.

2. The right to maintenance does not rest upon contract but upon law or custom. Long established custom prevails against the rules of general law, The right is purely personal. It is not transferable or saleable.

3. Two-fold liability for maintenance. A person's liability to maintain other persons is of two descriptions, one is limited by his inheritance of the ancestral or other property, while the other is absolute and independent of such property, and is determined by certain relationship.

Shastri G. C. Sarker—p 380.

4. The following persons can claim maintenance:—

(1) Aged parents, virtuous wife, minor children, an infant illegitimate child, and an infant sister.

In such cases the liability is absolute.

(2) An adult having no means.

(3) Out-cast—excommunicated on the ground of misbehaviour.

(4) Male members of a Malabar Tarward.

(5) Junior members of an impartible estate.

(6) Adopted son, when adoption is invalid.

(7) Unmarried daughters.

(8) Grand-mother.

(9) Wife—widow.

(10) Daughter-in-law.

(11) Unchaste wife or widow starving maintenance.

(12) All male members of the family, including those that are excluded from inheritance.

(13) A step-mother is entitled to maintenance from the estate of her deceased husband.

(14) disqualified person for idiocy, insanity, blindness, dumbness and deafness, leprosy and other incurable diseases.

(15) The wives and children of the disqualified persons.

(16) Among the three regenerate classes of Hindus (Brahmanas, Kshatriyas and Vaisyas) their illegitimate children.

Mr. Sarvadhikari—Tagore Lecture p. 815.

1. The disqualified persons are mentioned by Manu :—Eunuchs, outcasts, persons born blind or deaf, mad men, idiots, the dumb and such as are deficient in any organ are excluded from a share of the heritage.

Manu IX, 201.

The disqualified persons mentioned above and their virtuous wives are to be maintained.

Manu IX, 202.

2. To support those that are entitled to be supported, is an essential duty. The parents, the Guru, a wife, an offspring, poor dependents, a guest, and a religious mendicant are to be maintained.

Manu cited in Dayabhaga and in Srikrishna's Comentary II, 23.

3. The aged parents, the chaste wife and an infant child must be maintained at any cost.

Manu cited in Mitakshara.

4. The parents, the wife and the son should not be cast of. The delinquent is punished.

Manu VIII, 389.

The Commentaries fully explain the text.

The liability to maintain them is absolute.

5. They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require means of support; the dissipation (of their hereditary source) of maintenance is highly censured.

Manu cited in Dayabhaga, 1, 45.

6. The support of the group of persons who should be maintained is the approved means of attaining heaven; but hell is the man's portion if they suffer: therefore he should carefully maintain them.

Manu cited in Dayabhaga II, 23.

7. Maintenance allowed to—

(a) Outcast women—Manu XI, 189.

(b) Subsidiary Sons—Manu IX, 163.

N. B. The translation of the original texts by Shastri G. C. Sarkar—4th Edition p. 378 has been partially adopted.

Lecture XI, Gifts and Wills.

1. Gift.

A.

Vedic Age.

1. (a) বিত্তে সাগরস্তান্তো দানস্তান্তো ন বিত্তে ।

Even the ocean has a limit but gifts have no limits.

- (b) দানং ত্রিবিধং সাত্বিকং রাজসং তামসকং ।

Gifts have three characteristics marked by goodness, activity or dulness or impurity where gifts are made with pure and disinterested motive there is goodness of a high order. Where they are made to acquire laudable praise or self aggrandisement, there is some exertion or activity in the matter, and though according to ordinary notion they are commended there is a tinge of selfishness which is disapproved. Where, however, the acts are done with impure motive, they are justly censured or condemned.

2. There are four classes of gifts :—

(1) Deyam (দেয়ম্)—that which may be given.

(2) Adeyam (অদেয়ম্)—that which should not be given.

(3) Dattam—Valid gifts ; once made they cannot be resumed afterwards.

(4) Adattam—Invalid gifts. They can be resumed for their invalidity.

3. (a) What may be given (deyam) is of one kind only. It is the paramount duty of a person to maintain his family. The surplus he can give away excepting immovable property. The old rule was that even self-acquired immovable property could not be alienated.

(b) What is adeyam (अदेयम्) *i. e.*, cannot be given away is eightfold. They comprise the following :— (1) Joint property, (2) a pledge, (3) a deposit, (4) a son, (5) a wife, (6) one's entire wealth when one has offspring, (7) what has been borrowed for use, and (8) what has been promised to another.

(c) Dattam (दत्तम्)—Valid gifts are of seven kinds :—(1) the price of goods sold, (2) wages, (3) what is given to a musician, (4) what is given out of affection to a daughter or son (5) what is given out of gratitude or in return for a benefit, (6) what is given as the price of a wife, and (7) what is given as a token of respect.

(d) Adattam (अदत्तम्)—Invalid gifts. They are sixteen in number :—

(1) A gift out of fear, (2) out of wrath or anger (3) out of sorrow or grief, (4) what is given by one suffering from a disease (5) what is given as a bribe (6) what is given in jest, (7) as a result of fraud, (8) under mistake, (9) gift by a child, (10) by an idiot, (11) by a person not independent, (12) by a distressed man, (13) by a drunkard, (14) by an insane person, (15) under a false impression of some service in return, and (16) a gift to a person falsely taken to be a deserving man or for a purpose believed to be religious but in reality it is not so.

4. Gifts are of three kinds :—

(a) Those which convey a present title and interest accompanied with a present right of enjoyment.

(b) Those that carry a present right but enjoyment is deferred.

(c) Those that are contingent in their nature.

The above points though fully dealt with in the Smriti works were known long before.

5. Let us more properly turn to the Vedic period.

(a) "Dakshina (दक्षिणा) appears repeatedly in the Rig Veda (a whole hymn Rv. X—107 is devoted to its praise) and later (Av IV, 11, 4; V, 7, 11; XI, 7, 9, 8, 22) as the designation of the gift presented to priests at the sacrifice, apparently because a cow—a prolific (Dakshina) one, was the usual fee on such an occasion. The later Dana-stutis (Praise of Gifts) in the Rig Veda immensely exaggerate these donations, and the exaggeration grows in the Brahmanas. It is important to notice that these enumerations of gifts in the main include nothing but articles of personal property, such as kine, horses, buffaloes, or camels (ustra), ornaments, and so-forth, *but not land* (Rv 1, 126, 1—4, V, 30). Reference is, however, made in the Satapatha Brahmana to land as a Dakshina, but with disapproval, probably because the land came to be regarded as inalienable without the consent of the clansmen."

Macdonell's Vedic Digest Vol 1, p 336.

6. Those who do not give offerings to the gods or bestow Dakshina on the priests are severely condemned in the Rig Veda, (Rv. 1, 33, 3; 83, 2; 151, 9; 180, 7; IV, 28, 7; V, 34, 5, 7; 61, 8; VI, 13, 3; 33, 3; VIII, 64, 2; 97, 2; X, 60, 6; Av. V, 11, 7; XX, 128, 4.)

7. Danastuti—(दानस्तुति) Praise of Gifts in the Rig Veda (VIII—25, 22) Gifts are highly spoken of in the

Veda, specially if they are for religious and charitable purposes.

(Rig Veda I. 125, 126)

8 In the Vedic literature the sacrificial fee Dakshina and generally all presents to Brahmanas play an important part.

Dr. Jolly, p 228.

9 Gifts are implied in cases of adoption, partition or division. Manu in the Taittiriya Brahmana divided all his properties equally among his sons. This was really a case of gifts in favour of the sons in violation of the rule of primogeniture.

10. In the Vedic period the doctrine of patria potestas was very strict. Any departure from the ordinary rule in the matter of succession or inheritance would involve a question of gift directly or indirectly.

B.

Post Vedic period.

Before Manu Smriti.

1. In the Post-Vedic period gifts became very usual. The doctrine of spiritual benefit was fully developed and accepted, and as a consequence of it gifts became common and more extended.

2. Dr. Jolly in his work on Hindu Law & Custom at page 298 says—“The rules about presents and gifts of a religious nature (dharmartham—धर्मार्थम्) are described at a much greater length in the Smritis and the Puranas—e.g. they fill a big volume of Hemadri.” The 10 or 16 great gifts (Mohadana—महादान) are particularly emphasized.

3. The following questions are important : -

(a) what can be disposed of by means of gift ?

(b) What cannot be disposed of by gift ?

(c) Who can make gifts ?

(d) Who cannot make gifts ?

(e) Who can be donees ?

(f) Who cannot be donees ?

4. The following questions are important.

(a) Gifts to wife.

(b) Gifts to mother, daughter and others.

(c) Gifts to the members of a joint Hindu family.

(d) Gifts to a deity.

5. Stridhana developed out of the law of presents. Dr. Jolly at page 227 of his Hindu Law and Custom says :—

“Presents (dana) play an important role not only in worldly life, as for instance it has been the primary cause of the development of the theory of the personal property of women, but it is still more important for religion (dharma), for the right of accepting presents is the most important privilege of the Brahmanas.”

The writer also notices the following points

6. A family man cannot give away his whole property, at least when he has got any male issue.

7. Gift once bestowed cannot be lost through usurpation by an outsider. Hence the property of a learned Brahman obtained by gift cannot be the property of another through prescription.

8. Delivery of possession is necessary under Hindu Law to validate a gift.

9. A writing is not necessary for a gift. Oral gift was held to be quite valid.

10. The subject of conditional gifts is connected with the subjects of 'donatio mortis causa' and revocation of gifts.

It has been already observed that the law of gifts had extensive application in the Brahmanic period. The Srutis and Smritis amply developed them. In the Buddhistic period the influence of the Brahmanas was considerably diminished. Caste system received a tremendous shock, and equality was aimed at. But the laws of the land which were supposed to have a divine origin were not interfered with. Gifts were encouraged, specially if they were made for religious and charitable purposes. Gifts made to pious Brahmanas were not, as before, in any way interfered with. Old inscriptions on stones or on temples discovered afford us the richest documents of gifts and presents of every kind. King Asoka caused construction of mango parks and other plantations, wells, sarais, and water stations on the roads. Monasteries for ascetics were established. Erection of temples and establishment of images of gods were maintained by special endowments. Villages, fields and pieces of lands of every sort were given to Brahmanas. Also houses, gardens, shops, tanks and canals etc., appear in the documents of gifts.

Dr. Jolly—p. 230.

C.

Institutes of Manu.

1. Acceptance of gift is lawful for a Brahmana.

(I-88 ; X. 75-76,115.)

But the habit of taking too many gifts is dange-

rous as thereby the divine light in him is soon extinguished. The temptation is to be avoided.

2. Gifts from wicked or low men are forbidden. (III, 179 ; IV, 84-91 ; XI, 24-25 ; 42, 70.)

But they are not forbidden when offered unasked or in times of distress

(IV, 247-250, 252 ; X, 102-114.)

3. Gifts are made once only just as partition or the marriage of a maiden.

(IX, 47)

4. In some cases—as in the cases of learned Brahmanas, worthy recipient, him who married for the sake of having an offspring, performer of a sacrifice, a traveller who has given away all his property, him who begs for his teacher or parents, a student of the Veda, and a sickman, gifts are obligatory. Such men should not be denied of necessary gifts or presents.

(IV, 31-32, 226-228 ; VII, 82 ; XI, 1-6)

5. Separate or self-acquired property :—

Property acquired by learning belongs solely to him to whom it was given, likewise the gift of a friend, a present received on marriage or with the honey mixture.

(IX, 206).

6. Rewards for making gifts.

(III, 95 ; IV, 229-235 ; VII, 83-86 ; XI, 23)

7. There are some gifts which are void,—Resumption of gifts :—

(a) Money due by a surety, or idly promised, or lost at play, or due for spirituous liquor, or what

remains unpaid of a fine and a tax or duty, the son of the party owing it shall not be obliged to pay (VIII, 159).

(b) A fraudulent mortgage or sale, a fraudulent gift or acceptance, and any transaction where he detects fraud, the judge shall declare null and void (VIII, 165).

(c) What is given by force, what is enjoyed by force, also what has been caused to be written by force, and all other transactions done by force, Manu has declared to be void. (VIII, 168).

8. Worthy recipients of gifts :—

A Brahmana who knows the true meaning of the Veda, a srotriya worthy Brahmana, on the contrary a Brahmana who is ignorant of the Veda is unworthy of gifts which become inoperative.

(III, 96, 97, 128, 137, 142-143, 148, 168; IV, 31).

2. Wills.

1. "The origin and growth of the testamentary power among Hindus has always been a perplexity to lawyers. It is admitted that the idea of a will is wholly unknown to Hindu law, and that the native languages do not even possess a word to express the idea."

Mayne's Hindu Law 8th, Edition—Chapter XI—page 551.

But the author at page 552 says that the origin of wills due to religious influence caused by Brahmanas in the law of partition and alienation. Again at pages 595-596 he says that a grant by a man to his family priests to take effect after the life-estate of his widow

was decided to be good thereby implying that this had a complete effect of a will.

2. The same view is expressed by Shastri Golap Chandra Sarkar in his Hindu Law, 4th Edition p. 569. "Wills were unknown to the Hindus, and in fact, they appear to be opposed to the spirit of Hindu law".

3. Dr. Gour in his Hindu Code at p. 773 says that wills were originally unknown to Hindu Law. They were recognised by the decisions of the British Indian High Courts and of the Privy Council.

4. It may be submitted that an analogy may be drawn between a will and a gift. The Hindus were perfectly aware of the laws of gifts from the Vedic Age. They were in a manner acquainted with the tenour and scope of a will. I now proceed to quote other authorities which cannot be disregarded.

5. "Sale and gift and the power to adopt were the precursors of the testamentary power".

(Hindu Wills, by Phillips and Trevelyan, p 2)

6. The conception of a will is derived from the conception of a gift.

"Gift, *donatio mortis causa*, and will appear to be successive conceptions, the former leading to the latter.

(Sircar's "Hindu Law" 4th Edition—p. 575)

7. Sir Thomas Strange in his Hindu Law Vol 1 at p, 169 thus observes:—

"Connected with the above duty, is the discharge of obligations, resting on the intention of the deceased, sufficiently manifested; since, though nothing occurs in the Hindu law expressly in favour of the testamentary power, as exercised under other codes, it provides dis-

tinently for the performance of promises by the ancestor in his lifetime, to take effect after his death; and, to this extent, *a friendly gift*, as it is called, not being an idle one, and far less one founded on an immoral consideration, being available in law as a charge upon heirs, may be assimilated to a legacy." The passages that follow indicate that a Hindu in many cases does a thing, which takes effect after his death.

8. In the case of Sraddhas, offering of Pindas and all other matters that secure spiritual benefit, there is no immediate effect but the true and real effect lies in the future *i. e.* after death. We enjoy the rewards of virtuous acts and suffer the punishment of vicious acts in the next world after death. Gifts to a diety continue to be in full force even after the death of the donor. The donor in such a case is virtually a testator who ardently and anxiously desires that his arrangement will continue to take effect even after his death and for ever. Is it therefore correct to say "that the idea of a will is wholly unknown to Hindu law"?

9. Mr. Rajkumar Sarvadhikari in his Tagore Law Lectures of 1880—2nd revised Edition at p, 186 thus observes:—

"If we carefully analyse the extracts given above, we cannot avoid noticing a singular fact with regard to the disposition of property. The question, whether the Hindus possessed testamentary powers, has often been discussed. It is not our province to enter into the question; but we may be allowed to remark in passing that there is abundant evidence to show that, from the earliest times, the Hindus exercised the power of voluntary disposition within a narrow sphere. In the corporate state of the family the exercise of such a power is

naturally restricted if not impossible, but as soon as there was the slightest sign of the segregation of the individual from the family, voluntary disposition of property became a recognised institution, "Manu," we read in the Taittiriya Brahmana, "divided his wealth among his sons, and the rule of primogeniture was violated. The mediæval legislators all recognised this method of distribution, and social sanction must have been given to such a mode of procedure."

10. Mr. Ramkrishna in his Hindu Law Vol II at page 238 discusses the general principles relating to Wills. He points out:—

(a) The origin and extent of testamentary power among Hindus. The power is not of modern introduction, nor is it of local origin.

(b) Testamentary power under Hindu Law is different from the English system.

(10 M. I. A. 279 at p. 308)

(c) What is a will? Five elements constitute a will.

(d) Gift and Will how distinguished, and how the latter is a corollary from the former.

Lecture XII.

Religious and Charitable Endowments. *

A.

Vedic Age.

1. Charities are extolled in all ages and in all climes. But it is the motive that invests them with grandeur more or less. In a practical point of view it is their utility that determines their relative worth. They may be public or private. They may be religious or secular. The obvious object is the advancement of religion, knowledge, health, shelter, maintenance and the like.

2. Endowments consist of gifts made by the endower. They are either ishta (इष्ट) or purtha (पूर्त). The ishta are Vedic rites ; the purtha are Smarta ones. The former is given to the priest when the sacrifice has been performed ; the latter is given outside the Vedi or alter on the sacrificial ground. The ishta are as follows :—(Manu IV, 226)

- (a) Vedic sacrifices etc ;
- (b) Gifts offered to priests at the Vedic sacrifices ;
- (c) Preserving the Vedas ;
- (d) Religious austerity ;
- (e) Rectitude ,
- (f) Viswadeva sacrifices ;

* The present writer's Thesis on "The Doctrine of Spiritual Benefits and Its Legal Effects" for the D. L. Examination approved by the Board of Examiners furnishes materials for this lecture to some extent.

(g) Hospitality.

3. The late Pundit Prannath Saraswati in his learned work on Hindu Law of Endowment (Tagore Law Lecture, 1892) has clearly shewn how charities are extolled by various Rishis and Commentators and how they secure spiritual benefit to the donors. To a Hindu all earthly aggrandisements fame and fortune are of no consequence. They rather contribute to his fall if by proper charities, self sacrifice and self-forgetfulness, blessedness after death is not secured and salvation worked out.

4. In no country is a miser so greatly despised as in India. His very sight is avoided and is looked upon as ominous; his name is seldom uttered, and if uttered or heard by accident is calculated to forebode some mishap or injury to the speaker or the hearer. On the other hand the doner of gifts and charities is adored as a saint and is enshrined in the usually grateful heart of a Hindu.

5. He who gives alms goes to the highest place in heaven.

. Rig Veda I, 25, 5—6. By Max Muller.

6. He who propitiates the (gods), gives to the gods and sits at ease upon the summit of heaven; to him the flowing waters bear their essence; to him this fertile (earth) ever yields abundance.

Wilson's Rig Veda Vol II, 14.

7. Gift is very much praised. (Rig Veda, I, 125—126).

8. An Upanishada of the Sama Veda describes three gifts as of surpassingly meritorious character, namely: a gift for learning and gifts of land and cows.

9. Mention is made of public guest houses in Rig Veda, II 166, 9.

B.

Post Vedic Period.

1 Brahmanic Period.

1. The gifts that are called Ishta have been already mentioned while dealing with the subject of Endowment in the Vedic Age. The purtha gifts refer to the Brahmanic and Smarta periods. The purtha are :—

(1) Gifts offered outside the altar in the sacrificial ground ;

(2) Gifts on the occasion of an eclipse, solstice, etc ;

(3) Construction of reservoirs for water, such as tanks, wells, etc ;

(4) Construction of temples for the gods ;

(5) Processions or jatra in honour of gods;

(6) The gift of food;

(7) The relief of the sick.

2. In the Mohabharata it is said that the donor of land shines in heaven so long as the subject of gift lasts ; as the moon increases day by day, so does the religious merit of a gift of land increase with each succeeding crop.

II. The Sutra Period.

1. In this period Religious Endowments were very greatly encouraged. It was due to Brahmanic influence. The doctrine of spiritual benefit was fully developed, and with it all religious works came into full display. In the same way charitable endowments were also greatly encouraged and fully appreciated.

2. The saying of Agusthya :—

A person building a temple, establishing an asylum for ascetics, consecrating an alms-house for distributing food to the poor at all times, ascends to the highest region of heaven.

3. In the Bahupuran (बह्विपुराण) we have certain passages which are translated thus :—

(a) In this world there is no gift that secures greater special spiritual reward than the gift of property for the sake of learning that dwells in the organ of speech.

(b) Therefore, O King, one should cause the Sruti and Smriti to be daily taught in the temple of a god, if he wishes for religious merit

4. The donor may be inspired with purely religious motive, or he may be led away by pity and philanthropy, or he may be actuated by a desire to celebrity or popular applause or he may be displeased with the conduct of his heirs or anxious to protect his property from the hands of his creditors, or of those of his would-be heirs so that it may be tied unto his family. But the fact remains, that charities are, after all, charities conducive to the good of mankind. Out of the saline waters of the sea rise vapours into clouds that bless by their downpour this world of ours with health and plenty.

5. This beneficial tendency, this fertilizing overflow of goodness, this underlying beneficent current was early perceived by the Hindus. They viewed gifts, endowments, all charities far above all selfish or secular considerations. The idea was purely religious and behind

it was pure spiritualism. The donor must disregard all earthly considerations. Though spiritual benefits will flow from the gifts, he must not even work with that idea or everything is spoiled. All consequences of pious acts must not be sought for but must be assigned to Vishnu. A Hindu must always act with pure disinterestedness, and then he will reap all the rewards of his deeds. If there are various endowments all over India, they are all due to the belief that spiritual benefit will flow from them,

III. The Kautilya and the Buddhistic periods

1. Much useful information can be had from the works mentioned in the Introductory Lecture—in regard to Endowments. For the purpose of a synopsis the following points may be noted :—

2. The Brahmanic influence was considerably reduced. Equality was aimed at and caste system received a shock. Religious Endowments properly so called were not much given effect to. But charitable Endowments became more and more common. The following may be noted :—

- (a) Hospitals (আরোগ্যশালা)
- (b) Chattra (সত্র)
- (c) Guest-house (অতিথিশালা)
- (d) Rest House—A shelter for travellers,
- (e) Excavation and consecration of wells, tanks and other reservoirs of water for drinking, bathing or irrigation purpose. (Jalchatra—জলসত্র)
- (f) Planting and consecrating shady trees for the benefit of way-farers and the like.
- (g) Maths (মঠ)—Monastery, residential college, or

a college attached to a temple or asylum for the poor and the ascetics, or a shelter for travellers, or a combination of all these or some of them.

Shastri Golap Chandra Sarkar's Hindu Law, Chapter XIV supplies very useful materials relating to Endowments. References are made to KalikaPuran, BhagabatiPuran, Markendeya Puran, and other works.

2. In the time of King Asoka, when Buddhism flourished almost all over India there were numerous monasteries established for the education of students of all classes, who used to live there and were supported there till their education was finished. All such monasteries were public Institutions of Charity and were Charitable Endowments. By his order mango parks and other plantations, wells, sarais (सराई) and water stations on the roads were constructed in various parts of Hindusthan.

(Dr. Jolly p. 230)

3. The disciples of Buddha including kings and very many rich men, abandoned all their earthly possessions and became ascetics or sanyasis. Their heirs no doubt inherited their properties, but many of them were converted to charities, and thus several Charitable Endowments came into existence.

4. In Kautilya's work mention is made of several Charitable Endowments.

IV—Institutes of Manu

1. The subject of endowment falls under the Achar Kanda. The object is purely religious. It does not hence fall under any one of the 18 titles of litigation in

the Vyavahar Kanda. But it may very well fall under or be included in Prokirnakam, or the miscellaneous. Hence we find that disputes regarding endowments were tried by Hindu Law in the Hindu period.

2. Endowments are vested in God (Vishnu) and are irrevocable. Gifts are made once only, (Manu IX, 47).

3. Endowed properties are not saleable or partible.

4. The ishta (Vedic rites) and the purtha rites have been already mentioned. The purtha rites are mentioned by Manu (IV, 226).

5. Charity is declared to be the chief virtue in the present Kali Age.

Manu I, 186.

6. Let each (wealthy) man, without tiring always perform sacred rites and works of charity with faith, for such works made with faith and with lawfully-earned money secure endless rewards.

Manu IV, 226.

7. Both he who respectfully bestows a gift and he who respectfully accepts it, go to heaven; but, if they act otherwise, to a region of hell.

Manu IV, 235.

8. Construction of tanks and wells was much encouraged in ancient time for the benefit of the public and high religious merits were ascribed for the pious acts. It was at one time held sinful to sell a tank (Manu XI, 62). The dedication had reference to the water alone for use by ablution and drinking, the sub-soil and the banks remained the property of the dedica-

tor. In order to keep the water of the tank pure, bathing therein was prohibited. (Manu IV, 201).

Bathing in rivers, in ponds dug by the gods themselves, in lakes, in rivulates, and in springs or torrents was recommended.

Manu IV, 203.



Lecture XIII.

Contract.

A.

Vedic Age.

1. Evolution from status to Contract.

(Sir Henry Main's view)

2. Spencer's theory on the point.

(Comparative Legal Philosophy series III p 359).

3. Ethical origin of contract.

4. The law of Contract was well known in the Vedic Age :—

(a) Rina 'debt' is repeatedly mentioned from the Rig Veda (II. 27, 4, etc, usually in a metaphorical sense) onwards, having apparently been a normal condition among the Vedic Indians.

Kusid (कूसीद) means loan (Taittiriya Samhita). 'Kusidin' is a designation of the userer found in the Satapatha Brahmana (XIII, 4, 3, 11) and the Nirukta (VI. 32) and often in the Sutras.

'Bekanata' occurs only once in the Rig Veda (VIII. 16, 10). The natural sense is 'usurer', the explanation given by Yaska (Nirukta VI. 26).

(b) Reference is often made to debts contracted at dicing. (Rig Veda X. 34, 10 ; Av. VI. 119, 1) Allusion is made to debt contracted without intention of payment. (Av. VI. 119, 1).

(c) The result of a non-payment of a debt might be very serious : the dicer might be enslaved (Rv. X, 34) Debtors were treated like malefactors, such as thieves and were bound by their creditors to posts (drupada) for enforcement of the debts. (Rv. X, 34, 4).

(d) The heirs of the debtor, after his death, were liable for the debts.

(Atharva Veda VI, 117—119 ; Rv, IV, 3, 13).

(e) The rate of interest. The amount of interest payable is impossible to make out. In one passage of the Rig Veda and Atharva Veda, (Rv. VIII, 47. 17 ; Av. VI, 46, 3) an eighth (sapha) and a sixteenth (Kala) are mentioned as paid but it is uncertain whether interest or part payment of principal is meant. It is elsewhere noticed that the rate of interest on loans is not specified before the Sutra period (Gautama Sutra—XII. 29).

N B. The points stated in (a) to (e) are fully dealt with in Macdonell's Vedic Digest Vol. 1—pages 109 - 110 and 176.

5. Contract once made cannot be revoked.

(Rig Veda II. 27, 4 ; VIII, 47, 17).

6. In cases of marriage, Niyoga, adoption, Putrikaputra, Dakshina, partition, etc, we notice traces of contracts in some shape or other.

7 Dr. Jolly in his work on Hindu Law and custom has noticed the following points :--

(a) High antiquity of the law of debt. This is suggested by its vigorous emphasis on religious motives. (page 212)

(b) Usury condemned.

(c) As to interest and rates. The matter will be dealt with in the Sutra period.

(d) Debts, pledge, and sureties—p. 217—224.

(e) Deposit and treasure-trove—p. 224—227.

(f) Wages, hire and Compensata—p. 232—237.

B.

Post Vedic Period.

I Brahmanic Period.

1. Reference may be made to Strange Chapter XII and to Dr. Jolly pages 211—237.

2. There are certain forms of transactions ceremonious and symbolical which are followed in the matter of contract.

3. Debts. Non-payment of debts is a sin.

4. Liability of sons, heirs for debts. But immoral debts are excluded,

5. Usury allowed only to Vaisyas. Brahmanas and Kshatriyas are prohibited.

6. Deposits are of two kinds.

Pledges—Adhi pledge.

7. Interest. The rule of interest is known as Vashistha's law.

Rules as to interest :—

(a) Limit to interest.

(b) Interest ceases after the principal becomes doubled.

(c) If the pledge is used by the creditor, he cannot claim any interest.

(d) Interest ceases after tender.

8. Nothing should be lent to women, slaves, minors, nor to a person from whom payment cannot be enforced.

II. Sutra Period.

1. In Gautama Sutra (XII, 29) it is mentioned that the rate of interest on loans is not specified before the Sutra period. Macdonell's Vedic Digest Vol.I—p, 176).

2. In Gautama (XII, 31 and 32) we notice the rates of interest and usury laws.

3. Dr. Jolly in his work on Hindu Law and Custom at pages 212—215 states the following points :—

(a) Usury condemned. Vaisyas have the privilege. Brahmanas except in the time of distress should not lend money at interest.

(b) Usury condemned. Even simple interest is deprecated.

(c) Rates of interest and the period of accumulation. The latter varies according to the material which is lent.

(d) High rates of interest. Interest at 15 per cent per annum is allowed. But if the debtor belongs to the lower castes, and in the case of insufficient security it may rise to 60 per cent per annum. Higher castes are favoured. A Brahmana has to pay only 2 per cent per month. Those that travel through a wilderness are to pay 10 per cent, and those who make a voyage 20 per cent.

(e) There are certain debts which are free of interest :—reward, gambling debts, improper promises

(e, g, made to a coartesan), deposits, the price for a purchased ware, friendly loans, loans particularly mentioned to be free of interest, articles lent for use, as well as the property of a woman (stridhana) used by the male relations with her permission, liabilities for securities, fines, and articles of little value. But if there be delay on the part of the debtor *the usual rate of interest at 5 per cent per month* can be claimed.

4. Acquittance must be given for part payment, otherwise the rest of debt is forfeited.

5. Interest stops if creditor refuses to take money.

6. Earliar debts must be paid first, except in the case of Brahmanas and kings.

7. Mode of realizing debts :—

(a) Self-help in the law of debts.

Creditors take the law into their own hands.

(b) Forced labour and slavery.

(c) The debtor may be taken bound hand and foot by the creditor to his house and force him to fulfil his obligation by blows, threats etc. Brahmanas and respectable perons are exempted.

(Dr. Jolly—p 317—318)

8. Against a stubborn debtor the creditor sits and fasts at his door till his demand is satisfied. If he dies the debtor becomes guitiy of murder. This is called Prayopoveshana (প্রয়োপবেশন)

9. Similar forms at the beginning when the debt is incurred and at the end when the debt is satisfied. There are certain forms of transactions which are followed. Ceremonious and Symbolical actions and certain

verba (word of assurance) are generally connected with most of the legal transactions, particularly if in any way they have a religious character.

Dr. Jolly—p 243.

10. Law as to debts, pledges and sureties.

III. Kautilya Period.

1. In the previous two periods, i. e.—the Brahma-
nic and the Sutra period, we have seen that debtors of
higher castes were favoured in the matter of debts and
payment of interest. Kautilya ignores the caste
privileges in the law of debt.

Dr. Jolly—page 214 (Note).

2. Void agreement :—

Agreements are void if they are entered into in
seclusion, inside the home, in the dead of night, in forest,
in street, or with fraud.

(Kautilya III—I)

3. Exceptions to the above rule :—

(a) Agreement in seclusion is valid where it is
entered into by members of an association.

(b) Agreement relating to division of inheritance,
deposits, or marriage, agreements with women who do
not appear in public, may be effected inside house.

(c) Transactions relating to robbery, dotal,
marriage, or the execution of the royal order, and also
transactions by persons who ordinarily do their
business at night may be done at night.

(d) Persons living generally in forests may enter
into valid agreements in forests.

4. All questions relating to contracts are dealt with by Kautilya in Chapter III.

5. Persons incompetent to enter into any contract :—

(a) Persons of unsound mind ;

(b) Dependent or unauthorised persons whether father or son ;

(c) The youngest brother of a joint undivided family ;

(d) a wife, (e) a slave, (f) a hired labourer, (g) a person either too young or too old, (h) a convict, (i) a person under great provocation, anxiety, or intoxication, (j) a lunatic or a haunted person.

6. The principal subjects of contracts are debts, deposits, pledge, bailment, contract of service, sale, lease, mortgage, suretyship, etc.

7. Rules as to interest :—

(a) Limit to interest and the rates are prescribed (Kautilya III—11) No discretion as to fixity of interest by contract.

(b) Interest on grains shall not exceed half the principal when valued in money.

(c) Interest on stock is to be one-half of the profit.

(d) The amount shall not exceed double the principal.

(e) In case the interest be four times the principal, no further claim is allowed.

(Kautilya III—11)

(f) No compound interest is allowed.

8. A wife cannot be arrested for the husband's debts. (Kautilya III—11)

But a husband can be arrested for the wife's debts.

9. Debts between husband and wife, father and son, and between joint undivided brothers cannot be enforced.

(Kautilya III—11)

10. Liabilities of a surety and his representatives and of a depositary considered.

11. Nonliability of an heir as to bail, balance of a sulka or the stakes or gambling by the deceased.

(Kautilya III—16)

12. Sealed and unsealed deposits considered.

13. A debtor is liable to pay debts in order of time.

14. Two creditors cannot sue a common debtor simultaneously, except where the debtor is going abroad to avoid the debts.

15. No arrest of Government servants while on duties, in execution of decrees against them.

16. Redemption of mortgage and effect of tender.

IV. Buddhistic Period.

1. The Buddhist law-books which are used in Burmah and which may also be called the Burmese Law books may well be traced from the law books of India in force during the time of the Buddhistic supremacy in India. There were great changes in politics and in religion. Society also underwent great changes and caste system which was unknown in the Vedic

Age and which was gradually developed through the influence of the Brahmanas received a shock in this period. But the law of the land comparatively speaking received no great changes.

Dr. Jolly—pages 89—95.

In the matter of contract we notice very little changes. We notice the following :—

1. The rights of females were enlarged.

They could enter into contracts even without the consent of their husbands.

2. The husband was not liable for the debts of the wife as in the preceding periods.

3. The Brahmanas had no special privileges in the matter of debts, interests, etc.

4. Dr. Jolly points out at page 214 of his Hindu Law and Custom that Kautilya ignored the caste privileges in the law of debt. The same thing may be said as to the law of debt during the Buddhistic period.

5. Apart from the religious aspect of the question of adoption, there is an element (that of giving and taking) which forms a part of a contract. Under the Buddhist. Law, it has been held by the Burmah Chief Court that two sons can be adopted at the same time.

Ma Shweyin v. Ma Shwe Nyan

II I. C. 776, 4 Burm. L. R. 158.

Rai Bahadur Jogendra Chunder Ghose's Hindu Law Vol. 1—p. 686.

6. Special rules of the law of contract can be derived from the works mentioned by Dr. Jolly.

V. The Institutes of Manu

According to the Institutes of Manu the Law of Contract may be considered as follows:—

- A. General.
- B. Recovery of debts.
- C. Deposit and pledge.
- D. Sale without ownership.
- E. Partnership Transaction.
- F. Non-payment of wages.
- G. Non-performance of agreement.
- H. Rescission of sale and purchase.
- I. Dispute between the master and the herdsman.
- J. Gambling and betting.

A. General.

1. Of the 18 titles of Litigation enumerated by Manu (VIII—4—7) no less than half is included in the subject of contract. They should be dealt with in order.

2. The following agreements are null and void and cannot be enforced as contracts:—

(a) By a person intoxicated, or insane, or seriously disordered, or wholly dependent, by a minor or an extremely old man or by an unauthorised person.

Manu VIII, 163.

(b) Contrary to law or usage.

Manu VIII, 164.

(c) A transaction that is fraudulent. Fraud vitiates everything.

Manu VIII, 165.

(d) What is given, enjoyed, written or done by force or coercion.

Manu VIII, 168.

B. Recovery of debts.

1. Procedure in realizing debts without the intervention of courts.

Manu VIII, 48, 49, 50.

Debtor complaining in such a case is fined.

Manu VIII, 176.

2. Realization of debts through courts.

Manu VIII, 47.

3. The plaintiff loses the case under certain circumstances:—

(a) Calling false witnesses ;

(b) Retracting statements, varying statements ;

(c) Secretly conversing with witnesses ;

(d) Refusing to answer ;

(e) Leaving court without permission ;

(f) Not examining witnesses asked by the court to be examined, etc.

Manu VIII—53—57.

4 Interest claimable on debts:—

(a) Not exceeding double the principal in some cases and not five times in other.

Manu VIII, 151.

(b) Interest not more than five per cent per month and cannot exceed the legal rate. (Manu VIII, 152)

As to other rates—Manu VII, 140—143.

(c) What interest cannot be recovered:—
stipulated interest beyond the legal rate (5 per cent per month), compound interest, interest beyond the year and corporal interest cannot be recovered.

Manu VIII, 152, 153.

Dr. Jolly—page 215.

5. Satisfaction of the debt by payment, renewal, service, instalment, etc.

Manu VIII, 154, 155, 177.

6. Punishment for false claim and denial.

Manu VIII, 6, 51, 52, 139, 569.

7. (a) Sureties, their liabilities.

Manu VIII, 158, 162.

(b) As to apportionment, liabilities of representatives, sureties, etc—the matter is dealt with in the chapter on Execution.

C. Deposit and pledge.

1. Qualifications of a depositary:—

Good family, good conduct, well acquainted with the law veracious, having many relatives, wealthy and honourable.

Manu VIII, 179.

2. Trial as to deposits and pledges denied by the bailee :—

(a) Evidence of witnesses.

(b) On failure of witnesses a trustworthy spy should secretly deposit gold with the depositary. If the gold is returned on demand then he is proved to

be honest ; if not, he is found dishonest and is forced to return both the deposits.

Manu VIII, 191—194.

(c) By oaths and ordeals. (Manu VIII, 190)

3. Deposits must be returned in the very condition in which they were at the time of the bailment.

(Manu VIII, 180).

4. Deposits not to be returned to a relation.

Manu VIII, 185, 186, 189.

5. No interest can be claimed if the pledge is used or damaged.

6. Non-liability for loss under peculiar cases.

(Manu VIII, 189).

7. Punishments. (Manu VIII, 181, 190, 193).

8. Responsibilities of the depositary. Dr. Jolly at page 225 says—"The most sensible act is never to accept a deposit ; yet however high religious merit may be gained by faithfully keeping a deposit, while on the other hand, its misappropriation is as great a sin as the murder of a near relative".

D. Sale without Ownership.

1. A gift or sale made by any person other than the owner is null and void.

Manu VIII, 199.

2. Title and not mere possession is proof of ownership.

Manu VIII, 200.

3. Purchaser of a chattel at a market in the presence of witnesses is valid.

Manu VIII, 201.

4. If the original seller is not forthcoming, the buyer loses the chattel but is not punished. The former owner receives the chattel.

(Manu VIII, 202)

E. Partnership Transactions.

1. The shares of officiating priests for work partly done or completed or completed before the fees are given or where specific fees are ordained for several parts of a rite. Different priests take differently. (Manu VIII, 206—210)

2. The same principles as to shares apply to a' joint workers (VIII—211)

N. B. As to Gifts and Resumption of Gifts—they are dealt with in in Lecture XI relating to Gifts and Wills.

F. Non-payment of Wages.

1. A hired servant wilfully failing to perform his work according to agreement is not entitled to any wages and is fined.

Manu VIII, 215.

2. But if he falls ill and after recovery performs his work according to agreement, he is entitled to wages even after a long time (Mann VIII, 216)

3. Work not done according to agreement, though slightly incomplete is not sufficient and the workman cannot claim any wages.

4. Share of milk to a hired herdsman who is paid with milk.

Manu VIII, 231

5. Wages of women employed in the royal service. (Manu VIII, 125, 126)

G. Non-performance of Agreement.

Punishment to a man breaking a contract—banishment, imprisonment or fine. (Manu VIII, 219—221)

H. Rescission of Sale and Purchase.

1. After ten days rescission is not allowed and any act unless with consent is punished with fine. (Manu VIII, 223).

2. A completed transaction must be respected. (VIII, 228).

3. The following sales are forbidden :—

(a) Adulterated goods (VIII, 203).

(b) Children—(Manu XI, 62).

(c) Daughter—(III, 51—54 ; IX, 98—100).

(d) Garden, tank, etc, (XI, 62).

(e) Wife—(IX, 46 ; XI, 62).

4. Various goods are forbidden to be sold to Brahmanas :—

(a) The goods are mentioned by Manu—X, 86—94 ; XI, 63.

(b) Fraudulent sales forbidden (VIII, 203).

(c) Fraudulent sales become void (VIII, 165).

(d) Trade permitted to Kshatriya in time of distress. (X, 95). Regulated by king. Duties and sea taxes.

(e) Punishment of dishonest trader. (VIII, 399 ; X, 257, etc).

**I. Dispute between the Master
and the herdsman**

1. Space as pasture land in a village (VIII, 237),

2. The herdsman is responsible for the safety of the cattle in the day time and also during the night if it is not kept in the master's house. (VII, 230).

3. Compensation by the herdsman for the loss of the cattle (VIII, 230).

4. No responsibility for damage to unfenced crops, or by a cow within ten days after her calving, by bulls and cattle sacred to the Gods. (VIII, 238, 242).

J. Gambling and Betting.

1. A gambler is held in contempt and is not fit to be invited at a Sraddha.

Manu III, 151, 159, 160.

2. Gambling is discouraged. It is prohibited to a private person and also to a King. (IV, 74 ; VII, 47, 50).

3. Gambling is punishable. (IX, 221—228, 285).

Tort.

In the Hindu Law there is no clear distinction between Contract and Tort. The two subjects are jointly dealt with. That has been also done in the present Thesis. Contract is the main thing and instances of torts are not separately and clearly dealt with. A few words on the Law of Tort will now be added.

1. "It is impossible to trace in the early literature any legal theory or practice as to torts, but rules as to penalties for insults appear in the Sutras."

Macdonell's Digest, Vol. I, p, 393,

2. Dr. Jolly in his work on Hindu Law and Custom page 232, thus points out :—

(a) The cowherd is to make good the damage to cattle. (Manu VIII, 230).

(b) The owner compensates for the damage to fields, but if the field is without fence, or if the cowherd was ill or if any accident had befallen him, if the cow had calved very recently or if the cow was unusually obstinate, they are not liable for damage.

Gautama 12, 18—26 ; Vishnu 5, 137—150 ;
Manu VIII, 229—244.

(c) If the owner is to pay fine, the cowherd is subject to sound flogging.

3. No responsibility for damage to unfenced crops or by a cow within 10 days of the birth of the calf, or by bulls and cattle sacred to the gods. (Manu VIII, 238, 242).

4. Servants liable for loss of cattle.

Exceptions. (Manu)

5. Trespass by animals. Fines are payable. Various scales of fines. (Kautilya III, 10)

6. Accidents on the road by collision of carts. No contributory negligence. Owners of the carts are fined. The driver is also fined if he is guilty of negligence.

7. Compensation in various cases :—

(a) If any portion of a house is destroyed or damaged, repairs must be made with fines.

(b) If any channel or watercourse is stopped.

(c) If any current pathway is obstructed.

(d) If any tanks or wells or other reservoirs of

water are sought to be destroyed or are wanted to be filled up.

8. Creditors having recourse to self-help by beating or assaulting the debtors or binding them with ropes are exempted from fines on account of their tortious acts.

9. Husband beating a wife is exempted from punishment.

10. Deposit and treasure-trove. The former is the subject of a pure contract. The latter may be wrongfully appropriated either wholly or in part by a person who is not the owner thereof. Damage can be claimed by the owner against the wrongful misappropriator for his wrongful act. The following rules are laid down by the Hindu Law :—

(Dr. Jolly—page, 225—226).

(a) The owner in the absence of a reliable depositary buries his treasure in the earth. It becomes the property of the king or the finder of it until the real owner is traceable. (Gautama 10, 43, 45 ; Manu VIII, 39).

(b) If the finder be a Brahman, especially if he be a learned and dutiful Brahman he may keep the whole of it. (Gautama, 10, 44, etc).

(c) If the finder be not a Brahman, he must inform the king, who will get one-sixth and the remaining five-sixth goes to the finder.

(d) If the finder be the king himself, he will get half, and the other half goes to the Brahmans.

(Manu VIII, 35—39).

(e) Caste distinctions are observed. Different shares are allotted to people of different castes.

11. Now the question that arises is this: If the real owner or his heir comes forward and claims it against the finder or claims damage in lieu of it what is his remedy and under what law can he claim it?

(a) He bases his claim on natural right.

(b) As a rightful owner he can claim damage or compensation.

(c) The wrongful finder is bound to return it. It may be an implied contract on his part, but if he misappropriates or destroys it, it becomes a tortious act on his part for which he is liable for compensation.

12. The question of tort arises when, apart from the question of contract, an innocent person suffers for any wrongful act, omission, misconduct or negligence of another unless the latter is supported by any sanctioned custom or law in his favour either express or implied.

Lecture XIV.

Judicial Procedure. *

- A. The Constitution of Courts.
- B. The Law of Evidence.
- C. Other Kindred topics.

Vedic Age.

1. In this Lecture we shall deal with Civil procedure. In the next lecture (Lecture XV) we shall deal with Criminal Procedure.

There is little recorded as to civil law and procedure in Vedic literature.

2. The early form of judicial procedure was a voluntary arbitration. The word *madhyama-si* (lying in the midst) occurs in the Rig Veda meaning an arbitrator or judge acting with other judicial persons, and being surrounded by the assembly of the people.

Rig Veda X, 97, 12 ; Av. IV, 9, 4.

See the opinions of Roth, Zimmer, and Whitney in this connection.

3. The king is later the chief civil judge, and may presumably have been so earlier, no doubt in conjunction with the elders of the tribe.

4. The use of witnesses as evidence is uncertain and the ordeal is not recorded as deciding any civil matter,

* A Thesis styled "Vyavahara-Proccaranam" or the Hindu Law of Procedure by the present writer for the D. L. Examination has been approved by the Board of Examiners. The present lectures contain a synopsis from the said Thesis.

except the dispute between Vatsa and his rival as to the true Brahmanical descent of the former, which was settled by his walking unharmed through the flame of a fire. It would appear that an ordeal was used for the purpose of deciding disputes.

N. B. The points stated in paras 1 to 4 are dealt with in Macdonell's Vedic Digest Vol I—392—394.

5. In the Vedic Age the Government was monarchical. The king as *Satapati* held superior authority in war. There were assemblages of the people of the village, the district and the clan.

(The Vedic Aryan Series, p 36)

6. The king and his councils. Three Councils for Education, for Religion and for Administration of Justice.

(Rig Veda III, 38, 6);

Atharva Veda XIX.7, 35, 6.

7. Who is to be made Chief Justice by the king? His qualifications.

(Atharva Veda VII, 10, 98, 1.)

8. President of the three Councils.

(Rig Veda I, 37, 2.)

9. Ordeals. "In difficult issues of law the gods were appealed to for decision, and as usual in ancient practices, civil, moral and legal guilts were not differentiated. The Modern Legal Philosophy, Series II. The Vedic Aryans p 40.

Post Vedic Period.

I. Brahmanic Period.

1. The courts consisted of the king, three judges of whom one was the Chief Judge. A Sudra could not

be a judge. Arbitrators also decided cases. King's council decided all cases. The members acted as assessors. The Modern Legal Philosophy—Judicial Proceedings, p 158, 179.

2. Judicial procedure was greatly developed in this period.

3. Various kinds of ordeals mentioned in details.

4. Evidence of witnesses was recorded. Where no evidence was forthcoming, ordeals were resorted to.

II. Sutra Period.

1. Judicial procedure was now quite developed.

2. Dr. Jolly in his Hindu Law and Custom deals with the subject of Judicial Procedure. The details are all taken from Gautama, Vasishtha and Baudhayana and other works. The following points are derived from the work :—

(1) King's penance for wrong judgment.

(2) In order to pass the right judgment the king should learn the right law for each caste from authoritative persons and in doubtful cases take the advice of learned Brahmanas.

(Gautama II, 22-26.)

(3) Assessors were to give their free opinions fearlessly.

(4) Composition of the court and various functions of the members :—The Chief Judge passes the judgment, the king inflicts the punishment, the assessors or judges investigate the merits of the case, the law books help the decision, gold and fire are used in case

of ordeals, water is used to refresh, the accountant values the disputed property, the scribe records the proceedings and the court servants have to summon the accused, the assessors, and the witnesses and hold both the parties in custody in the absence of surety.

(5) Qualifications of the judges and the assessors.

3. Oath was administered to parties as well as to witnesses.

4. There were courts to which could be filed.

5. Modes of execution of decrees.

III. Kautilya Period.

1. The law of Resjudicata was well known. It was called Prang-Naya (প্রাঙ্কনয়)

2. Constitution of several courts.

3. Plaints were either written or oral. In the latter case the statements of the plaintiff were recorded by the court officer.

4. After the plaint was filed or the statements were recorded, the defendant was served with a summons.

5. At the trial evidence was tendered and recorded on behalf of both parties.

6. Liability of parties and witnesses for giving false evidence.

7. Limitation and Prescription not unknown to ancient Hindu Law—(Mandlik, p. 203)

8. Procedure as to execution :—

(a) Self-help.

- (b) Slavery for debt.
- (c) Sale of property for debt by court.

9. Kautilya ignores the caste privileges in the law of debt. (Dr. Jolly at page 214).

10. The above points are noted by Kautilya in Chapters III and IV of his work.

IV. Buddhistic Period.

1. It may be noted here that the laws enumerated in the Sutra and Kautilya periods continued almost the same in this period. No special mention is therefore necessary.

V. Institutes of Manu.

The following points may be noted :—

- A. Procedure.
- B. Evidence.
- C. Trial by Oaths and ordeals.
- D. Execution.
- E. Limitation.

A. Procedure.

1. The constitution of courts :—

(a) A king, desirous of investigating law cases, must enter his court of justice, preserving a dignified demeanour, together with Brahmanas and with experienced councillors.

(Manu VIII, I).

(b) Lord over each village and Lords over several villages with ministers and superintendents should be appointed for the purpose of administration.

Manu VII, 115, 122.

(c) Bench how constituted (VIII, I, 9—11)

(d) Special Bench to decide cases relating to landed property and boundaries. (VIII, 258, 260)

(e) Powers of a learned and virtuous Brahmana. (IX, 313, 321 ; XI, 31-33)

(f) Powers of a creditor (VIII, 49, 50)

(g) Powers of a spiritual guide, a teacher, a father, husband, and the head of a household.

Manu. (Colebrooke Vol II, XI p. 324)

(h) A Sudra disqualified to act as a Judge. (Manu VIII, 20, 21),

2. None exempt from trial or punishment.

(a) Even a king is subject to punishment or penalty. (VIII, 18, 304, 336 ; IX, 245).

(b) Relations of the king cannot claim exemption (VIII, 335).

(c) Brahmans are also subject to trial and punishment (VIII, 337-338).

3. There are 18 heads of litigation. The list is not exhaustive. There is another form called Prokirnakam i. e. miscellaneous, (VIII, 4-7).

4. Exparte trial in certain cases (VIII, 58). If a defendant does not plead within three fortnights he loses his cause. (VIII, 5-57)

5. Suit fails in the following cases :—

If the plaintiff calls a false witness or makes a false statement, contradicts himself, talks with witnesses in an improper place, declines to answer a question properly put, leaves the court without permission,

declines to answer when directed, does not know the points of his case, and refuses to produce his admitted witnesses when called by the court.

B.

Evidence.

1. Oath administered to witnesses.
(Manu VIII, 93, 100, 110, 113, 114 ; 80-83).
2. Time of Examination—Morning
(VIII, 87).
3. Oral evidence must be direct.
(VIII, 74).
4. Competent and Incompetent witnesses.
(VIII, 64, 65, 67, 77)

Women should give evidence for women and for twice born men, twice born men (of the) same kind, various Sudra for Sudras, and men of the lowest castes for the lowest. (VIII, 68).

5. Number of witnesses necessary in each case :—
 - (a) One witness (VIII, 77).
 - (b) Three witnesses (VIII, 72).
6. Demeanour of witnesses (VIII, 25, 26).
7. Cases in which falsehood is permissible
(VIII, 103 -14, 112).

Falsehood for a pious motive, for protecting a person from death, for loss of caste, for swearing falsely to women the objects of one's desire, at marriages, for fodder for a cow, or of fuel or for shewing favour to a Brahmana.

But certain penances must be performed.

(VIII, 105, 106).

8. Penalty for false evidence (VIII, 107, 210-122).
 9. Writing—Documentary evidence.
 - (a) Written documents in regard to loans.
(VIII, 154, 155).
 - (b) Records in boundary disputes.
(VIII, 252).
 10. Invalid transactions for force or fraud.
(VIII, 158).
 11. Suit dismissed and plaintiff nonsuited for false evidence and other circumstances as mentioned above.
 12. Revision by the King (IX, 234).
 13. Judgment based on false evidence is reversed
(IX, 234).
 14. No suit by the king or his servant and no suit should be hushed up. (VIII, 43)
 15. Punishment for wrong decision.
(VIII, 18, 127, 128 ; IX, 234)
- C. Trials by Oaths and Ordeals.**

1. Trials by oaths:—

- (a) Different forms of oath peculiar to different castes. (VIII, 113)
- (b) Trial by an oath where no evidence is forthcoming in the matter of boundary disputes. (VIII, 109, 256)
- (c) Oaths in doubtful cases. (VIII, 110).
- (d) Oaths have been ordained by Manu in trifling cases.
- (e) In the matter of boundary disputes, the parties swore an oath by putting earth on their heads and

wearing chaplets (of red flowers) and red dresses. (VIII, 256).

2. Trials by ordeals:—

- (a) Manu gives no details regarding ordeals.
- (b) Manu mentions only two kinds of ordeals, namely—the ordeals by fire and water. (VIII, 114).
- (c) Declaration of innocence if the person is not affected by any of two ordeals or is not afflicted with any speedy misfortune. (VIII, 115).
- (d) The case of Vatsa in the matter of an ordeal by fire. He was declared innocent. (VIII, 116).

Ordeals were not unknown in ancient India. Mention of ordeals in Vedic works. They were gone into in criminal matters.

4. Non-mention of ordeals in some Smritis is accounted for by custom.

D. Execution of Decrees.

1. Different modes of execution :—

- (a) By sale of the property of the Judgement-debtor.
- (b) By his arrest and imprisonment.
- (c) By fines.
- (d) By compelling him to serve the decreeholder.
- (e) By force and compulsion.
- (f) By confining the wife, son or cattle of the debtor.
- (g) By remaining fasting at the door of the debtor.
- (h) By forcing him to servitude.

(i) By enabling the debtor to pay his debt by instalments.

(j) By asking the debtor to offer securities for the debt.

(k) By having sureties in the place of the original debtor.

(l) By a new contract superseding the old one.

2. Recovery of debts in execution :—

(a) By selfhelp. A creditor may realize an admitted debt. (VIII, 50).

(b) Various means of realization. (Manu VIII,49). Explained by Vrihaspati (XI, 54).

(c) Execution in court. The king is to see that the debt is paid. (VIII, 47)

(d) Discharge of a debt by instalments by a poor Brahmana and by labour by people of other castes. (VIII, 229)

Colebrooke's Digest Vol 1—p 357.

(e) Realization of debts from some debtors according to custom. Manu—Colebrook's Digest. (Vol. I, 357).

3. Rateable distribution and appropriation of payment :—

(a) A Brahman should be paid first and then the king, and lastly the other creditors in the order of the loans.

Colebrooke's Digest Vol. 1, p. 38.

(b) Manu is silent on the point.

4. Liability of the legal representative :—

(a) A son is not liable to pay his father's debt if it be incurred by the latter as a surety, or idly

promised or lost at a play, or incurred for spirituous liquor, or if it be the balance of a fine and a tax or duty.

Manu VIII, 166.

E. Limitation.

1. No limitation in some cases :—

(a) A pledge and a deposit are not lost by lapse of time, though they have remained long with the bailee (VIII, 145).

(b) Things of which one has permissive possession under friendly assent, a cow, a camel, a riding horse, and a beast made over for breaking in are never lost to the owner. (Manu VIII, 146)

(c) A pledge, a boundary, the property of minors, an open deposit, a sealed deposit, women, royal property, and the wealth of a Srotriya are not lost by adverse possession. (VIII, 149)

(d) If the hired servant, or workman is ill, and after recovery performs his work according to the agreement he shall receive his wages even after the lapse of a very long time. (VIII, 216)

(e) No limitation in the matter of institution of criminal cases.

2. (a) Document becomes invalid in thirty years if debtor is not repeatedly reminded of it. (Dr. Jolly—p. 247)

(b) Limitation 20 or 10 years :—

Adverse possession for ten years in the presence of the owner and for twenty years in his absence extinguishes the right of the owner. (Manu VIII, 147, 148)

3. Limitation—3 years :—

Three years let the king detain the property of which no owner appears, after a distinct proclamation:

the owner appearing within the three years may take it, but after that term, the king may confiscate it. (VIII, 30). Colebrooke's Digest Vol. II p. 115.

4. Short periods of Limitation :—

(a) The time allowed to the purchaser for the examination of seeds, iron, beasts of burden, jewels, females, and milch beasts is 10, 1, 5, 7 days, 1 month—3 days, and a fortnight respectively.

Manu VIII, 222.

(b) No responsibility for damage to unfenced crops by a cow within 10 days after her calving.

Lecture XV.
Criminal Law.

A.

Vedic Age.

1. In the Vedas criminal matters are more fully dealt with than civil matters.

The king, in modern phraseology, was the source of criminal law; and he clearly retained this branch of law in his own hands even in later times.

There are very few references to police officials: no doubt the king employed some of his dependents to execute sentences and arrest offenders.

(Macdonell's Vedic Digest Vol. I, p 213, 394.)

2. The king performed the duties of judge. Himself immune from punishment, he wields the rod of punishment (Danda).

(Satapatha Brahmana, V, 4, 4, 7.)

Criminal justice remained largely in his actual administration. A royal officer or even a delegate could exercise the jurisdiction.

"In civil justice it may be that the king played a much less prominent part, save as a court of final appeal. A wide criminal jurisdiction is, however, to some extent supported by the frequent mention of Varuna's spies, for Varuna is the divine counterpart of the human king." Macdonell's Digest Vol. II, p 213.

3. The crimes recognised in Vedic literature :—

The crimes enumerated include the slaying of an embryo, the slaying of a man, and the slaying of a Brahmana, a much more serious crime. Treachery was punishable by death.

The system of wergeld (Vaira)—compensation to the injured person indicates that criminal justice remained in the hands of those who were wronged.

Macdonell's Digest Vol 1—391.

4. Theory of retribution. Judicial punishment must always be applied because the law has been violated. Punishment is not a means to an end.

Kant's view—L.P.series II—187.

5. Hindu idea. Punishment is necessary not only for the sake of society but for the offender himself. Its expiatory value. Judicial punishment as well as divine punishment, both necessary to absolve the offender from his sin. Proper punishment procures the offender's heaven, fame and success. (Mandlik p, 200)

6. "The more archaic the Code, the fuller and the minuter is its penal legislation." Mains view.

7. How far is this applicable to the Vedic period?

Punishment by the head of the family. Punishment by society -excommunication, etc. Punishment in the shape of penances.

Judicial punishment :—

Divine punishment in this and in the next world. Hence penal legislation though deemed necessary was not given too much importance as in other countries.

8. Penalogy in the case of the Vedic Aryans.

Different kinds of punishments:—

(1) Outlawry. Prominent in Germanic Law. It also appears in Aryan Law.

(2) The offender was excommunicated by society and excluded from communal privilege, and was forced to flee beyond the pale of jurisdiction.

(3) Bodily punishment of various kinds extending to capital sentence.

(4) Exile and banishment. (Rig Veda X, 61, 8).

(5) Fines.

(6) Damage or compensation to the aggrieved party. (Rig Veda VI—35—6)

(7) Various penances. Expenses incurred for the same. Wergeld (Vaira) compensation was fixed at 100 cows, for it was called sata-daya—'one whose wergeld is a hundred'. (Rig Veda II, 32, 4)

(8) Special punishment prescribed in the case of ordeals.

(9) The offender was forced to be a slave to the aggrieved party.

(10) Self-help. The aggrieved in some cases was permitted to punish the offender.

9. Special mention of ordeals.

(1) Punishment of thieves left to the action of the robbed. The practice of binding them in stocks seems clearly referred to. (Rv. I. 24, 13, 15; VII, 86, 5; Av. VI, 63, 3, etc)

(2) Death inflicted by the king. (Rv. V, 79, 9)

(3) A fire ordeal is not known to the Atharva-Veda, and the ordeal known to the Chandogya Upanishada is not said to be used in the case of theft.

(4) Ordeal (Divya) is a term not found until the later literature, but several references to the practice of ordeals have been seen in Vedic literature. Fire ordeal occurs in Atharva-Veda (II, 12) An ordeal with a glowing axe occurs in the Chandogya Upanishada as applied in an accusation of theft.

There are references to fire and water ordeals as well as to the balance ordeal. But there are different opinions on the point. At any rate the first two ordeals were well known in the Vedic time.

Macdonell's Vedic Digest Vol. 1, pages 304, 364, 394.

10. The following points are noted bearing on the moral condition of the people:—(a) the exposure of children, (b) the exposure of the aged ; (c) prostitution, (d) adultery ; (e) incest.

As to (a) and (b) the passages in the Rig Veda have been misunderstood by Zimmer. There were really no such occurrences. As to (c) its existence in the time of Rig Veda is certain, but its extent is disputed. As to (d) adultery was deemed by the Aryans as a serious offence against the husband. An adulterer could be slain with impunity if taken in the act. As to (e) *i. e.* incest, it is said that it was allowed in the case of Yama and Yami (brother and sister) in the Rig Veda (X, 10), but it was a legend which was not approved and followed at all.

Macdonell's Vedic Digest Vol I, 395—397.

11. The punishment of robbers committing murder was very severe. They were burnt and killed in the presence of the public.

Rig Veda X, 99, 7.

B.

Post Vedic Period.

I Brahmanic Period.

1. As in the Vedic Age so in this period the king had the authority to punish offenders.

2. Punishment by the king, penances and religious acts had the effect of full atonement and exemption from future punishment in the next world.

3. There were two sorts of offences : Mohapatak and Upapatak. They are fully dealt with by Manu.

4. These offences were severely dealt with.

5. Sudras adopting the life of a Brahman and practising Yoga were severely punished. Even Ram Chandra killed a Sudra under similar circumstances. It must be noted that Sudras as understood then were quite different from the Sudras of the present time. The latter can hardly be called Sudras.

6. Gambling is mentioned in the Vedas. In the Mahabharat the gambling scene is the central theme of the whole plot. It is not taken to be prohibitory.

Dr. Jolly p 272.

II. Sutra Period.

1. The law of crimes and procedure was very much developed in this period.

2. Dr. Jolly in his work on Hindu Law and Custom fully deals with the law of this period. In Chapter IV—pages 251 to 285 he notices the following points:—

(1) There are various religious transgressions. A list of sins which are mohapatak and upapatak is given. The list is not exhaustive.

(2) For the said sins penances through prayers and by presents to learned and virtuous Brahmanas are prescribed. But deadly sins are expiated for only by suicide.

(3) Excommunication from the caste is the result—but the sinner may be restored to his former position by undergoing penances.

(4) As to crimes—they are dealt with by the king and punishments are awarded by him.

(5) Capital punishment for theft and for other offences.

(6) Various punishments for theft according to the value of the stolen property.

(7) Caste distinction in criminal law. A Brahman in petty matters is not punished. A Sudra by stealing gold which belongs to a Brahmana is punished by death.

Gautama 12, 15—17.

(8) Death sentence is passed when a low caste man kills a Brahmana.

(9) Death sentence in other serious cases.

(10) Gambling is condemned in this period

Gautama (12, 41); Baudhayana, (2, 2, 16). But Apastambha (2, 25, 12) regards it to be a lawful amusement of the higher castes, as in the case of Mahabharat.

(11) Punishment for adultery varies according as the woman was guarded or not. Caste privileges in adultery. A Sudra guilty of adultery with the wife of an Aryan shall have his organ cut off and his property confiscated and if the woman was under guard, he shall also be executed. In the case of a Brahmana he shall be only fined.

(Gautama 12, 2f, etc)

(12) Punishment for the incest.

(13) Wergeld (Vaira)—Blood money. In the Vedic age a blood money of 100 cows was paid to the relations of a murdered person. But in this period (Sutra period) both Apastambha (I. 9, 24, 1—4) and Baudhayana (I. 10, 19, 1, 2) prescribe the scale of 1000 cows for a Kshatriya, 100 for a Vaisya, 10 for a Sudra and a bull over and above in each case. Apastambha leaves the destination of the payment vague, but Baudhayana assigns it to the king. It is supposed that the cows were for the relations of the murdered person, and the bull for the king. Gautama also deals with the matter. According to them the crime of slaying a Brahmana is too heinous for wergeld,

Macdonell's Digest Vol. II p, 331.

3. Ordeals :—

(1) Number of ordeals grows from two to nine.

(2) Ordeals by fire, water and balance were of very ancient date.

4. As to procedure in criminal cases :—

(1) The accused in a criminal case could not appear by a proxy.

(2) Certain persons could not be arrested.

(3) Every body can bear witness in a criminal case. (Gautama 13, 9)

(4) A single witness may be sufficient. Decision by majority. Respectability of the witness is also considered.

III & IV. Kautilya and Buddhistic Periods.

1. The Brahmanic influence was greatly diminished in both the periods. The special privileges of Brahmanas in the matter of criminal prosecutions against them were considerably diminished.

2. The king as before with the aid of the assessors or other officers under him administered criminal justice.

3. The several offences are described in Kautilya's Arthashastra Books II, III & IV.

4. The following is a classification of different offences :—

(1) Offences affecting the human body: such as murder, grievous hurt, simple hurt, assault, causing abortion, committing rape, defiling a maiden, etc.

(2) Offences against property: Robbery, theft, criminal breach of trust, misappropriation, trespass, etc.

(3) Offences relating to weights and measures.

(4) Offences relating to marriage :—

Adultery falsely impersonating a bridegroom for the purpose of marriage, enticing a married woman, etc.

(5) Offences against public justice.

(6) Offences by public servants.

(7) Offences against the state.

(8) Offences against morality and religion.

4. Several kinds of punishment : —

- (a) Capital sentence with or without torture.
- (b) Mutilation of limbs.
- (c) Exile or banishment.
- (d) Imprisonment.
- (e) Forfeiture of property.
- (f) Fine.
- (g) Whipping.
- (h) Preventive measures.

5. (a) There were three descriptions of fines :—

The first amercement, the middle most amercement, and the highest amercement. A scale of fines is laid down. The fines are according to the gravity of the offence.

(b) The social position and respectability of the offender is taken into account. What other matters are to be considered in awarding punishment.

6. Punishment other than those mentioned in para 4.

(a) Self-help. The accused could be ill-treated or made a slave for his offence by the prosecutor.

(b) He might be excommunicated from his society.

(c) He would be subject to undergo penances and to incur expenses for them.

7. Criminal cases were never barred by limitations.

8. Witnesses are to take oaths. Number of witnesses to be examined in any special case.

9. Competency or incompetency of witnesses :—

(a) Every body can bear witness in a criminal case.

(b) There are certain persons who may be called inadmissible witnesses.

Dr. Jolly—p 305.

10 There was prevention of crimes by the appointment of spies. Special spies were appointed in serious and difficult cases.

11. No case could be defeated for want of evidence. Either ordeals were resorted to, or special spies were appointed to get at the real truth.

12. The king incurs sin if he cannot or does not decide a case or decides it wrongly.

V. The Institute of Manu.

1. A tabular statement of offences with the nature of different punishments may be prepared by reference to the Chapters 8 and 9 of Manusmriti.

2. The offences alluded to in Manusmriti are stated below. The details are omitted here :—

(1) False Evidence and offences against Public Justice. Manu VIII, 119-121, 138, 123, 263, 232, 107, 108, 231, 234, 232, 31-32, 35-36, 37, 38, 139, 176, 191, 192, 194, 193, 198.

(2) Defamation (বাক্পাক্ষ) Manu VIII, 225, 267 to 277.

(3) Adultery. (Manu VIII, 356—368)

(4) Theft—Manu VIII 319 to 331, 333, 334, IX 293, 276, 280, 277.

(5) Assault and Hurt (दण्डपारुष्य) Manu VIII, 279, 281 to 284.

(6) Trespass—Manu VIII, 264.

(7) Offences relating to the stat —Manu IX, 232, 275, 280, 289, 399, ; VIII 400 ; IX 274.

(8) Offences relating to the Public. Manu IX, 279, 281 to 286, 291.

(9) Gambling (दूत) and Betting (आखरः)—Manu IX 223, 224, 355.

(10) Offences relating to marriage (Yoga-I, 66 65.)

(11) Breach of contract—(Manu VIII, 213, 217, 219, 220, 223, 392 ; IX 287, 291, 292.)

(12) Offences relating to Religion and society. (Manu VIII—388, 285, 393, 290, 389.)

3. Classification of punishments :—

(1) Death under various modes.

(2) Exile or Banishment.

(3) Arrest and imprisonment.

(4) Corporal chastisement of various degrees.

(5) Forfeiture of property.

(6) Fines.

(7) Harsh reproofs.

(8) Gentle admonition.

(9) Penances of various kinds.

4. The punishment of death was inflicted in the following ways :—

- (a) By being drowned in water.
- (b) By being devoured by dogs in a frequented place.
- (c) By being burnt on a red-hot iron bed, logs being put under it until the offender is burnt to death.
- (d) By being slain by an elephant.
- (e) By being impaled on a pointed stake.
- (f) By being cut to pieces with razors.
- (g) By extending himself on a heated iron-bed or embracing the red-hot image of a woman.
- (h) By having himself cut off his organ and his testicles, and having taken them in his joined hands, the offender is to walk straight towards the southeast until he falls down dead.

Compare the various modes devised by Hiranya Kasipu to put his son Pralhad to death.

5. Tonsure of the head was ordained for a Brahmana instead of a capital sentence. He was also liable to be banished, leaving all his property to himself and his body unhurt.

6. Corporal punishment may be made to fall in the cases of the three lower castes in the following places only :—the organ, the belly, the tongue, the two hands, the two feet, eyes, the nose, the two ears, likewise the whole body. A Brahmana shall depart unhurt from the country. (Manu VIII, 124—125).

Sometimes the forehead is branded with particular marks.

7. The king shall inflict punishment with a whip, a cane, or a rope, and the like on women, children, men of disordered mind, the poor and the sick (Manu IX, 230).

8. Banishment is to be distinguished from transportation. There was no fixed place for the offender. He was required by the king to leave his kingdom and to shift for himself outside the realm.

9. Penances are religious sanctions. They are various in number. In the case of mortal sins (mahapatak) even death is ordained.

10. If the penance is not performed, corporal punishment and fines are prescribed in accordance with the law.

Manu IX, 236.

11. A double fine is inflicted on the man who once being convicted is again accused within a year. Repeated intercourse with a (Vratya and a Chandali entails double fine (VIII, 373).

12. A right of private defence may be exercised in some cases :—

(a) A twice-born man may take up arms when he is hindered in the discharge of his duties, or when the twice-born castes are threatened with destruction in evil times.

Manu VIII, 348.

(b) A person commits no sin or offence, if he kills another in the cause of right, in his own defence, in a strife for the fees of officiating priests and in protecting women and Brahmanas. (VIII, 349).

(c) An assassin, though he may be a teacher, a child, or an aged man, or a Brahmana well versed in the Vedas may be slain with impunity, if he approaches with murderous intent. The slayer incurs no guilt,

whether the assassin is killed publicly or secretly. In such a case fury is well met by fury.

13. There were no offences in the following cases:—

(a) Giving false evidence in particular cases. (VIII, 103—106, 112)

(b) A wife, a son, a slave, a pupil, and a singer, whole brother, who have committed to be beaten with a rope or a split bamboo on the back of the body only and not on a noble part. (VIII, 299-300)

(c) Mendicants, bards, performers of the introductory ceremony of a Vedic sacrifice, and artisans are prohibited from speaking to married women. (VIII, 360)

(d) One may converse in spite of prohibition with wives of actors and singers and of those who are on the intrigues of their own wives; for such men encourage or allow their wives to hold criminal intercourse with others. Yet conversation with such women is not permissible. (VIII, 362, 363)

(e) It is not permitted to take the roots, and fruit from trees, wood to build a sacrificial fire and grass for feeding cows.

(f) A twice-born man whose provisions are used as a traveller takes two stalks of sugar-cane from another's field. (VIII, 341)

(g) No fine shall be inflicted on a cow within ten days after her calving, by bulls or other cattle sacred to the gods, whether or not there be a herdsman to look after them.

Manu VIII. 242.