ELEMENTS OF HINDU LAW

CHAPTER I

NATURE, ORIGIN AND SOURCES

Hindu Law, unlike Roman Law, is more religious than secular in character. It is not a codified law but extracted from various religious texts, commentaries, usages and customs, and judicial decisions.

(Nature & Origin.) The Hindus believe that their law is of divine origin and to them this is positive law emanated from the Deity. The Hindu Kings were bound by the divine laws contained in the 'Smritis' and these were applicable to Kings and subjects alike. By original theory of its origin the law was independent of the state or rather the state was dependent on law. The King used to administer justice as the representative of God and royal edicts, though had the force of divine laws in some matters, these were also considered void if found repugnant to revealed laws. Hence, the theory 'King can do no wrong' or 'The King is the fountain of justice' does not always apply to Hindu law.

(Sources) "The main sources of Hindu law are :—

(i) The **Sruti** (ii) The **Smriti** (iii) The immemorial and approved **Customs,** by which the divine will or law is evidenced.

1. Sruti : The Sruti comprises the four Vedas, the six Vedangas and the Upanishadas. The 'Sruti' is believed to contain the very words of the Deity. The root *Sru* means *to hear* and Sruti literally means *what was heard*. To the Hindus the 'Sruti' is of paramount authority but it contains very little of lawyer's law. The four Vedas are known as (i) the **Rik-Veda** (ii) the Yajur-Veda (iii) the Sama-Veda and (iv) the atharva-Veda.

The Vedangas are appendages to Vedas and are six in number. The Upanishadas are known as Vedantas or concluding portions of the Vedas and embody the highest principles of Hindu religion.

(Difference between Sruti & Smriti.) **2. Smriti :** The 'Smriti' literally means, that which was remembered, and is believed to contain the precepts of God. The 'Sruti' contains the very words of God whereas in 'Smriti' the language is of human origin but the rules are divine. The Smritis are the principal sources of lawyer's law but they also contain matters other than positive law. The three principal Smritis are :—

(i) The Code of 'Manu' (200 B. C.-200 A. D.)

(ii) The Code of Yajnavalkya (4th Century A. D.) The 'Mitakshara' is the leading commentary upon this Code.

(iii) The Code of 'Narada' written in the 5th or 6th century, A. D.

(Authority of Smritis.) The Smritis are believed to be founded on lost or forgotten 'Sruti' inasmuch as they are compiled from memory and are declared as embodying binding rules of conduct, by the sages who admitted the 'Sruti' alone to be the foundation of law. The 'Smritis' have all along been followed in practice by the sages and the persons learned in Vedas. Human memory is short. Hence, the precepts have been remembered while the exact words in which they had originally been expressed might be forgotten. The inference given above, forms the foundation of authority of Smritis. If a 'Smriti' is in conflict with 'Sruti' it must be rejected.

3. Customs : Custom is explained by the Judicial Committee in *Hurpurshad VS. Sheo Dayal* (3 I.A. 253, 285)[1] thus : —

"Custom is a rule, which in a particular family or in a particular district, has from long usage obtained the force of law. It must be ancient, certain and reasonable, and being in derogation of the general rules of law, must be construed strictly."

Customs are supposed by some writers to be based on lost or forgotten 'Sruti' and by others on lost or forgotten 'Smriti'.

According to some commentators usages are inferior to Smritis and must not be followed when in conflict with them. But others maintain that Smritis and Usages are of equal authority and in case of conflict between them the Usages, which are actually observed in practice, must prevail. This view was taken by the Privy Council in the case of *The collector of Madura V. Mootoo.* (12.M.I.A. 397, 436)[2] It observed, "Under the Hindu system of law, clear proof of usage will out-weigh the written text of the law".

(Division of Customs.) Customs may be divided into three classes (i) **Local :** Which are binding on the inhabitants of a particular locality. (ii) **Class :-** Which are binding on a particular caste, etc. (iii) **Family :-** Which are confined to a particular family, maths or religious institutions.

(Essentials of a Valid Custom,) Antiquity, certainty, reasonableness and continuity are the essentials of a valid custom. A custom, in order to have the force of law, must be ancient or immemorial. The Hindu lawyers have laid down a reasonable rule on this question. One hundred years is the limit propounded by them. Whatever is beyond a century is immemorial.

It must not be opposed to morality or public policy and it must not be expressly forbidden by the legislature. *(Vannia kone V. Vannichi Ammal* (1928) 51. Mad. I, 108 ; I.C. 760).[3]

1. *Hurpurshad VS. Sheo Dayal* (3 I.A. 253, 285)
2. *The collector of Madura V. Mootoo.* (12.M.I.A. 397, 436)
3. *(Vannia kone V. Vannichi Ammal* (1928) 51. Mad. I. 108 : I.C. 760).

If a custom is discontinued it has the effect of destroying the custom. It is however, different in the case of a local custom which is the lex loci binding on all persons within the local limits in which it prevails.

Where the members of a family governed by Hindu law set up a custom derogatory to that law, the burden lies on them to prove it. In case of a tribe who were originally not Hindus, plead that they have adopted a particular usage or custom the burden of proof lies on them.

(Difference between customs and Usages) Customs and Usages are often used as convertible terms, still a distinction is drawn between them. Antiquity is an essential for a valid custom but the usages may be of recent origin. A mercantile usage may be still in growth. The same principles apply to an agricultural usage which may be of recent origin.

OTHER SOURCES OF HINDU LAW.

Besides three, mentioned above, there are other sources of Hindu law also. These are :—

4. Commentaries or Nibandhas :

Since the Hindu law is believed to be of divine origin perfect harmony amongst the different Codes must necessarily be expected. But the conflict between the Smritis, seeming or real, has given rise to the commentaries that are called 'Nibandhas'. Though the commentators professed to interpret the laws laid down in the Smritis, in fact, they recited the customs and usages which they found in vogue around them and on this ground their interpretations have been accepted as authoritative.

5. Factum Valet : The so called doctrine of *factum valet quod fierinon debuit* meaning, "What should not be done, yet being done, shall be valid", was enunciated first by the author of the 'Dayabhaga'. It was laid down on the principle,

"বচনশতেনাপি বস্তুনোন্যথাকরণাশক্তেঃ"

meaning, ``A thing or the nature of a thing. cannot be altered by a hundred texts``. The above passage was rendered by Colebrooke into :- ``For a fact cannot be altered by a hundred text``.

Though the doctrine of `factum valet` was enunciated by the author of Dayabhaga, it was accepted by the Mitakshara school to a great extent.

(Appplication of factum valet) ``In cases in which the `shastra` is merely directory and not mandatory or only indicates particular persons as more eligible for adoption than others, the maxim may be usefully and properly applied, if the moral precepts or recommended preference be disregarded. (*Laksmappa V. Ramava* 12.Bom H.C.R.364).[4] Sir M. Westroop observed, `If the factum valet, external act, is void in law, there is no room for the application of the maxim.' `Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law.' *(Sri Balasu V. Sri Balasu* 22.M. 398, 423).[5]

The doctrine of factum valet does not ever excuse the violation of a legal rule. (*Budansa V. Fatma 26.M.L.J. 260, 266).*[6]

6. Puranas : The puranas, eighteen in number, (excluding upa-puranas) are not considered authoritative, so as to override the `Smritis.` These illustrate the law by the instances and are looked upon as precedents. Prof. Wilson observes, `The puranas are not authorities in law; they may be received in explanation or illustration, but not in proof.'

4. (*Laksmappa V. Ramava* 12.Bom H.C.R.364).
5. *(Sri Balasu V. Sri Balasu* 22.M. 398, 423).
6. (*Budansa V. Fatma 26.M.L.J. 260, 266).*

7. Acts of Legislatures : The Hindu law has been modified and supplemented in certain respects by the Acts of Legislatures. (i) Freedom of Religion Act-1850 (ii) The Hindu Widows' Remarriage Act-1856 (iii) The Hindu Women's Right to Property Act-1937 are instances on the point.

8. Judicial decisions : Judicial decisions, to some extent, have become a source of Hindu law. Decisions of the Privy Council and of High Courts are binding on the subordinate courts. Rules enunciated in the cases of *The collector of Madura V. Mootoo, Sri Balasu V. Sri Balasu* are instances on the point.[7]

9. Minor texts and commentaries not regarded as authoritative :

The Upa-Puranas or the minor or subsidiary pura-nas, though regarded generally as spurious, compositions, some rules enunciated by the authors of those have found favour with the courts. The authors called these rules as **"বিধায়ক ব্যাকানি"** or rules of conduct. Raghunandana's prohibition of intermarriage between different tribes, though contrary to 'shastras', is based on 'Aditya-Purana' and it was accepted by the court in *Malaram V. Thanooram.* (9.W.R.552).[8]

10. Equity, justice and good conscience :

The court has the inherent power of applying equity, justice, and good conscience. Mahmood, J. of Allaha-bad High Court in the case of *Ganga V. Lekhrj* obser-ved : "To such matters which do not affect the essence of the adoption, the doctrine of factum valet would undoubtedly apply upon general grounds of justice, equity and good conscience, and irrespective of the authority of any text in the Hindu law itself."

But such appliction must be consistent with the basic provisions and principles of Hindu law and not offending the same. (*Ramchandra V. Vinayak* 41. I.A. 290, 310).[9]

7. *The collector of Madura V. Mootoo, Sri Balasu V. Sri Balasu* are instances on the point.
8. *Malaram V. Thanooram.* (9.W.R.552).
9. (*Ramchandra V. Vinayak* 41. I.A. 290, 310).

CHAPTER II

APPLICATION, ENACTMENTS AND SCHOOLS

Application The Hindu law applies not only to Hindus by birth, but also to Hindus by faith that is converts to Hinduism. *(Shedeo V. Kusum* (1922) 59.I.A.58)[1]

2. To illegitimate children where both parents are Hindus.

3. To illegitimate children where the father is a Christian and the mother a Hindu and the children are brought up as Hindus.

4. To Jains, Sikha, Arya Samajists, Dayanandis and Nambudri Brahmanas except so far as such law is valid by custom.

5. To a Hindu by birth who renounced Hinduism but reverted to it afterwards by performing the religious rites. *(Kusum V. Satya* (1903) 30. Cal. 999)[2]

6. To sons of Hindu dancing girls of Naik caste converted to Islam, where the sons are taken into family of the Hindu grand-parents and are brought up as Hindus.

If a Hindu by birth, departs from the standard of orthodoxy in matters of diet and ceremonial observances or if he becomes a member of the `Brahmo Samaj` or accepts `Granth Sahib` or becomes `Jati Vaishnava` he does not cease to be a Hindu.

But the Hindu law does not apply to the following persons :

(1) To the illegitimate children of a Hindu father by a Christian mother who are brought up as Christians or to illegitimate children of a Hindu father by a Muslim mother.

(2) To a Hindu converted to Christianity. A person ceasing to be a Hindu in religion cannot elect to continue to be bound by the Hindu law in the matter of succession after passing of the Succession Act. 1925.

1. *(Shedeo V. Kusum* (1922) 59.I.A.58)
2. *(Kusum V. Satya* (1903) 30. Cal. 999)

(3) To the descendants of Hindus who have formed themselves into a separate community with peculiar religion and usages different from the Hindu shastras. The *'Kalais'* of Burma constitute such a community.

(4) To converts from Hindu to Islam. The Khojas, Cutchi Memons etc., who were converts from Hinduism to Islam, and succession would be governed by the Muslim personal law except where the questions relate to agricultural land after passing of shariat Act-1937 and Cutchi Memon Act-1938.

Enactments

In certain respects Hindu law has been modified and supplemented by the Acts. Some of these have been given in the appendix for ready reference. The principal Acts, which modified the Hindu law are given below : —

(i) The Freedom of Religion Act or the Caste Disabilities Removal Act-1850. By virtue of this Act a Hindu who is outcasted or who has become a convert to another faith, does not lose his right to property by the mere fact of such conversion.

(ii) The Hindu Widows' Re-marriage Act-1856, legalises the re-marriage of Hindu widows.

(iii) The Native Converts Marriage Dissolution Act-1866, enables a Hindu, converted to Christianity to dissolve his marriage.

(iv) The Special Marraige Act-1872/1923 allows inter-caste marraige before a Registrar.

(v) The Succession Act-1925.

(vi) The Transfer of Property Act-1882/1929 modifies Hindu Law to a great extent regarding transfer of property and transfer and bequest to an unborn person.

(vii) The Majority Act-1875 is applicable to Hindus except in cases of marriage, divorce and adoption.

(viii) The Guardians and Wards Act-1890 applies to Hindus where guardian has been or is to be appointed by the court.

(ix) The Hindu Inheritance (Removal of Disabilities) Act-1928 limits the cexlusion from inheritance on account of disabilities as per Hindu Law.

(x) The Hindu law of Inheritance (Amendment) Act-1929 admits some relations before father's brother in the matter of succession.

(xi) The Hindu Gains of Learning Act-1930 states that all acquisitions by means of learning are the separate property of the acquirer.

(xii) The Hindu Women's Rights to Property Act 1937, strikes at the root of Mitakshara and gives right of inheritance to Widows.

(xiii) The Contract Act-1872, supersedes the Hindu Law of contract except `Damdupat.' The law of `Damdupat' is not applicable in Bangladesh.

(xiv) The Evidence Act-1872, supersedes all rules of Hindu Law on evidence.

(xv) The penal Code-1860, supersedes the whole of the Hindu Law of crimes.

SCHOOLS

(Origin) Conflict of law is opposed to the theory of its divine origin. The `shastras' which were universally or very generally received became the subject of subsequent commentaries and the different commentaries had given rise to the several schools of Hindu law. `The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose.' *(The collector of Madura V. Mootoo.* (1868) 12 M.I.A. 397, 435).[3]

3. *(The collector of Madura V. Mootoo.* (1868) 12 M.I.A. 397, 435).

(Number of Schools) The schools are ordinarily said to be five in number. But there are only two principal schools namely, the Mitakshara school and the Dayabhaga school. The Dayabhaga prevails in Bangladesh and in the province of West Bengal in India ; the Mitakshara prevails in the whole of India (except the province of West Bengal,) and in Pakistan.

The Mitakshara is anterior to Dayabhaga and is a running commentary on the Code of *Yajnabalkya* written by *Vijnaneswara.*

The `Dayabhaga` is not a commentary on any particular Code but a digest of all the Codes. It gives first preference to the Code of `Manu`. In the case of the *collector of Madura V. Mootoo* and in the case of *Bhugwandeen Doobey* (II.M.I.A. 487, 507)[4] it was observed that the Dayabhaga was an enactment amending the Mitakshara law in Bengal. Justice Dwarkanath Mitter observed, ``The authority of Mitakshara, it should be remembered, was at one time supreme even in Bengal, and as the author of the Dayabhaga did not intend to dispute the correctness of all the propositions laid down in that treatise, we need not be at all surprised at his silence in regard to some of them. It is for this reason that the Mitakshara is still regarded as a very high authority on all questions in respect of which there is no express conflict between it and the works prevalent in the school``.

The Dayabhaga may also be refered to in a Mitakshara case on points on which the latter treatise is silent. *(Mahabir Prasad V. Raj Bahadur Singh* (1943) 18. Luck. 585).[5]

The Mitakshara school is regarded as the orthodox school and the Dayabhaga, the reformed one and the two mainly differ on the following matters : —

(i) The law of inheritance.

(ii) Joint family system.

4. *collector of Madura V. Mootoo* and in the case of *Bhugwandeen Doobey* (II.M.I.A. 487, 507)

5. *(Mahabir Prasad V. Raj Bahadur Singh* (1943) 18. Luck. 585).

The Mitakshara is sub-divided into four or five minor schools. These differ between themselves in some matters of detail relating mainly to adoption and inheritance.

The schools along with the commentaries, respected as authorities, are given below : —

1. Dayabhaga school :
(i) Dayabhaga of Jimutabahana.
(ii) Mitakshara of Vijnanes-wara.
(iii) Dayatattwa of Raghunan-dana.
(iv) Daya-Karma-Sangraha of Srikrishna.
(v) Viramitrodaya of Mitra Misra.

2. Mitakshara School :

(a) Benares School :
(i) Mitakshara
(ii) Viramitrodaya
(iii) Nirnayasindhu.

(b) Mithila School :
(i) Mitakshara.
(ii) Vivada-Chintamani of Vachaspati Misra.
(iii) Vivada Ratnakara of Chandeswara.

(c) Maharashtra or Bombay School :
(i) Mitakshara.
(ii) Vyavahara Mayukha of Nilkants.
(iii) Viramitrodaya.
(iv) Nirnayasindhu.

(d) Dravida or Madras School :
(i) Mitakshara.
(ii) Smriti Chandrika of Deva-nanda Bhatta.

(iii)Parasara-Madhava of Madhavacharya.
(iv)Viramitrodaya.
(v) Saraswati Vilasa.

(c) Punjab School : (i) Mitakshara.
(ii) Viramitrodaya.
(iii)The Punjab customs, compiled in Riwaz-I-Am.

(Works on adoption) Two treatises on adoption *Dattaka Chandrika* and *Dattaka Mimansa* are equally respected throughout Bangladesh, India and Pakistan. In case of conflict *Dattaka Chandrika* is prefered in Bangladesh and in the province of West Bengal in India ; and the *Dattaka Mimansa* is prefered in India (except the province of West Bengal) and in Pakistan.

A Hindu family residing in a particular place is presumed to be governed by the law of the locality where he is domiciled.

(Migration and schools) A Hindu family, migrating from one place to another. is presumed to carry with it its personal law. But this presumption may be rebutted by showing that the family has adopted the law and usages of the province to which it has migrated. (*Basant Kumar Basu V. Ram Sankar Ray* (1932) 59. Cal. 859).[6]

(Proof of change of school) Whether a family adheres to the law of the former place or has adopted the doctrines of its new domicile, may be proved by the mode in which it performs the religious ceremonies. The most direct evidence is the instances of succession in the family and next, ceremonies at marriages, births (Annaprasan etc.) and *shaddhas. (Parbati V. Jagadish* (1902) 29. Cal. 433 ; 29 I.A.82).[7]

6. (*Basant Kumar Basu V. Ram Sankar Ray* (1932) 59. Cal. 859).
7. *(Parbati V. Jagadish* (1902) 29. Cal. 433 ; 29 I.A.82).

Difference between mitakshara and Dayabhaga schools.

It has already been discussed that Mitakshara is anterior to Dayabhaga and it is a running commentary on the code of Yajnabalkya written by Vijnaneswara, the Dayabhaga is the digest of all the Codes while giving preference to the Code of 'Manu'. The Mitakshara is still regarded as a very high authority even in Bangladesh and in the province of West Bengal in India, When Dayabhaga is silent on any point, Mitakshara may be referred to. Similarly the Dayabhaga may also be referred to in a Mitakshara case on points on which the latter treatise is silent. *(Mahabir prasad V. Raj Bahadur Singh.* (1943) 18.Lnck.585)[8]

The two schools mainly differ on the following points.

Mitakshara School.	**Dayabhaga School.**
	Inheritance
1. The right of inheritance arises from propin-quity. Exception is the daughter's son. (*Buddha Singh V. Lahu Singh.* 37.All.604.P.C.)[9]	1. The right of inheritance depends on spiritual efficacy. (*Guru Govind V. Amund Lal.* 13.W.R.F.B.49)[10]
2. There are three classes of heirs (i) Sapindas (ii) Samanodakas (iii) Bandhus.	2. There are three classes of heirs (i) Sapindas (ii) Sakulyas (iii) Samanodakas. The sakulyas of Dayabhaga school are the sapindas of Mitakshara school from 5th to the 7th degree.
3. So long there are gotraja sapindas or samanodakas no bandhu or bhinna-gotra sapinda can generally inherit.	3. Both agnates and cognates come in the list of sapindas and inherit before sakulyas or samanodakas.

8. *(Mahabir prasad V. Raj Bahadur Singh.* (1943) 18.Lnck.585)
9. (*Buddha Singh V. Lahu Singh.* 37.All.604.P.C.)
10. (*Guru Govind V. Amund Lal.* 13.W.R.F.B.49)

Mitakshara School.	Dayabhaga School.
4. A larger number of cognatic heirs are recognised in Mitakshara than Dayabhaga.	4. Some cognates are included in the sapindas and they enter into succession straightway. But number of such cognates are less in Dayabhaga than Mitakshara.
5. All sapindas are agnates with the exception of daughter's son.	5. Sapindas are those who can confer spiritual benefit on the deceased by offering pindas and include both agnates and cognates.

Devolution of property

1. Under Mitakshara school property devolves in two ways (i) Survivor-ship (ii) Succession.	1. Under Dayabhaga no living hindu has got any heir; succession opens after his death. Survivor-ship is not recognaised.

Joint family property

1. A son, born to one of the coparceners, acquires an interest in the property from the moment of his birth and he cannot be ousted from such interest while he is alive.	1. In Dayabhaga succession opens to a son only after the death of the father. A Dayabhaga father is competent to make a testamentary disposition of the whole of property. A son has got no right to object to it. A son cannot claim partition during the lifetime of his father.

Mitakshara school	Dayabhaga school
2. The Karta or manager has got a restricted right of transfer.	2. Succession once opens, share of each heir becomes fixed, and every member (including karta) can alienate his share in any way he likes.
3. Property devolves on the male survivors only.	3. Property passes by inheritance only and may go to female heirs like widows, daughters etc.

Factum Valet.

1. The doctrine of factum valet was enunciated by the author of the dayabhaga. It was held by the Privy Council in the case of *Wooma Daee* (3.C.587) that the doctrine is recognised by the Mitakshara school also.	1. It is recognised by the Dayabhaga school to a greater extent. But factum valet is no defence when the act is immoral or against public policy ro prohibited by any Act of Legislature or against express principles of Hindu Law.

CHAPTER III
DEFINITIONS

(Etymolo gical meaning) The words **sapinda, sakulya, samanodaka, sagotra** and **samana-pravara** mean respectively those whose **pinda, kula, udaka, gotra,** and **pravara** are common.

Gotra (combination of go (a cow) and *tra* (to protect) means that which protects the cow, such as a pasturage.

The Sanskrit word **udaka** means water, or a reservoir of water, such as a tank or well.

`**Kulya'** is derived from *kula (*to cultivate) and means a field or cultivated land.

The word *pinda* means food.

The ancient Hindus lived in villages. `Assuming that a single family established a new village, and bearing in mind that pasturage and a reservoir of water indispensable in a tropical country, are not divisible according to Hindu Law, we may take the words `sagotra' and `samanodaka' to mean all members of the family, holding in common, the pasturage and the reservoirs of water used for domestic or agricultural purposes; the word `sakulya' to signify those members that jointly carried on cultivation ; and the word sapinda to comprise those that lived in common mess. When a family increased in the number of its members, they would separate in mess first, and might still continue to hold in common their kulya or property, consisting mainly of land, by jointly carrying on the cultivation and dividing the produce according to their shares, and when this was felt to be inconvenient, they divided the family land, continuing, however, to use and occupy jointly the gotra or the land reserved for grazing

the cattle, and the udaka or reservoirs of water, which remained common to the most distant agnatic relations. The plain meaning of the texts of the **Baudhayana** and of **Brahma-Purana** lends some support to this view.' (Golap Chandra Sarkar Sastri). The definition of the terms, generally used in Hindu law is given below:-

(i) **Daya :** According to Mitakshara the word `daya' means `heritage' and signifies that wealth which becomes the property of another, solely by reason of his relationship to the owner.

According to Dayabhaga the term daya is by usage employed to signify wealth in which proprietary right dependent on relation to the former owner, arises `on the extinction of his ownership' by death, natural or civil.

(ii) **Partition :** According to `Mitakshara' partition is the adjustment of rights of coparceners into specified portions, whereas under Dayabhaga it consists in separating the shares of the coparceners, and assigning to each specific portions of the property by *metes and bounds*.

(iii) **Sapinda :** The term sapinda means one of the same pinda. In Hindu Law books the term has been used in two different senses. In `Mitakashara' the term is used in the sense of `one of the same body' that is blood relation. But the term is used now-a-days in a technical sense.

According to `Dayabhaga', especially for the purpose of inheritance the term `sapinda' is used in the sense of one connected through the same funeral cake (*pinda*) offered at the time of *sraddha* ceremony.

(iv) **Sakulya :** The term `sakulya' means one belonging to the same *kula* or family and means two groups of heris according to `Dayabhaga.' The first group comprising the 4^{th}, 5^{th} and 6^{th} male descendants in the male line of that person, and that of his father, grandfather and great-grand-father ; and it includes the 4^{th}, 5^{th} and

6th paternal male ancestors in the male line and also six male descendants in the male line of each of these ancestors ; altogether thirty-three relations.

Secondly it includes the group of heirs called `Samanodakas`.

The term sakulya is not used in `Mitakshara` for denoting any class of heirs.

(v) **Samanosdaka :** The terms `samanodaka' includes all agnatic relations of the same `gotra' or family within 14 degrees excepting those included under the terms `sapinda' and the first group of `sakulya'. According to some it comprises all such `sagotras' or agnatic relations whose common descent and names are remembered.

(vi) **Gotra :** The `gotra' of a person is the name of the sage from whom he or his agnate is supposed to have descended in the male line.

(vii) **Sagotra :** Two persons descending in the male line from the same `rishi' or sage after whose name the `gotra' or family is called, are `sagotra' Every Hindu knows the `gotra' to which he belongs. Sagotras' are descendants in the male line from the founder of the `gotra'.

(viii) **Pravara :** `Pravara' is the group of sages distinguishing the sage who is the founder of the `gotra'. The number of `rishis' included in `pravara' are usually three but never exceed five. For instance in *Bharadwaja gotra* there are three `pravaras' namely *Bharadwaja Angirasha and Barhaspatya ;* of whom `Bharadwaja' is the founder of the `gotra' which is distinguished from other `gotras' by having for its pravars the other two sages.

The `samana-pravaras' are descendants in the male line of the three paternal ancestors of the founder of the `gotra'.

(ix) **Bandhus :** `Bhinna-gotra' sapindas are called bandhus. They are all cognates that is persons relate to the deceased through a female such as a sister's son, a brothers's daughter's on etc.

The term is used in `Mitakshara' only.

CHAPTER IV

MARRIAGE

(It is a sacrament, not contract.) Hindu marriage is not a contract. According to the `shastras' it is more a religious than a secular institution. It is the last of the ten sacraments or purifying ceremonies. All men are enjoined to marry for pro-creating a son necessary for the continuation of the line of paternal ancestors and for offering `pindas.'

In ancient times, the daughter was regarded as an item of property and the marriage involved the idea of the transfer of dominion over the damsel from the father to the husband. It appears to have owed its origin to the *patria potestas* of the Roman law.

(Forms of marriage.) The Hindu sages divided marriage into eight kinds, of which four are called approved forms, and four disapproved forms.

1. Approved forms :

(i) Brahma : When the father or other guardian of the bride makes a `gift' of the damsel, adorned with dress and ornaments to a bachelor, versed in the `Brahma' or the Veda, it is called the `Brahma' form. In this form the bridegroom is to be sought out and invited by the guardian to accept the bride offered to him.

(ii) Daiva : In this kind of marriage the damsel is given to a person who works as a priest in a sacrifice performed by the father, in lieu of the *dakshina* or fee. It is inferior to the `Brahma' form as the father derives a benifit in such a marriage.

(iii) Arsha : When the bridegroom makes a present of a pair of *kine* to the bride's father it is known as `arsha' form. If the present is accepted for a non-religious purpose it becomes `asura' marriage.

(iv) Prajapatya : This form does not materially differ from 'brahma.' Here, the bridegroom may not be a bachelor and he appears to be the suitor for the marriage. In this kind of marriage the gift is made with the condition, "You two be parents for performing secular and religious duties."

The male issue of these four kinds of marriages confers special spiritual benifit on the ancestors.

2. Disapproved forms :—

(i) Gandharva : The gandharva marriage appears to be the union of a man and a woman by their mutual desire and consent. Gandharva form of marriage has been held in *Bhaoni V. Maharaj* (3.A.738)[1] as nothing more or less than concubinage. It has been held that cermonies are necessary in such marriages. (*Brinda V. Radha* 12.M.72).[2]

(ii) Asura : The 'sulka' or bride's price is the prime consideration for the gift of the daughter by the father in such a marriage. It amounts to a sale of the daughter. Such marriage "when actually performed is recognised valid (*Govind V. Sabitri* 43. B.173).[3] An agreement to pay money to the father in consideration of his giving his daughter in such a marriage is not valid and the money cannot be recovered by a suit (*Baldeo Das V. Mohamaya* 15.C.W.N. 447, 453),[4] but when it is actually paid it dees not constitute an unlawful consideration (*Shambhu V. Nand* 58.I.C.963).[5]

(iii) Rakshasa : When the marriage is done by forcible, capture it is know as 'rakshasa' form. It is allowed to *kshatriyas* or military class only.

1. *Bhaoni V. Maharaj* (3.A.738)
2. (*Brinda V. Radha* 12.M.72).
3. (*Govind V. Sabitri* 43. B.173).
4. (*Baldeo Das V. Mohamaya* 15.C.W.N. 447, 453),
5. (*Shambhu V. Nand* 58.I.C.963).

(iv) Paisacha : It is most detestible as being marriage of a girl by a man, who ravished her when asleep or drunk. The principle is this that the ravisher should marry the deflowered damsel. Both the `gandharva' and `paisacha' forms are preceded and caused by sexual intercourse, in the first case with the consent of the girl and in the second by fraud. The `asura' and `gandharva' forms resemble *co-emption*, and *`usus'* respectively in Roman law.

These eight kinds of marriages are not really eight different forms. The form appears to be the same in all cases except perhaps in `gandharva' and `rakshasa'.

(Presumptions) It is, however, held that the law will presume the marriage to have been according to the approved form. It has also been held that, whatever may be the caste to which the parties belong, it should be presumed to have been made in the `brahma' form.

Where it is proved that a marriage was performed in fact, the court will presume that it is valid in law (*Inderun V. Ramaswamy* 13M.I.A.141)[6] and that the necessary ceremonies have been performed. (*Mouji lal V. Chandrabati* (1911) 38.Cal 700, 706).[7]

Marriage between a male of lower caste and a female of higher caste is known as *prathiloma marriage*. Since the ancient texts prohibit such a marriage it has been held by courts to be invalid. (*Bai Kasi V. Jamnadas* (1912) 14.Bom.L.R. 547 ; 16.I.C.133)[8]

(Prathiloma and Anuloma marriage) Marriage between a male of higher caste and a female of lower caste is known as *anuloma marriage*. Such marriages are permitted and recognised by the texts. Accordingly, it has been held by courts that such marriages are valid and that the son born of such a marriage is legitimate. (*Natha V. Mehta Chotalal* (1931) 55.Bom.I ; 130.I.C.17).[9] The High Court of Calcutta has held that a marriage between a brahman and a sudra woman both of whom are *Jati Vaishnavas* is valid. *(Nalinaksha V. Rajani.* (1931) 58.Cal.1392 ; 134.I.C.1272).[10]

6. (*Inderun V. Ramaswamy* 13M.I.A.141)
7. (*Mouji lal V. Chandrabati* (1911) 38.Cal 700, 706).
8. (*Bai Kasi V. Jamnadas* (1912) 14.Bom.L.R. 547 ; 16.I.C.133)
9. (*Natha V. Mehta Chotalal* (1931) 55.Bom.I ; 130.I.C.17).
10. *(Nalinaksha V. Rajani.* (1931) 58.Cal.1392 ; 134.I.C.1272).

Essentials or prerequisites of a valid marriage :

Sages and commentators differed on the subject so widely that it is difficult to say what are the essentials of a valid Hindu marriage. However these may be enumerated as follows : —

1. Only one husband at a time :

A woman cannot marry another man while her husband is alive, except where her marriage has been dissolved by divorce.

2. The bride should be virgin :

Shastras do not allow the marriage of a Hindu widow except in some special cases, but the re-marriage of Hindu widows is now legalised by the Hindu widows' Re-marriage Act-1856.

3. Guardianship and consent .

Hindu law does not contemplate the marriage of males in their infancy hence, there is no rule regarding guardianship in their marriage. Minority terminates as per Mitakshara school on completion of sixteenth year and as per Dayabhaga school on completion of fifteenth year. The Majority Act does not apply to the Hindus in matters of marriage, divorce and adoption. So a young man of that age is *'sui juris'* and may act for himself as regards to his marriage.

The shastras, however enjoin early marriage of girls and rules are laid down relating to guardianship in their marriage. The following persons are qualified in the order mentioned below to give a girl in marriage : —

Mitakshara school	**Dayabhaga school**
1. The father	1. The father
2. The paternal grand father	2. The paternal grand father
3. The brother	3. The brother
4. A 'Sakulya' or a member of the same family	4. A 'Sakulya' or a member of the same family
5. The mother	5. The maternal grand-father
	6. The maternal uncle
	7. The mother.

(Marriage without consent of guardian.) Guardianship in marriage is duty and not a right but there is difference of opinion among commentators and text writers as to the correctness of this principle.

Whatever the correct view may be, the rule established by the decisions is that a marriage which is duly solemnized and is otherwise valid, is not rendered invalid, because it was brought about by misrepresentation to the guardian (*K.C. Chakrabarty V. Emperor* (1937) 2. Cal.221)[11] or without the consent of the guardian or in contravention of the express order of the court. But a marriage, though performed with the necessary ceremonies, may be set aside by the court, if it was brought about by force or fraud. The above rule applies only where a marriage has been actually celebrated. In case of only contract for marriage a guardian may sue for an injunction and the court may grant it for the benifit of the minor.

4. Marriage should be performed in any one of the approved forms

As per `shastras' marriage should be performed in any one of the approved forms to have legal validity. But it has already been discussed that law will presume the marriage, when solemnized with necessary ceremonies, to have been according to an approved form. The gandharva marriage also is held valid provided necessary ceremonies are observed.

5. Parties should belong to the same caste :

The parties to a marriage must belong to the same caste, otherwise the marriage is invalid unless it is sanctioned by custom. But a marriage between persons belonging to defferent sub-divisions of the same caste is not invalid. (*K.C. Chakraborti V. Emperor* (1937) 2.Cal.221).[12] A marriage between a male of a higher caste and female of a lower caste is valid. The High Court of Calcutta has held that a marriage held between a brahmin and a sudra woman both of whom are *jati vaishnavas* is valid. *(Nalinaksha V. Rajani* (1931) 58.Cal.1392).[13]

11. (*K.C. Chakrabarty V. Emperor* (1937) 2. Cal.221)
12. (*K.C. Chakraborti V. Emperor* (1937) 2.Cal.221).
13. *(Nalinaksha V. Rajani* (1931) 58.Cal.1392).

6. Parties should not be within prohibited degrees for marriage :

Different sages have laid down different rules on the subject of prohibited degrees. *Manu* prohibits the largest number, while *Paithinasi the* smallest.

The rules regarding prohibited degress may be summarised as follows : —

1. A man cannot marry a girl of the same `gotra` or `pravara`. This rule is called exogamy. This rule is not applicable to a widow who has remarried a person of her father's gotra, as she does not revert to her father's `gotra` on her husband's death. The issue of such marriage is legitimate. (*Radha Nath Mukherjee V. Shaktipada Mukherjee* (1936) 58 All.1053).[14] This rule does not apply to sudras as they have no gotra of their own.

2. A man cannot marry a girl who is his `sapinda`. This rule is accepted both by `Dayabhaga` and `Mitakshara schools. But there is a difference of opinion between the two schools as to who are `sapindas` for marriage.

Dayabhaga school : (i) A man cannot marry a girl if she is within the 7th degree in descent from the father or from any of his six male ancestors in the male line, namely. The paternal grand-father and so forth.

(ii) If she is within the 5th degree in descent from the maternal grand-father or from any of his four paternal ancestors in the male line. The five degrees are counted exclusive of the mother.

(iii) If she is within the 7th degree in descent from the mother's `bandhus` or from any of their six ancestors through whom the girl is related.

(iv) If she is within 5th degree in descent from the mother's bandhus or from any of their four ancestors, through whom the girl is related to him.

14. (*Radha Nath Mukherjee V. Shaktipada Mukherjee* (1936) 58 All.1053).

(Exception to rule 2. (Trigotra rule) The above rule is not applicable in case of a girl who is removed by three gotras or in other words by two intervening gotras.

Mitakshara school : A man cannot marry a girl (i) if their common ancestor, being traced through his or her father, is not beyond the 7th in the line of ascent from him or her.

(ii) If their common ancestor, being traced through his or her mother, is not beyond the 5th in the line of ascent from him or her.

In computing the degrees, the common ancestor and the person in question, are each to be counted as one degree.

Realationship by marriage is not by itself an impediment to marriage. Thus a man may marry the daughter of his wife's sister. (*Ramakrishna V. Subbamma* (1920) 43.Mad.830).[15]

3. A man cannot marry certain damsels though there is no consanguine relationship between them. They are the stepmother's sister, her brother's daughter and his daughter's sister, her brother's daughter and his daughter's daughter ; the paternal uncle's wife's sister, the wife's sister's daughter, and the preceptor's daughter. This rule appears to be of moral obligation only. Accordingly it has been held that a marriage between a Hindu and the daughter of his wife's sister is valid. (*Ragav V. Jaya 20M. 883).*

The rules regarding prohibited degrees extracted from the texts of the sages, by Raghunandana, are to be found in Dr. Banerji's valuable Tagore Lectures on the subject (pages 58-66 3rd Ed). The same rules are reiterated by Kamalakara Bhatta. the author of the Nirnaya-sindhu which is regarded as an authority in the Benares school.

15. (*Ramakrishna V. Subbamma* (1920) 43.Mad.830).

The second rule is complicated and the following diagram * may prove useful.

F_7	F_{12}		
F_6	F_{11}	F_{17}	
F_5	F_{10}	F_{16}	F_{20}
F_4	F_9	F_{15}	F_{19}
F_3	F_8	F_{14}	F_{18}

D F_2 M D S_1 D F_{13} M D S_2

B_1 F_1 B_2 B_3 B' M B'' B'''

P

P is the bridegroom. F_1 to F_7 are his seven paternal ancestors in the male line ; F_8 to F_{12} are his father's five maternal ancestors in the male line ; F_{13} to F_{17} are his mother's five paternal ancestors in the male line ; F_{18} to F_{20} are his mother's three maternal ancestors in the male line; B_1, B_2 and B_3 are his father's bandhus; B', B'' and B''' are his mother's bandhus.

The damsels that are prohibited to a man by the second rule are those that are within the 7^{th} degree in descent from F_1 to F_{12}, from B_1, B_2 and B_3 and from S_1. ; and that are within the 5^{th} degree in descent from F_{13} to F_{20} from B', B'' and B''' and from S_2.

* Reproduced from Hindu law of G.C. Sarker, sastri.

There is no difference between sapinda relationship for marriage and that for inheritance. (*Ramchandra V. Viuayaka.* (1914) 41.I.A. 290, 309).[16]

16. (*Ramchandra V. Viuayaka.* (1914) 41.I.A. 290, 309).

7. Betrothal : Before the marriage, contracts of betrothal, popularly known in Bangladesh as `Patra`, `Pati-Patra` or `Mangalacharana` is made, in more or less solemn form by the guardians. But these are not considered binding or irrevocable so as to be capable of specific performance. (*Gunput V. Rajun.* 24 W.R. 207 = I.C.74).[17] But damages may be claimed or awarded for the breach thereof. (*Purshotam V. Purshotam.* 21. B. 23).[18]

8. Ceremonies : Numerous cermonies are observed in a Hindu marriage. But the following are considered necessary for a valid marriage :-

(i) The formal gift and acceptance

(ii) Recitation of vedic texts and the performance of nuptial *homa* called *kusandika*

(iii) *Saptapadi-gamana* or walking seven steps. The *vriddhi-sraddha* is not an essential ceremony.

If the performance of some of the ceremonies usually observed on the occassion of marriage be proved, a presumption should be drawn that the marriage has been duly completed. (*Bai V. Moti* 22.B.509).[19]

The marriage is complete when the seventh step is taken; till then it is imperfect and revocable. Consummation is not necessary to make a marriage complete and binding. (*Emperor V. Munchi Ram* (1936) 58. All.402).[20]

A marriage may be completed by performances of ceremonies other than those mentioned above, if it is allowed by the custom of the caste to which the parties belong. (*Hurry churun V. Nimai* (1884) 10. Cal.138).[21]

No religious ceremonies are necessary in the case of marriage of a widow.

Legal Consequences of marriage.

The legal consequences of marriage may be summarised under the following heads : —

17. (*Gunput V. Rajun.* 24 W.R. 207 = I.C.74).
18. (*Purshotam V. Purshotam.* 21. B. 23).
19. (*Bai V. Moti* 22.B.509).
20. (*Emperor V. Munchi Ram* (1936) 58. All.402).
21. (*Hurry churun V. Nimai* (1884) 10. Cal.138).

(i) Guardianship :- After marriage the wife is placed under the control of the husband, who is entitled to the custody of her person, when she is minor, even in preference to her father. But when the husband is a minor he cannot be the guardian of his minor wife. (*Mohideen V. L. Mohomed.* (30M.L.J.21,27).[22] The deceased husband's relations are entitled to be her guardian in preference to her paternal relations, (*Khudiram V. Bonwari,* 15. C 584).

2. Maintenance & Residence : A contract to maintain a woman as wife, who is not lawfully wedded is unenforceable. (*Bai Kashi V. Jamna* 16.I.C.133).[23]

(Separate residence and maintenance.) The wife is bound to reiside with the husband wherever he may choose to live. A wife's first duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection. She is not, therefore, entitled to separate residence or maintenance unless she proves that by reason of his miscon-duct or by his refusal to maintain her in his own place of residence or for other justifying cause, she is compelled to live apart from him. The fact of the husband having another wife will not relieve her from that duty ; nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere. (*Sitanath V. Haimabutty,* 24 W.R.377).[24] But she would be justified in leaving his house and would be entitled to separate maintenance from him if he kept a concubine in the house. (*Dular koeri V. Dwarknath* (1905) 32. Cal.234).[25]

22. (*Mohideen V. L. Mohomed.* (30M.L.J.21,27).
23. (*Bai Kashi V. Jamna* 16.I.C.133).
24. (*Sitanath V. Haimabutty,* 24 W.R.377).
25. (*Dular koeri V. Dwarknath* (1905) 32. Cal.234).

The husband is bound to maintain his wife and to live with her. The wife is entitled to the right of maintenance against the husband personally so long he is alive and against the estate after his death. But if the wife resides in her father's house against the will of the husband or deserts him without sufficiant cause she cannot claim maintenance while living apart. When a wife suffers from virulent leprosy, she is entitled to live apart and claim maintenance. (*Shinappaya V. Rajamma* 45.M.812).[26]

The maintenance being a matter of personal obligation, she has no claim for maintenance against her husband's property in the hands of a transferee from him ; nor has she any claim against the Crown, if his property has been attached under Secs. 87 and 88 of Cr. P.C. as property of an absconder. (*Chatru V. The crown* (1929) 10. Lah. 265).[27]

(Unchastity of wife.) A wife living apart from her husband for no improper purpose may at any time return and claim to be maintained by him. `He cannot under the provisions of the Succession Act execute a will to defeat such a right''. (*Periambal V. Sunderamal* (1945)[28] Mad. 586). The amount of maintenance depends on various circumstances such as social standard, husband's property etc.

A wife who leaves her home for purpose of adultery, and persists in following a vicious course of life forfeits her right to maintenance even though it is secured by a decree. But if she completely renounces her immoral course of conduct, her husband is liable to furnish her with a `bare' maintenance.

26. (*Shinappaya V. Rajamma* 45.M.812).
27. (*Chatru V. The crown* (1929) 10. Lah. 265).
28. (*Periambal V. Sunderamal* (1945)

Change of religion by the husband :- A wife is entitled to maintenance though her husband abandons Hinduism. If the marriage is dissolved under the Native Converts Marriage Dissolution Act-1886, the court may order the husband to provide maintenance for his wife during the remainder of her life. An allowance, so ordered, ceases from the time of any subsequent marriage of the wife.

Wife of disqualified heir : Where the husband is excluded from inheritance on account of personal disability, his wife is entitled to maintenance out of the property which he would have inherited but for the disability. But her right to maintenance is conditional upon her continued chastity.

(Presumption of legality marriage.) When it is proved that a marriage has been solemnised it will be presumed that the marriage was according to one of the approved forms and it is valid. But the fact and validity of marriage must be strictly proved when the question arises in cirminal cases under Sections 494, 495, 497 and 498 of the Penal Code.

'There is a presumption in favour of marriage rather than concubinage, where a man and a woman are proved to have lived together as husband and wife. The law will presume, unless contrary is clearly proved, that they were living together in consequence of a valid marriage. The presumption of marriage cannot be wiped out by reason of the conduct, and mode of life and predilections of various relatives and other persons. (1952) 4.D.L.R.237). [29]

29. (1952) 4.D.L.R.237).

3. Gharjamai :— A son-in-law who was married with the daughter of a Hindu on the understanding that he should be brought up and maintained as a member of his family and as such remained in his father-in-law's family, has a right of maintenance so long as he resides as a member of the family of his father-in-law. The court under special circumstances, has power to pass a decree for separate maintenance. (*Gobind Rani V. Radha* 12.C.L.J. 173).[30]

4. Restitution of conjugal rights : — In case of breach of marital duties, the either party may institute a suit for restitution of conjugal rights. Ill health or inability to afford her husband the marital rights is no ground for husband's refusal to give her protection.

The court may refuse to pass decree for restitution of conjugal rights against the wife, if the husband is suffering from a loathsome disease, such as leprosy or syphilis or if he keeps a concubine in the house, or is guilty of cruelty in a degree, rendering it unsafe for the wife to return to her husband's dominion. (*Dular Koer V. Dwarkanath,* (1905) 34.Cal 971)[31] or if he adopts another religion. But the mere fact of the husband marrying a second wife or mere infidelity on the part of the husband or the fact that the wife is a minor is not by itself sufficiant to disentitle the husband from claiming restitution of conjugal rights.

(Re-marriage of women.) Hindu law, though provides single husbandedness allows a woman to marry even while her first husband is alive in the following cases : (i) should she be abandoned by her first husband (ii) if the husband is not heard for a certain period (iii) if the husband adopts a religious order (iv) if he becomes impotent (v) if he is outcasted. It is based on the following text.

30. (*Gobind Rani V. Radha* 12.C.L.J. 173).

31. (*Dular Koer V. Dwarkanath,* (1905) 34.Cal 971)

নষ্টে মৃতে প্রব্রজিতে ক্লীবে চপতিতে পতৌ।
পঞ্চস্বাপৎসু নারীনাং পতিরন্যো বিধীয়তে।।"

'Another husband is ordained for women in five calamities, namely if the husband be unheard of, or be dead or adopts a religious order or be impotent or become outcasted''.

(Polygamme and polyandry) The Hindu law permits a man to have more wives than one at the same time ; although it recommends monogamy as the best form of conjugal life. Polyandry is not allowed in Hindu law.

(Divorce.) Marriage in Hindu law is regarded as an indissoluble union of husband and wife extending to the next world. Divorce is not recognised by Hindu law unless allowed by custom. Change of religion or loss of caste, does not operate as a dissolution of marriage, nor does the adultery of either party, nor even the fact that the wife has deserted her husband and has become a prostitute.

As per Native Converts Marriage Dissolution Act, 1866 if a Hindu becomes a Christian and in consequence of such conversion, the husband or wife deserts or repudiates the convert, the court may pass a decree dissolving the marriage. the parties then, can marry again. conversion does not operate *per se* as a dissolution of marriage. (*Gobardhan V Jasodmoni* (1891) 18.Cal 252).[32]

32. (*Gobardhan V Jasodmoni* (1891) 18.Cal 252).

(Widows) The Hindu Widows' Re-marriage Act legalises the re-marriage of Hindu widows but it expressly lays down that the rights which any widow may have in her husband's or his lineal sucessor's property, shall upon remarriage cease even if there be any custom of re-marriage. ''The expression any widow in Section 2 of the Hindu Widows' Re-marriage Act applies universally to all Hindu widows who re-marry, whether their re-marriage is allowed by their caste or not.'' (1952.4.D.L.R.492)[33]

'The word any widow in Section 2 of the Act includes all widows, who being Hindus, become widows, and is wide enough to cover the case of a widow re-marrying a Hindu or a member of other religion.' (1960.12.D.L.R. 634).[34]

The court may place the minor children under the guardianship of the re-married widow if the court deems it proper for the benifit of the minor.

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33. (1952.4.D.L.R.492)
33. (1960.12.D.L.R. 634).

CHAPTER V
ADOPTION

"ঋণম্ অস্মিন্ সন্নয়তি অমৃতত্বঞ্চ গচ্ছতি।
পিতা পুত্রস্য জাতস্য পশ্যেচ্চেৎ জীবতো মুখং।
অনন্তাঃ পুত্রিণাং লোকা নাপুত্রস্য লোকোস্তীতি শ্রুয়তে"।।

— বশিষ্ঠঃ —

"The father's debt is transferred to the son and he attains immortality as soon as he sees the living face of a son on birth, Endless are the heavenly regions for those having sons but there is no heavenly region for a sonless man".

—Vasistha —

(Purpose of adoption.) As per Vasistha, 'For a sonless man there is no heavenly region'. A son is required for offering funeral cakes (*Pinda)* and libations of water not only to him (after death) bu to his ancestors also. A man who is not blessed with a son, may adopt one for the above purpose. But adoption is made for secular purposes also that is to secure an heir and to continue the lineage. Sometimes it is done out of natural love and affection.

Adoption is not peculiar to Hindu law itself. In Roman law also there was a system of adoption. It appears that in the Roman system the purpose of adoption was secular whereas in the Hindu system it is mainly religious. Adoption is not recognised by the Muslim law nor it is recognised by the English or Parsi law.

(Kinds of sons.) Hindu shastras mention twelve kinds of sons, of these, sons by adoption may be of five kinds.

(i) Aurasa : A son begotten by a man on his legally wedded wife (*Patni)* is called the *aurasha* son. In modern times the term son generally means an *aurasha* son.

(ii) Kshetraja : A son begotten on one man's wife by another man, who was appointed by the husband or his kinsman for that purpose *(Niyoga)* is called a *kshetraja* son.

(iii) Gudhhaja : A son secretly brought forth by the wife of a man by adultery is called a *gudhhaja* son.

(iv) Kanina : Son of an un-married daughter is called *Kanina. karna* of Mahabharata was the kanina son of *Kunti.* In ancient times kanina son used to be regarded as the son of the maternal grand-father.

(v) Putrikaputra : Sometimes the father used to give the daughter in marriage with the condition that the son born of her would belong to her father. Such a son was known as *putrikaputra.*

(vi) Sahodhaja : The child in the womb of the pregnant bride was known as *sahodhaja.* Such a child used to be transferred to the bridegroom by marriage.

(vii) Paunarbhava : A son, born of a twice-married woman was known as *paunarbhava.* At present, such sons are deemed as *aurasa* sons.

By the operation of ancient law a man became the father of these seven kinds of *child.*

(Sons by adoption) Besides these, the smritis mention five kinds of sons by adoption. These are : —

(i) Dattaka : A son, given by the parents to a man who affiliates him as a son is known as *dattaka.*

(ii) Krita :- A son sold by the parents to a man who affiliates him as a son is known as *krita.*

(iii) Kritrima : When a man adopts a son, who is *sui juris* and can act for himself, it is known as *Kritrima* adoption.

(iv) Svayandatta : It literally means *self given.* The only difference between kritrima adoption and svayandatta is that in the former case the offer comes from the adopter and in the latter it comes from the adoptee.

(v) Apavidha : When a deserted, abandoned, or disowned boy is adopted by a man as his son it is known as *apavidha.* The word *apavidha* means deserted.

The shastras also divided the sons into three groups to show their relative ranks. The *aurasa* son and the appointed daughter's son *(putrika-putra)* are declared to hold the highest rank. The sons by adoption occupy a middle rank, while the other kinds of sons are condemned and regarded useless from spititual point of view.

(Position of sons now-a-days.) Now-a-days *aurasa* and the sons adopted under *dattaka and kritrima* forms are recognised by Courts. *Putrika-putra* is now obsolete except in places where it is allowed by custom. *Sohodhaja* and *paunarbhava* sons are, at present, regarded as *aurasa* sons.

(Law of adoption Dattaka Mimansa and Dattaka Chandrika.) As per smritis the law of adoption is very simple. Many unnecessary and arbitrary innovations were introduced in the system first by *Nanda Pandita* in his treatise **Dattaka Mimansa** and then by *Mahamohopadhyaya kuvera* in his treatise **Dattaka Chandrika.** There is a well known tradition that `Dattaka Chandrika' is a literary forgery and it was written by ***Raghumani vidyabhusana,*** the pundit attached to *Colebrooke* in support of an adoption case of a well known *Raj* family of the then Bengal. Notwithstanding the aforesaid facts and other cogent proofs against the treatises mentioned above, the Privy Council in several cases like *Bhagwan Singh V. Bhagwan Singh* (17.A.294), *Sri Balasu V. Sri Balasu* (1899) 22 Mad 398.,[1] observed that those should be regarded as authoriative. When they differ **Dattaka Chandrika** is preferred in Bangladesh and in the province of West Bengal in India and the **Dattaka Mimansa** in the rest of India and in Pakistan.

1. *Bhagwan Singh V. Bhagwan Singh* (17.A.294), *Sri Balasu V. Sri Balasu* (1899) 22 Mad 398.,

ESSENTIALS OF VALID ADOPTION

The following may be considered as essentials of a valid adoption.

(1) The adopter should be legally capable of taking in adoption :

A male Hindu of sound mind, who has attained the age of discretion may take a son in adoption provided he has no son, grand-son or great-grand-son, natural or adopted living.

A wife cannot adopt, while her husband is alive except with his express consent, (*Narayana V. Nana* (1870)7.B.H.C.A.C. 153).[2]

Except in Mithila, a widow can adopt under an authority, express or implied from her husband. In certain places she can adopt even without such an authority.

(2) The person giving in adoption must be legally competent to do so :

The only persons who are authorised to give a boy in adoption are his father and mother. The mother cannot give a boy in adoption while the father is living without his express permission. But she can do so if the father enters a religious order or becomes incapable of giving consent. The power of giving a boy in adoption belongs exclusively to the parents and it cannot be delegated. But the physical act of giving the boy may be delegated to another. (*Shamsingh V. Santabai* (1901) 25Bom.551).[3]

(3) The adoptee should be lawfully capable of being taken in adoption :

The person to be adopted must be a male and belong to the identical caste of the adopting father, A boy, whose mother (had she been unmarried) could not be lawfully given in marriage with the adoptive father, cannot be adopted. In recent cases this rule has been restricted to the daughter's son, sister's son and mother's sister's son. This rule does not apply to sudras and in places where such adoption is allowed by custom.

2. (*Narayana V. Nana* (1870)7.B.H.C.A.C. 153).
3. (*Shamsingh V. Santabai* (1901) 25Bom.551).

As to the age of the boy there is difference of opinion between the schools. In Bangladesh, and in West Bengal, Benares, Bihar and Orissa a married boy may be adopted provided it is done befor *upaṇayana*. The same rule is followed in Madras with the exception that a married boy cannot be adopted there. In Bombay a married person with children may be adopted. In Madras, Nagpur and Allahabad adoption of a married person is not valid even among the sudras.

The adoption of an orphan and simultaneous adoption of two or more persons are invalid.

Adoption of a stranger, and *Dvyamushyayana* adoptions are valid.

Adoption of a daughter by dancing girls is not valid, except in Madras.

(4) Actual giving and taking : Actual giving and taking is absolutely necessary even in case of sudras. The physical act of performing the giving and taking may be delegated to another by the parents.

(5) Datta homa . High Courts differed on the point whether *datta homa* is necessary for a valid adoption. It is now generally agreed that datta homa is necessary but it may be performed later on even after the dath of the adoptive father of the natural father of the boy.

Minor ceremonies like *putresti jag* etc., are not considered essential.

Besides these, an adoption must be made with the free consent of the parties. In case of misrepresentation, fraud, coercion or undue influence the adoption is voidable at the option of the party whose consent was so obtained. (*Sri Sitaram V. Sri Harihar* (1911) 35.Bom. 169).[4]

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4. (*Sri Sitaram V. Sri Harihar* (1911) 35.Bom. 169).

A promise for consideration for adoption is unenforceable but such a consideration does not render the adoption invalid.

An adoption once made cannot be cancelled. (*Bhoopatinath Chakrabarty V. Basanta Kumari Debi*(1936) A.C.556).[5]

(Existing forms of adoption) The only forms of adoption now recognised by the courts are **dattaka** and **kritrima** and the subject may be discussed under the following heads :-

(i) Dattaka (ii) Kritrima and other allied forms (iii) Adoption of daughters.

DATTAKA

The dattaka adoption may be discussed under nine heads, viz. (i) Who may adopt. (ii) Who may give away in adoption. (iii) Who may be adopted. (iv) Ceremonies required. (v) Legal consequences of adoption. (vi) Divesting of estate on adoption. (vii) Alienations prior to adoption. (viii) Invalid adoption. (ix) Mode of proof and estoppel.

(Capactiy of males) **(1) Who may adopt :** Every Hindu male of sound mind, who has attained the age of discretion may adopt a son, provided he has got no son, grand-son or great-grand-son, natural or adopted, living at the time of adoption.

A bachelor may adopt. Similarly there is no bar on adoption by a widower. Wife's consent is not required and the fact that the husband knew at the time of adoption that his wife was pregnant would not vitiate it. (***Daulat Ram V. Ramlal*** (1907) 29.All.310).[6]

A minor may adopt and give authority to his wife to adopt.

Impurity by birth or death of a relation does not vitiate an adoption.

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5. (*Bhoopatinath Chakrabarty V. Basanta Kumari Debi*(1936) A.C.556).
6. (***Daulat Ram V. Ramlal*** (1907) 29.All.310).

(Capactiy of males) **Wife :** Vasistha says, ``A woman should neither give nor receive a son except with the permission of her husband.'' A wife or a widow cannot adopt a son to herself ; the adoption must be made to her husband. If a woman adopts a son to herself it is invalid *ab initio.* (*Narendra V. Dinanath* (1909) 36.Cal.824).[7] A wife cannot adopt a son to her husband during his life time except with his express consent.

Widow : The doctrines of the different schools in this regard are given below : —

(a) Mithila : In Mithila the assent of the husband is absolutely necessary at the time of adoption so a widow cannot adopt at all there.

(b) Dayabhaga and Benares school :- The express authority of the husband is absolutely necessary and it is operative after his death. The widow must follow the authority *in toto* to make the adoption valid.

(c) Madras, Bombay and Punjab : A widow may adopt under an authority, express or implied from her husband. But it cannot be implied from the mere absence of a prohibition to adopt. (*B.P. Thalaivar V. S. Thevar* (1938) 65.I.A.93).[8]

In Madras a widow may adopt with the assent of the husband's kinsmen, but in Bombay she can adopt even without such an assent. A Jain widow, a widow of a Marwari of Bikanir and a widow of a Raghubansi Rajput can adopt without the authority from her husband or his kinsmen.

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7. (*Narendra V. Dinanath* (1909) 36.Cal.824).
8. (*B.P. Thalaivar V. S. Thevar* (1938) 65.I.A.93).

NATURE OF WOMEN'S RIGHT TO ADOPTION

(Modern view.) According to modern view a woman has got no right to adopt and she acts merely as an agent of her husband. (*Collector of Madura V. Moottoo*).[9] A man cannot authorise any other person except his wife to adopt a son for him. A joint power to the widow and other person or persons is invalid. A man having a son may give a conditional authority to his wife to adopt a son in case the son dies without any male issue.

(Authority must be strictly followed.) From the above, it appears that the widow's right to adopt entirely depends on the power and it must be strictly followed. The power must be exercised subject to the restrictions imposed by the husband. When it is clear that the intention of the husband was to be represented by a son, the widow may adopt another after the death of the former adopted son. In *Kannepalli V. Pucha* (33.I.A.145),[10] the widow was empowered to adopt with out any specific limitation thereto. It was held that the power was not exhausted by the adoption of one son.

A widow has no larger power to adopt than her husband.

A minor widow may adopt provided she has attained the age of discretion.

An unchaste widow cannot adopt. (*Syamlal V. Saudamini* (1870) Beng L.R.362).[11] In Bombay a sudra widow, though unchaste, can adopt.

A widow cannot adopt a son to her first husband after remarriage.

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9. (*Collector of Madura V. Moottoo*).
10. *Kannepalli V. Pucha* (33.I.A.145),
11. (*Syamlal V. Saudamini* (1870) Beng L.R.362).

(Conditional authority) Conditional authority, is valid but the condition itself must not be illegal. If the widow is permitted to adopt in the event of disagreement between the widow and the natural born son it is invalid. Since a Hindu cannot adopt while a son, grand-son or a great-grand-son living, such an authority is void *ab initio.*

(Authority to co-widows.) If the authority is given to one of the widows only, she only can adopt and she may adopt without consulting the other widows. If a general authority is given to all the widows, the senior widow has the preferential right to adopt, even without the consent of the junior widows. The adoption by the junior widow, without the consent of the senior, though made earlier is void. (*Raj Damara V. Damara* 29.M.L.J.18).[12] If the power of adoption is given to two or more widows jointly it is valid provided it is exercised by them all and that it cannot be exercised after the death of any one of them.

(The widow may or may not adopt.) A widow is not legally bound to adopt though enjoined by her husband to do so. Her right to her husband's property is not affected by her omission or refusal to adopt. But an agreement by the widow in which she undertakes that she would not exercise her right of adoption is void as against the public policy. (*Jagadananda V. Kunja,* 49.I.C.929).[13]

"Where a Hindu widow is empowered to adopt, inheritance to the property is not suspended for her nonexercise of the power to adopt-if not exercised, ordinary law of succession will follow". (*Ram Dasi Pal V. Sura Bala Dasya* (1962)14.D.L.R. 810).[14]

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12. (*Raj Damara V. Damara* 29.M.L.J.18).
13. (*Jagadananda V. Kunja,* 49.I.C.929).
14. (*Ram Dasi Pal V. Sura Bala Dasya* (1962)14.D.L.R. 810).

(Froms of authority) An authority may be verbal or in writing in the form of *anumatipatra.* If it is in writing it must be registered, unless the authority is given under a will. The authority in the form of a will must conform to the provisions of the Succession Act-1925 and if it is given by a minor it must be registered.

An authority to adopt may be revoked.

TERMINATION OF WIDOW'S POWER.

It should be remembered that an adoption can only be made when there is no son, grand-son or a great-grand-son, natural or adopted, living at the time of adoption. So the power of the widow to adopt terminates in the following cases :

1. As per Dayabhaga school (and as per **Mitakshara school** where the husband was divided at the time of death) :

(a) If the son dies leaving a son or a wife. The widow might have been expressly authorised by her husband to adopt in the event of death of the son, but as soon as the son dies, the estate vests in the heir of the deceased son and her authority comes to an end. (*Bhoobun Moyee V. Ramkishore* (1865) 10.M.I.A.279).[15]

"Where the duty of providing for the continuance of the line, which was upon the father, and was laid by him conditionally upon the mother, has been assumed by the son and by him passed on to a grandson, or to the son's widow, the mother's power is gone. (*Amrendra Mansingh V. Sanatan Singh* (1933) 12.Pat.642).[16]

If the son dies leaving a daughter, as per Bombay school, the adoption is valid.

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15. (*Bhoobun Moyee V. Ramkishore* (1865) 10.M.I.A.279).
16. (*Amrendra Mansingh V. Sanatan Singh* (1933) 12.Pat.642).

(b) Formerly it was held that the power to adopt, if comes to an end is extinguished for ever. But in a recent case the Nagput High Court observed that it was not extinguished but remained suspended. Hence, on the re-marriage of the son's widow, the property reverts to mother and she can validly adopt.

2. As per Mitakshara school, where the husband was a member of the joint family at the time of death, a widow may validly adopt so long there is a male member in the coparcenary.

(ii) WHO MAY GIVE IN ADOPTION

(Only father and mother can give a boy in adoption) Only the afther and the mother of the boy are competent to give him away in adoption. The concurrence of the both is desirable but the father may give the boy in adoption even against the will of the mother, as the primary right belongs to him. The mother cannot give without the assent of the husband while he is alive. But she may do so if the father enters a religious order or becomes incapable of giving consent. After the death of the father, the mother can give the boy provided there be no express or implied prohibition from him. (*Jogesh Chandra V. Nityakali* (1903) 30.Cal.965).[17]

(Delegation of power) The power of giving a boy in adoption belongs exclusively to the father and the mother and neither parents can delegate that power to another person. A stepmother or any other relation cannot make such a gift. (*Papamma V. Venkatadri.* 16.M.384).[18] But the physical act of giving and taking may be delegated to another. (*Shamsingh V. Santabai* (1901) 25.Bom.551).[19]

17. (*Jogesh Chandra V. Nityakali* (1903) 30.Cal.965).
18. (*Papamma V. Venkatadri.* 16.M.384).
19. (*Shamsingh V. Santabai* (1901) 25.Bom.551).

A Hindu father who has became a convert to Islam or has become a Brahmo may give his son in adoption provided the physical act of giving and religious ceremonies are performed by a Hindu relation. (*Kusum V. Satya 7.C.W.N. 784).*[20]

(Difference between giving and taking by a woman.)

Though Vasishtha enjoins a woman not to give or take a boy in adoption except with the consent of her husband there is a great distinction between giving and taking by her. Her power is almost unrestricted as regards gift and the consent of the husband may be presumed in the absence of an express prohibition. Since the adoption is made to her husband not to herself, she cannot accept a boy without express authority from him. But she is allowed to adopt with the kinsmen's assent in Madras and even without any authority in Bombay and in places where it is allowed by custom.

(iii) WHO MAY BE ADOPTED

Any person who is a Hindu may be adopted or given in adoption subject to the following rules : —

(i) The boy to be adopted must belong to the same caste. It is not necessary that he should belong to the same sub-division of the caste. (*Shib Deo V. Ramprasad* (1924) 46.All.637).[21]

(Nanda pandita's conelusions.) (ii) The boy should not be such one whose mother could not legally marry the adopting father. This rule is restricted now-a-days to the daughter's son, sister's son, and mother's sister's son. This prohibition does not apply to Sudras. In case of three upper classes also adoption, though prohibited under this rule may be valid, if sanctioned by custom. Nanda Pandita deduces the rule from two texts of doubtful validity. The texts are as follows :-

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20. (*Kusum V. Satya 7.C.W.N. 784).*

21. (*Shib Deo V. Ramprasad* (1924) 46.All.637).

(a) "দৌহিত্রো ভাগিনেয়শ্চ শুদ্রৈস্তু ক্রিয়তে সুতঃ।
ব্রাহ্মণাদি-ত্রয়ে নাস্তি ভাগিনেয়ঃ সুতঃ ক্বচিৎ।।"

— শৌনকঃ —

meaning -``A daughter's son and a sister's son are made sons by Sudras ; among the three tribes begining with the Brahmana, a sister's son is not (made) son some-where (or anywhere)- Saunaka.

(b) "সপিণ্ডাপত্যকঞ্চৈব সগোত্রজমথাপি বা
অপুত্রকো দ্বিজো যস্মাৎ পুত্রত্বে পরিকল্পয়েৎ।
সমানগোত্রজাভাবে পালয়েৎ অন্যগোত্রজং
দৌহিত্রং ভাগিনেয়ঞ্চ মাতৃস্বসৃসুতং বিনা।।"

— শাকল —

Meaning -``A sonless twice born man shall adopt a son of a `sapinda' or also next to him a son of a `sagotra'; and in default of a son of a `sogotra' shall adopt one born of a different `gotra' except the daughter's son, the sister's son and the mother's sister's son''.

— Sakala —

(Sutherland's marriage theory.) Sutherland formulates the rules thus :- That a twice born man cannot adopt a boy when the relationship between the boy's mother and the adopter is such that there could have been no valid marriage between the adopter and the boy's mother, had she been un-married.

(iii) The person to be adopted must be a male. In Madras a girl, even two girls, may be adopted by *naikins*, provided the purpose is not immoral.

(iv) A deaf and dumb person cannot be adopted.

(v) An orphan cannot be adopted except where it is allowed by custom.

Regarding the age of the boy there is a difference of opininon between the schools : —

(Age of the persons to be adopted.) (i) As per Dayabhaga school and also in Bihar, Orissa and Benares adoption must be made before *upanayana.* It is immaterial that the adopted boy is older than the adopter.

The same rule is followed in Madras with the exception that adoption may be made even after *upanayana* provided it is made before marriage-if the person to be adopted belongs to the same gotra of the adopter.

(ii) In Bombay even a married person with children and a person of any age may be adopted.

(iii) In Madras, Nagpur and Allahabad adoption of a married person is not valid even among the Sudras.

A stranger may be adopted though there are near relations.

A boy cannot be adopted by two persons even if the persons adopting are brothers. Simultaneons adoption of two or more persons is invalid.

"ন ত্বেবৈকং পুত্রং দদ্যাৎ প্রতিগৃহ্ণীয়াৎ বা,
সহি সন্তানায় পূর্ব্বেষাং।"

— বশিষ্ঠঃ —

(Only son.) meaning-``But an only son should neither be given nor accepted since he is intended for continuing the lineage of the ancestors''.

— Vasishtha —

In the above text, Vasishtha has forbidden the adoption of an only son. This rule is merely recommendatory in character and all superior Courts accepted this view till a Division Bench of Calcutta High Court declared in 1868, that adoption of an only son is invalid. The Bombay High Court also expressed its opinion against the adoption of an only son. Such adoption has all along been held valid in Madras, N.W.F. Province and in Punjab. In 1892 a Full Bench of Allahabad High Court concluded that the adoption of an only son was valid. (*Beni Prasad V. Hardai Bibi* 14.A.67).[22] So much difference of opinion proves that the rule is of moral obligation only. The controversy has been set at rest by the decision of the Judical Committee in the case of *Sri Balasu V. Sri Balasu* (26.I.A.113),[23] in which it was held that the adoption of an only son is valid.

The view expressed by the Judicial Committee in the case of *Sri Balasu V. Sri Balasu* is perfectly consistent with what is deducible from the Sanskrit texts and the learned writers who maintain the contrary view, it is submitted, could not follow the spirit of the texts properly. G.C. Sarkar Sastri and D. F. Mulla also opined that the text of Vasistha is merely recommendatory and the adoption of an only son is valid.

Dvyamushyayana : A son adopted in this from is called the son of two fathers, since he is not absolutely given away in adoption and is made a son common to both his original as well as his adoptive parents. Such an adoption must be affected by an agreement and such a son of two fathers is called *Nitya Dvyanmushyayana.* Adoption in this from is rare now-a-days.

(iv) CEREMONIES REQUIRED

The ceremonies relating to an adoption are : —

(i) Actual giving and taking.

(ii) Datta Homa.

(iii) Other ceremonies.

22. (*Beni Prasad V. Hardai Bibi* 14.A.67).

23. *Sri Balasu V. Sri Balasu* (26.I.A.113),

(Giving and taking) The physical act of giving and taking is absolutely necessary in all cases of adoption. These ceremonies must be accompained by the *actual delivery of the child.* This in necessary in case of Sudras also. Symbolical or constructive delivery, mere expression of consent or the execution of a deed of adoption, though registered, without the actual delivery of the boy is not sufficient. (*Shoshinath V. Krishnasundari* (1861) 6.Cal.381, 388).[24]

The father or the mother may authorise another person to perform the physical act of delivery to a named person and can delegate someone to accept the child in adoption on his or her behalf.

(Datta Homa.) In a Sudra adoption no other ceremony is necessary except giving and taking. *Datta Homan* is not necessary in case of adoption in the twice born classes, when the boy to be adopted belongs to the same gotra as the adoptive father.

The Judical Committee seemed to be in favour of *Datta Homan* in the case of *Shoshinath V. Krishuasundari.*

The datta homan may be performed at any time even after the death of the adoptive father or the natural father of the boy. The Homan may be performed by the parties themselves or it may be delegated by them to others.

Other minor ceremonies like *putresti jag* etc., are not considered essential for a valid adoption.

In every adoption free consent of the person giving and the person receiving in adoption and also of the person to be adopted, if he is a major, is necessary.

(Free con-sent, consideration, and cancellation.) If the consent is obtained by fraud, misrepresentation, mistake, coercion, or undue influence it is voidable at the option of the party whose consent was so obtained.

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24. (*Shoshinath V. Krishnasundari* (1861) 6.Cal.381, 388).

Consideration does not make an adoption invalid but promise of such consideration cannot be enforced in law.

A valid adoption, once made, cannot be cancelled. But the adopted son can renounce his right of inheritance in the adoptive family. (*Lunkurn V. Birji* (1930) 57.Cal.1322).[25]

(v) LEGAL CONSEQUENCES OF ADOPTION

"গোত্র-রিকথে জনয়িতুর্ন হরেদ্ দত্রিমঃ সুতঃ।
গোত্র-রিকথানুগঃ পিণ্ডো ব্যপৈতি দদতঃ স্বধা।।"

— মনুঃ —

(Absolute adoption is civil death and new birth.) Meaning- The *gotra* and the *riktha* (wealth) of the progenitor the dattrima (dattaka) son is not to take away, the *pinda* is follower of the gotra and the *riktha :* (therefore) the *swadha (pinda)* goes away absolutely from the giver.

— Manu —

(View expressed in Tagore Law Lectures is not correct.)

From the above text, it is clear that an absolute adoption operates as birth of the boy in the adopter's family and as a civil death in the family of his birth. `**Dattaka Chandrika'** and other Sanskrit-commentators support this view. The view expressed in the Tagore Law Lectures that there is no clear authority for maintaining adoption to be tantamount to civil death is erroneous. From the text cited above, it is clear that the view expressed is not correct.

``By adoption a person passes out of the family to which he belonged by birth and is transplanted into the family which adopts him''. (*Perumal V. Govt. of Pakistan* (1963)15.D.L.R. (S.C.)58).[26]

25. (*Lunkurn V. Birji* (1930) 57.Cal.1322).

26. (*Perumal V. Govt. of Pakistan* (1963)15.D.L.R. (S.C.)58).

Adoption confers upon the adoptee same rights in the family of the adopter as the *aurasa* son except in the following cases :

(i) When a son is born after adoption, to the adoptive father, the adopted son does not share equally on a partition with the natural born son. He takes : —

(Adopted son's rights in the natural family.) (a) Under Dayabhaga School, one third of the adoptive father's estate.

(b) In Benares, one fourth of the estate.

(c) In Bombay and Madras, one fifth.

(d) In case of an impartible estate, the *aurasa* son alone suceeds.

In case of Sudras, the adopted son shares equally in Dayabhaga School and in Madras. In Bombay he takes one fifth.

The same rules apply on a partition effected during the life time of the father.

(ii) Adopted son cannot marry in his natural family within the prohibited degree nor can he adopt a boy from that family whom he could not have adopted if he had remained in that family.

An adopted son acquires the right of a son in the adoptive family but he loses all the rights of a son in the natural family including the share in the estate of his natural father, natural relations, or any share in the coparcenary property.

Under Dayabhaga School, adoption does not divest any property which has already vested in the adopted son prior to adoption. (*Shyamacharan V. Sricharan* (1929) 56.Cal.1135).[27]

It has been held by Madras High Court that the adopted son does not lose his rights in the coparcenary property which has already vested in him as the sole surviving coparcener prior to adoption. (*Venkata Narsimha V. Rangayya* (1906) 29.Mad. 437). [28] The same view has been expressed by the Bombay High Court.

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27. (*Shyamacharan V. Sricharan* (1929) 56.Cal.1135).

28. (*Venkata Narsimha V. Rangayya* (1906) 29.Mad. 437).

(Adoption of married persons.) If a married person is given in adoption, his wife also passes into the adoptive family. If he has a son at the date of adoption, the son does not pass into the adoptive family. In such a case if the husband dies, the wife cannot adopt her son. Where a married person is given in adoption and at the time of adoption, his wife is pregnant and a son is born to him, the son on his birth passes into the adoptive family and should, therefore, be treated as a member of that family.

(Adopted son in herits both father and mother and their relations.) The adopted son will inherit from the adoptive father, the adoptive mother and all their relations. Even if the wife of the adopter was dead, the adopted son is entitled to inherit to the relations of her father's family. An adoption by a widower will take effect as if the son had been adopted in the life time of the deceased wife and as such the adopted son will divest all estates which had vested before the adoption. (*Subramaniam V. Muthia Chettiar* (1945) Mad.638).[29]

(Rights of adopted son in the separate property.)

An adoptive father has got the right to disposal of his separate property by gift, will or in any way he likes and the adopted son is in no way in a better position than a natural born son in this respect. But if there is an express agreement that the adoptive father shall not dispose of his property to the prejudice of the adopted son, the adoptive father cannot dispose of the property to the boy's prejudice. (*Surendrakeshab V. Durga Sundari* (1892) 19.Cal.313).[30]

(Rights of adopted son in coparcenary property.)

An alienation of coparcenary property made prior to adoption, is binding upon the adopted son provided the alienation was valid when it was made. (*Brij Raj Saran V. Alliance Bank of Simla* (1936) 17.Lah.686).[31]

29. (*Subramaniam V. Muthia Chettiar* (1945) Mad.638).
30. (*Surendrakeshab V. Durga Sundari* (1892) 19.Cal.313).
31. (*Brij Raj Saran V. Alliance Bank of Simla* (1936) 17.Lah.686).

(Agreements curtailing the rights of the adopted son,)

When the adopted son is a major at the time of adoption, any agreement made by him with the adopting father or the widow, before adoption, in which he consents to a limitation of his rights in the property of his adoptive father, is valid.

If the adopted son is a minor, such an agreement made by the natural father is valid provided (i) it is fair and reasonable (ii) and it is sanctioned by custom. For example, where the agreement proivides that the widow of the adoptive father is to ``enjoy his property during her life time or for a less period'', it may be reasonable. If the arrangements go beyond that i. e. either give the widow property absolutely or give the property to strangers it cannot be considered to be sanctioned by custom. (*Krishnamurthi V. Krishmamurthi* (1927) 54.I.A.248).[32]

But it should be remembered that such an agreement is not void but voidable and may be ratified by the minor on attaining majority.

(vi) DIVESTING OF ESTATE ON ADOPTION.

(Once vested cannot be divested.) The question of divesting on adoption rises only when a Hindu dies without a male issue and authorises his widow to adopt or when he dies leaving behind a son and authorises his widow to adopt in the event of death of that son without a male issue. As soon as a Hindu dies, his estate must vest either in his widow or any nearest heir. Hence, arises the question of divesting on subsequent adoption. The ordinary principles of Hindu law being that an estate once vested cannot be divested by reason of any subsequent disqualification of the heir (*Moniram V. Keri 5.C. 776),*[33] or by reason of nearer heir coming into existence after-wards (*Callydoss V. Krissan.* 2B.L.R.F.B.103),[34] divesting by adoption is an exceptional rule and is entirely based on judical decisions which do not seem quite consistent.

32. (*Krishnamurthi V. Krishmamurthi* (1927) 54.I.A.248).
33. (*Moniram V. Keri 5.C. 776),*
34. (*Callydoss V. Krissan.* 2B.L.R.F.B.103),

(The adopting widow or widows become divested by adoption.)

The adopting widow becomes divested by adoption, which is an act of her own choice. If there are more widows and one of them adopts a son in exercise of the power granted by the husband all the widows become divested. When on the existing son's death the estate vested in his widow or in another heir, it was held that his mother in the former case and his stepmother in the latter, could not adopt and cause the estate to be divested. (*Bhoobunmoyee V. Ramkishore* 10.M.I.A. 279 ; *Manikyamala V. Nanda Kumar* 33 C.1306).[35]

As regards the estate of any other than the adoptive father, succession to which had opened before adoption, the adopted son cannot lay any clim to the same. (*Kally V. Gocool, 2.C.295.*[36]

(Adoption telates back to the time of husband's death.)

Adoption of a son to her husband by a Hindu widow under the Dayabhaga school of law, relates back to the time of her husband's death. The adoption has thus a retrospective effect ; the adopted son is entitled to be put in possession of the father's share of the property left by him at his death. (1952) 4.D.L.R.400,405,425.[37]

But the adopted son is not entitled to inherit the property of a collateral, which vested in the other collaterals before the date of adoption. (1952)4.D.L.R.400,411,427.[38]

On an adoption made to a coparcener in an undivided family, the adopted son takes the place of a legitimate son and he divests the estate of any one, who in his absence takes his father's interest. (1952) 4.D.L.R. 400, 426.[39]

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35. (*Bhoobunmoyee V. Ramkishore* 10.M.I.A. 279 ; *Manikyamala V. Nanda Kumar* 33 C.1306)
36. (*Kally V. Gocool, 2.C.295.*
37. (1952) 4.D.L.R.400,405,425.
38. (1952)4.D.L.R.400,411,427.
39. (1952) 4.D.L.R. 400, 426.

Adoption by a widow does not divest her *stridhana.* A widow, whose estate is divested by adoption is entitled only to maintenance out of her husband's property. (*Jamnabai V. Raychand* (1883) 7. Bom.225).[40]

The subject matter of divesting of estate on a doption is closely connected with *termination of widow's power to adopt* and both relate to the same subject in different forms.

(vii) ALIENATIONS PRIOR TO ADOPTION.

(Alienation by adoptive father prior to adoption) If the adoptive father alienates any property prior to adoption, the adopted son is bound by it to the same extent, as natural born son would be.

(Alienation by a widow) The widow cannot, after adoption, alienate any portion of her husband's estate for any purpose whatever. As regards alienations made by the widow before adoption ; if the alienation was made without legal necessity or without the consent of the reversioners, the same would be valid only to the extent of widow's interest upto the date of adoption. The alienee has no power to retain the property as against the adopted son unless his claim has become barred by limitation. "If the purchaser is satisfied that there were legal necessities for selling property, that is quite sufficiant. It is not the concern of the purchaser to keep a watch and to prove as to how that money was spent after the payment. (1960) 12D.R.142.[41]

(viii) EFFECTS OF INVALID ADOPTION.

In case of an invalid adoption, the adopted son does not acquire any rights in the adoptive family nor does he forfeit his rights in his natural family. (*Haridas Chatterjee V. Manmathanath Mallik* (1937) 2.Cal.265).[42]

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40. (*Jamnabai V. Raychand* (1883) 7. Bom.225).
41. (1960) 12D.R.142.
42. (*Haridas Chatterjee V. Manmathanath Mallik* (1937) 2.Cal.265).

(Gift to a person whose adoption is invalid.) The validity of the gift or bequest in such cases depends on the intention of the donor. If the intention is to benifit the donee as a *designated person* the gift prevails, though other descriptions of the donee is in-correct. (*Nidhoomoni V. Saroda* (1876) 26.W.R.91 ; 3.I.A. 253).[43] But if the adoption is *the reason and motive of the gift and indeed a condition of it* then the gift cannot prevail, if adoption is declared invalid. (*Fanindra Dev V. Rajeswar* (1885) 11.Cal.463).[44]

(IX) MODE OF PROOF AND ESTOPPEL.

The fact of adoption must be proved in the same way as any other fact. But the onus is particulary heavy and rests upon the person who seeks to displace the natural succession by alleging an adoption, when the adoption is made a long time after the date of the alleged authority to adopt. (*Dal Bahadur Singh V. Bijay Bahadur Singh* (1930) 57.I.A.14).[45]

(Onus) Onus of proof lies heavily on the person who supports adoption. (1956) 8.D.L.R. 577)[46]

Challenging an adoption after many years-standard of proof as regards the fact of adoption in such cases need not be so strict. (1956) 8.D.L.R. 577.[47]

(Estoppel) A person may be estopped though be was acting in good faith or under a mistake or misapprehension.

There is a distinction between the factum of adoption and its legality. Participation in or admission of the ceremonies of adoption may prevent a person from challenging the factum of adoption but it cannot be a bar to challenge the legality of adoption itself or the competency of the person seeking to adopt. (1956) 8.D.L.R. 577.[48]

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43. (*Nidhoomoni V. Saroda* (1876) 26.W.R.91 ; 3.I.A. 253).
44. (*Fanindra Dev V. Rajeswar* (1885) 11.Cal.463).
45. (*Dal Bahadur Singh V. Bijay Bahadur Singh* (1930) 57.I.A.14).
46. (1956) 8.D.L.R. 577)
47. (1956) 8.D.L.R. 577.
48. (1956) 8.D.L.R. 577.

Estoppel operates as a personal disqualification and does not bind any one who claims by an independent title. (*Dhan Raj V. Soni bai* (1925) 52.I.A. 231).[49]

(Limitation) The period of limitation for a suit for declaration of an adoption as invalid one, is 6 years from the date when the alleged adoption becomes known to plaintiff.

The period of limitation for obtaining a declaration that an adoption is valid is 6 years from the date when the rights of the adopted son is interfered with.

The period of limitation by an adopted son against the alienee is 12 years from the date when the possession of the alienee becomes adverse to him. Where the sale is not for legal necessity the adopted son may sue for possession without suing to have the sale set aside.

KRITRIMA ADOPTION AND OTHER ALLIED FORMS.

(Difference between dattaka and kritrims.) In case of *dattaka* from the boy is given in adoption by his natural parents or either of them, whereas in case of *kritrima*form the consent of the boy only, is necessary, who should, therefore, be *sui juris* and destitute of parents.

(Modern from prevalent in Mithila,) In the modern form, which is prevalent in Mithila only, a man and wife may either jointly adopt one son or may each of them adopt a son separately. The son adopted by husband only, does not become wife's son and vice versa and in such a case the son of the one does not perform the exequial ceremony, nor succeeds to the estate of the other. (*Sreenarain V. Bhya.* 2. Sel.Rep. 29.(33).[50]

(Reqirements.) The offer by the adoptive parents and the assent of the boy only, expressed in the life time of the former, is necessary for such an adoption. No religious ceremony is required. Restrictions regarding dattaka adoption do not apply in case of an adoption in kritrima form.

49. (*Dhan Raj V. Soni bai* (1925) 52.I.A. 231).
50. (*Sreenarain V. Bhya.* 2. Sel.Rep. 29.(33).

(His status.) The adoptee in this form acquires rights in the estate of adoptive parents and does not lose his status in his family of birth. But he cannot inherit the property of adopter's father or even of the adopter's wife or husband where adoption is made separately by either of them.

ADOPTION OF DAUGHTERS.

Though *Nanda Pandita* recommends adoption of daughters, as per Bombay and Calcutta High Courts such adoption is illegal. Such an adoption appears to be a general custom amongst the dancing girls or *naik* caste. But adoption by a dancing girl for the purpose of prostitution is void as it is opposed to public policy. (*Kandaiya V. Chokkammal.* 59.I.C.214).[51]

ILLATOM SON-IN-LAW.

In some districts of Madras the custom of *illatom* or affiliation of son-in-law exists. A person who has no male issue may affiliate a son-in-law in this form. Among the Sudras of *kamma* caste there exists a custom of *illatom* adoption by persons who had natural sons living at that time.

(His status.) *Illatom* son-in-law stands in the same position as a natural born son and in a competition with a subsequent born natural son he takes an equal share. At the same time his natural rights of inheritance in the natural family subsists.

A man is, however, competent to adopt a son in dattaka form after having affiliated an illatom son-in-law.

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51. (*Kandaiya V. Chokkammal.* 59.I.C.214).