CHAPTER IX

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In the pages that have been turned over, it has been discovered that a son occupied a very significant place in the Aryan social scheme which lent the highest importance to the law of adoptions. Though the doctrine of adoption is antique and traces its origin to the very early Vedic times, the history of its development is marked by vicissitudes. In the time of the dharmasūtra-s it received formal recognition in so far as various rules were laid down regulating its practice, while in the period of the sāṃśātra-s it assumed still greater importance till ultimately the adopted son was left as the only alternative for a man destitute of a male issue.

The law of adoption was treated with more elaborate details in the later juridical works like the commentaries and the digests, and several treatises dwelling exclusively on this law were produced. Of these the Dattakamīmāṃsā and the Dattakacandrika have been considered the most important and widely recognized and followed. In the pages that have been passed in review, the doctrine of adoption has been dealt with in almost all
its aspects, drawing profusely on these two treatises on the subject. The points of comparison and contrast in these works have been critically brought out and examined in relation with the observations on the subject made by some of other important works.

It can be seen that the whole law of adoption has been developed from a few texts of the *dharmasūtra* and *smṛti* writers and a metaphor of Saunaka. Much of the meaning of these texts is esoteric and unexpressed which accounts for the differing percepts laid down by these and other works and consequently, for the rise of various schools. The application of these precepts in practice to cases during the British Indian period and later, as well as the adoption, of those that have stood the test of time, in the HAMA 1956 most patently establish that the law of adoption, like the whole Hindu law, is a continuous and perennial stream exhibiting exceptional flexibility, resilience and adaptability to the changing needs of society. Thus, the contention of some that the earlier law must be regarded as differing stands refuted and the right view seems to be that there is no break and that it is in complete continuity with the later and the present save that
a few requisites of the religious nature, like the dattahoma and the equality of caste and the rest, are not treated in law as essential now. The present law is a-religious and not irreligious in nature. It does not forbid adoptions made for religious purposes in conformity with the śātric principles; but an adoption, made for both the religious as well legal purposes must also be in accordance with the provisions of the Act, and one that conforms to the śātric principles only will not entitle the adoptee to succession or maintenance in the case of the adopter dying intestate unless it also conforms to the statutes. Thus, it may be seen that passing from the śātric law to the Anglo-Hindu case-law and thence to the HAMA is a continuous process without the impression of a break; only that the law in the code is a step forward towards liberation from religious and social (e.g., of caste) orthodoxy, a trend which was set in motion by such works as the Dattakacandrika. The Dattakamīmāṃsa is in the limpet-grip of orthodoxy unrelenting from which the Dattakacandrika emancipates itself and adopts a liberal approach as, for instance, in conceding independent power to women in the matters of adoption.
The *Dattakamimamsa* indulges in fanciful distinctions and glaring distortions at places more than, perhaps, any other work on adoption does and at times the *Dattakacandrika* is guilty of irrational imitation. The *Dattakacandrika* blindly adopted the *Dattakamimamsa*’s interpretation of Saunaka’s metaphor, viz., 'the son bearing the reflection of a son' as 'the capacity of the adopted son to have been procreated by the adopter himself by such means as the *nivoga* and the like'. The courts, it is submitted, were not less guilty, which instead of examining the issue threadbare with an open mind, irrationally accepted this exposition and a further gloss added to it by the *Dattakamimamsa* in prohibiting the adoption of one who would have been an offspring of a marriage between prohibited degrees had the adopter married his mother when she was maiden and showed their ignorance in ruling that the *Vyavaharamavukha* also barred the adoption of a daughter’s son and sister’s son. They placed undue reliance on the *Dattakamimamsa* and the *Dattakacandrika* instead of thoroughly examining numerous other treatises on adoption and giving their due weight.

inspite of their protestations of equity, justice and good conscience. Dr. Bühler's explanation that 'He then should adorn the child, which (now) resembles a son of the receiver's body, that is, which has come to resemble a son by the previous ceremony of giving and receiving', also fell wide of the mark. Almost the entire line of jurisprudence down the modern times failed to come out of the narrow zig-zagged grooves of these authorities and to see in the daughter's son or sister's son the likeness of a son or grandson. The metaphor of Saunaka should have been seen in the historical perspective. Manu, in no uncertain terms had already declared that legally and religiously no distinction existed between the sons of a son and daughter, since their father or mother were produced from the body of the man himself. They were equally competent to offer religious benefits to him and to inherit his estate in case of his being sonless. While admitting the undisputed authority of the Dattaka


3. Manu IX. 131-133, 139.
the Privy Council rightly cautioned that its authority must be rejected where it could be shown that it deviates from or adds to the smrtis. Saunaka's text and that of others forbidding the adoption of a son of a daughter or sister are subject to examination from various angles.

These shortcomings and others do not, however, lessen, the importance of these two works even today, which have held so high an esteem since their times through the Anglo-Hindu case-law and statutes to the code. Though various authorities aver, in view of what is stated in S4, Ch.I of the HAMA 1956, that the Act constitutes the most authoritative source of the law, modern codified law has parted company with ancient sources and that the statutes have made redundant the old Sanskrit texts, their interpretations, or rules or any custom or usage as part of the old law in use immediately before the enactment of the Act, the importance of these works cannot be belittled. Even Derrett, who asserts that Sanskrit texts and their translations and other interpretations now belong to the orientalist and the legal historian, admits that the spirit of
those sources often lives on. Paras Diwan also affirms that the religious philosophy behind those provisions of law still governs, regulates and permeates everyday life of Hindus and all classes of Hindu society. The statutes have deep roots and continue the tradition. Derrett approvingly refers to a Supreme Court decision which restated a rule (though the authenticity of which is called to question by him) laid down long ago by the Privy Council that the practitioner needs to know the rule's origin and its history, although, he further asserts, the student likes that his country's judiciary adopts it in the words of their own choice and in the context which at once makes sense. Sir Henry Maine who, in general, adversely criticized ancient Hindu law, also had to admit that 'Hindu jurisprudence has a substratum of forethought and sound judgment.'

4. IMHL, Preface, p. lxxxii.
It may be asserted that there is a splendid synthesis of the old law with the new in the statutes of adoption as it is in the whole code. It may, however, be admitted that there is a lot unexpressed in the provisions of the Act and it is very likely that original source material may still be relied upon in support of some argument or the other. The rules of the Act must be viewed in proper historical perspective and not in isolation. A student of laws who has vistas of successful career as a practitioner and a judge before him must have at least a workable grounding in the philosophy and principles underlying these rules. The decisions of the courts disregarding these principles are bound, in the long run, to perforce lead the Hindu world to break away from its roots and isolate them from their rich ancient heritage. A society that is thrown from its moorings, allows its natural form to be disfigured rather than polished and sheds its glory and greatness, is tossed and drifted like an aimless, pale dry leaf broken off its suckling stalk by a strong wind.