CHAPTER I

INTRODUCTION
The *dharma-sastra* has held high prestige amongst the Hindus amounting to a population of hundreds of millions. It is the only indigenous system of Hindu jurisprudence, the ancient and medieval religions and civil law, which has supplied actual rules of law in a wide variety of contexts as, for instance, inheritance, debt, marriage, cultivation of lands, caste and other matters of religious as well as temporal nature. This oldest and continuous system of law, which has been known for its richness and diversity of materials, being subjected to modifications occasionally by statutes, has resulted into a system known since the 1920's by the pejorative but accurate name of *Anglo-Hindu law*. The courts constantly referred themselves to the *dharma-sastra* texts, but subject to a method which had been gradually devised during the British rule. For the aforesaid purpose, the assistance of the Indian sastric scholars, was sought. The authenticity of Pandita's references was also often difficult to verify. Therefore,


to ensure steady and consistent administration of justice throughout British India and thus, to restore the prestige of the supreme court, various steps, besides acquainting the European Judges with the Hindu as well as Islamic laws, were contemplated. As part of Warren Hastings' plan, Sanskrit colleges, one at Benares and another at Calcutta were founded to train the pandita in the Sastric education who could then become 'jud e-pandit' to a District Judge.

The earliest available list of works used at Calcutta from 1721 to 1737 for the purpose cited above, consisting of such legal works as Kauya, the Hitaksara, the Lavabhaga, the Lavakrama-marscara, the Law-tattva, the Vivads-ctiisamani, the tithi-tattva, the Buddh-tattva and the Lavascitha-tattva, also included the Bhataka-sigam of Narendra and the Bhataka-candraika of Saphurani authoritative works on the law of adoption. The high prestige that these works held and the wide recognition that they received in the courts, is evident from their inclusion in the agreed bibliography drawn up for the training of the jud e-pandita. The question of authenticity of the Bhataka-candraika, dealing exhaustively with the subject of adoption was discounted and disregarded by the courts, while the Supreme Court of India had refused to reopen it, whenever there was an occasion to do so. The Privy Council had elaborately examined Bhataka-candraika and Bhatakamarscara and recognised their paramount authority all

over India. The Council observes, "Again of the *ātika-
śāstras* of Hanumānṣaṇī and the *ātikaśāstras* of
Levaṇa-bhaṭṭa, two treatises on the particular subject
of adoption, Sir William Macnaghten says that they are
respected all over India, but that when they differ, the
doctrine of the latter is adhered to in Bengal and by the
southern jurists, while the former is held to be the
infallible guide in the provinces of Mithilā and Benares."5
In the case of Bhāparv Sinha, it was contended that both
works must be accepted as bearing high authority for so
long a time that they have become embedded in the general
law.6 They observed in another case that the authority of
these two works was not open to examination, explanation,
criticism, acceptance or rejection like any other scientific
treatises on *European* jurisprudence.7

It may be asserted here that no other author or work,
save those under reference here has been the subject of so
much discussion and debate by the judges of the British Indian
courts. It has been pointed out by F.V. Kane that no branch
of Hindu law has been so fruitful in litigation as adoption.
There are instances, where, fifty years after a point in the
law of adoption was deemed to have been settled by a Full
Bench

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4. H.C. Sutherland's mistake in attributing the *Ātikaśāstras* to Levaṇa-bhaṭṭa has been explained in Chapter III of
decision, the Privy Council intervened and over-ruled the Full Bench decision inspite of its usual practice to follow the rule of stare decisis. This resulted in a confounding chaos.

After Indian independence in 1947, the four statutes including the one on adoptions and maintenance, which formed the so-called codified Hindu law were enacted in 1955 and 1956 by the Indian parliament. The reforms said to have been dramatically, effected by these laws, which did not satisfy all sections of opinion, gave a superficial impression of having rendered the learning of the past superfluous and obsolete. H. V. Kane, however, has shown, as he himself asserts, that many regulations of \textit{shastras} are still very much alive, that they govern the everyday life of Hindus and permeate all classes of Hindu society inspite of the fact that a considerable part of \textit{shastras} has become obsolete. Terrett points out that many were prepared to entice into the assertion that the Hindu law, being the oldest and continuous system, rich and diverse in its materials, was "superior to roman law, while the longevity of its institutions altogether exceeded anything which any other system could provide. But the researcher has to meet disappointment on account of his lack of knowledge of sanskrit on the one hand and the disadvantage that Hindu law suffered from after 1956.

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on the other, namely, that the difficulty of the materials did not yield at once to a determined researcher, because there was no short and attractive guide to the subject. The present work is a very modest attempt to tide over this difficulty as far as the law of Hindu adoptions is concerned.

Nandapandita (1553-1633 A.D.) who came of the Dharmadhikari family with a long history of smartha learning, is known for his scholarship and voluminous work. The second chapter deals with his life and works. He hailed from Benares, but that was not the only centre of his activity. He was highly honoured for his erudition and, the wealthy patronage that he received helped in the proliferation of his genius. He moved from place to place and urged by wealthy patrons and princes he made his mark in the exceptional capacity of creativity by producing not less than a dozen and a half of works including digests as well as commentaries on principle smritis like those of Visnu, Parasara and others. His works have enduring value and have been received with honour and recognition in the courts.

The important of his legal works are the Vidyanamanohra, the Pramitaksara and the Veijavanti, which are commentaries on the Parasara, Yajnavalkya and Vismu smritis respectively, the compendiums of smriti-material, like the smriti-sindhu and a treatise on adoption, the Dattakamamama, while his works like the Sraddhakalpalata and the Suddhicandrika are purely
on religious matters. He stands out a mile from several
digest writers in virtues of the enormity and excellence
of his productions.

The third chapter has, Raghunani, his life and
works, as its subject for treatment. He was a scholar of
repute and is supposed to have written a Sarti-candrike,
besides the Āetiśekacandrika. In the opening verse of the
latter work he himself states to have dealt with the
eighteen copies of litigation as propounded by Manu.

Doubts have been expressed about the authenticity
of the ĀC which was mistakenly ascribed to Devanabhatta,
the author of the celebrated work of law called the Sarti-
candrike, by Sutherland. He knew that Kubera was not the
real author of the ĀC, but he did not attribute it to
Raghunani either. So it was asserted by the Europeans
that the doubts were only symptomatic and the courts
including the J.C. and the S.C. declined to lend credence
to the theory of forgery. The work was so highly regarded
that the question of its authenticity could be ignored,
they said.

O.C. Sarkar, Gastri and others who subscribe to the
theory of forgery advanced by the Bengali pandits finally
and decisively clinch the issue and attribute the author-
ship of the work to Raghunani Vidyabhusana of Bengal who
lived in and around 1790 A.D. and is stated to be a member
of Colebrooke's circle.
The origin and development of the institution of adoption has been treated of in the 4th chapter. Vedic society was strictly agnatic and exogamous where an auras, i.e., 'the real legitimate son' was highly extolled and much sought after. On failure of a real male issue man looked for a substitute and his search resulted in the growth of the institution of secondary sons.

The secondary sons were the growth out of tradition. The Aryan concept of sonship was connected with procreation, which created no relationship in the matrilineal communities round about their settlements and the son of a damsel, no matter how procreated, belonged to the mother and her family. Den Gupta holds that the growth of the secondary sons was the effect of the influence of the matrilineal culture on the Vedic community. The mutrika, i.e. 'the daughter appointed son', her son and the kanina, i.e. 'the son of an unmarried daughter' and possibly some more must have been the result of this influence, but the dattaka and the like were certainly of independent growth. The kastrala, i.e. the son of the head, was most probably the part of the Aryan culture itself. Once the concept of sonship ceased to be connected with procreation within the bounds of the lawful wedlock, it was later extended to such other sons as the suchotrama, the mutrika and the like. The institution of the mutrika had already grown to its full stature in the Vedic period itself. The mutrika and the kastrala were among the preferred sons who ruled the roost till the period of the
when both of those along with the rest except the dattaka, became obsolete.

The Vedic texts show an awareness of the practice of taking a son in adoption, but it is only in an initial stage of its growth. Further evolution of the adopted son has been marked by vicissitudes through the ages. By the time of the Gautama, the dattaka had found a place amongst the preferred sons next only to the ksetra. He was treated not only a kinsmen, but also a successor of his adopter as well as the latter's kinsmen, evidently, on failure of the ksetra. Later on, the institution of adoption once again witnessed a decline and in the Brahmah, the putrika's son was preferred to both the ksetra and the dattaka.

It was, however, for the first time that the institution of adoption received formal recognition in the Vedic which lays down a few but very important regulations in respect to the taking of a son through adoption. But it is only in the Vedic like those of Haru and Brhaspati that the dattaka was left as the only substitute for the guru. The ksetra and the rest being morally unacceptable were rejected. The putrika became obsolete, because the daughter and her son had by themselves entered the legal scheme of kinship and heirship. In the commentaries and the digests, an adopted son has been treated elaborately. The Dattaka-mimamsa and several other digests dealing exclusively with
adoption were produced and since then upto the modern times, no one other than the adopted son has been recognised as a substitute for the real one.

In the fifth chapter of this thesis, the concept of adoption has been dealt with. The epithets *dātā-, dātākē or dāttrīma*, used to denote the adopted son are derived from the root *dā* 'to give'. An adopted son is one who is given away by his parents to a sonless man of the same class.

The scope of the work having been defined, the community or the people, to whom the law of adoption is applicable, are then identified. The Aryas or the Hindus to whom this law is applied are divided into four castes and sub-castes. The term Hindu, as it has evolved, does not denote a particular religion, creed or community, Hindus are not one people but many, a sum total of all those religious and ethnic communities which have come up as a result of an exchange of cultural systems between the Aryas and other societies in their historical and geographical setting through the ages since the Vedic to the modern times, excluding Mohamedans, Christians, Persians or Jews or those who are proved to be not governed by the Hindu Law.

A son has been treated with excessive affection and regarded very important on account of the religio-spiritual as well as secular bene fits which he is supposed to offer.
By begetting a son a man pays off his debt to the ancestors, through him he conquers the other world and secures heavenly bliss, the *lokasa*. Further, he also supports his father in the infirmity of his old age and celebrates his name. A sonless person is considered insuspectible and the religious law permits him to remarry if his first wife fails to produce a male child. On his failure to beget a legitimate son, man turns to a substitute of the several secondary sons that have evolved through a long course of time, only the *dattaka* survives where as the rest have become obsolete. For all purposes, religious and legal, he is treated as a complete substitute for the real son.

The analysis of various definitions of sons characterised as the *dattaka*, the *kriya*, the *suvannidatta*, the *aparaviddha* and the *kritika* shows that they are all essentially the adopted sons distinguished by different nomenclatures on account of the slight variations in the circumstance of affiliation.

Though no *pratinihi*, i.e., 'substitute' is recognised for the son in general, it is different in the matter of adoption. An adopted son is supposed to produce the desired religious benefits for his adopter. The content of emotional satisfaction of adoption will depend upon the degree of his capacity to produce religious effects recognised by the *vasta* and the promise that he might hold to meet adopter's filial urge and support him in his old age.
Determination of the capacity of the persons who may adopt or give their son in adoption as also of the one who may be adopted constitute the subject which has been dwelt on under the title 'Execution of Adoption' in the sixth chapter. Man is under religious obligation to beget a male issue and since the precept to procreate a male child is peremptory failure to do so is a cause of offence. A man who remains destitute of a son is called upon in positive terms, to constitute a substitute for the same. This precept is applicable to all irrespective of their marital status. The term 'son' in this context signifies a son in general and not either principal or subsidiary exclusively and includes a grandson and a son of a grandson. Hence, he only is competent to affiliate a son, who has none of these living at the time of adoption. He has no power as long as any one of these, whether primary or secondary, is living.

There has been a good deal of conflict over the competence of a woman to adopt a son. A woman in general has been held competent to do so by the Patañjali-sūtra except when she is married and her husband is living in which case she may adopt with the sanction of her husband. This prohibition is related to her dependence on him and his capacity to assent. A woman whose husband is dead or has emigrated is exempted from this restriction.
As against the view held by the LE, a woman in general, according to the LE, has no power to adopt. She may be exempted from this prohibition if she has the sanction of her husband in the matter. The cause in the exceptive exemption from this general prohibition is her husband's sanction and not her non-dependence on him or his kinsmen. The purpose of his authority is the affiliation of the adoptee as the son of her husband by means of the adoption made by the wife ever and consequently, to create in him the competence to perform the obsequies of the father. The requisite of performing the dattahoma with vyahritis accompanied by Vedic prayers is waved in the case of a woman proceeding with his authority which is not done in the case of a widow. Husband's sanction is also the cause of the filiation of the adopted son to both the parents. Consent of the wife, however, is not required.

A Sudra may also adopt and the requisite of the Vedic rites is either dispensed with or such rites are allowed to be performed through the intervention of a priest. The same person may be affiliated by more than one persons, where the adopter has well as the giver are brothers of the whole blood.

The father has an unrestricted right to give his son. But an only son must never be given or received on account of extinction of lineage consequent on such gift. A man having several sons alone, at least more than two, may give away his son in adoption. In the old law this prohibition was mandatory,
but under the modern law it is treated as recommendatory only. According to the Dk, silence also on the part of the husband gives his consent. The death of the husband and her distress are respectively treated by the Dk and the Dk as the cause of independent gift by a widow. In a pre-eminent case both the mother and the father jointly give their son.

It is established by the Dk that a brother cannot be the adopted son of another and sisters and brothers cannot be the reciprocal adoptive parents of the offspring of each other. A daughter's son, a sister's son and a mother's sister's son cannot be adopted amongst the three superior classes, whereas a sudra must adopt one of these, if available. According to S'raunaka an adopted son must bear the reflection of a son which is taken to imply the capacity of the adopter to have been procreated by the adopter himself by means of niyoga and the like. It is taken to mean that a son of a prohibited connection must be avoided. The courts evolved the rule that a son must not be adopted whose mother the adopter could not have married in her maiden state. The doctrine has been critically examined in brief. According to the Dk, the ancient practice of adoption was not restricted to any age and then various opinions regarding the age and marriage of the boy proposed to be adopted are discussed. According to the Dk, a daughter may be adopted as a substitute for the real one.
following the usage of the adopted son where as the DC is silent over the subject.

Adoption brings about far reaching consequences of social and legal nature which constitute the subject of treatment in Chapter VII. The locus classicus on the subject is मह. IX. 142 according to which the relation of the son given with his natural family is extinguished and he relinquishes his right to succeed to his father who in turn relinquishes his privilege of obsequial offerings from such son.

The courts were led to construct a fallacious legal fiction that adoption operated as civil death of the son given his natural family and new birth in the adoptive family. The matters were stretched too far which misled courts into delivering contradictory and unwarranted decisions. In fact Manu's rule was not so rigidly applicable to all sets of circumstances which have been discussed with special reference to the DC and the लिन.

The adopted son is filially related to his adopter and receives all the rights of a natural son in the adoptive family. The role of proximity of relation between the adopted son and his adopter, the formal procedure and initiatory rites in creating the filial relation have been discussed. The resulting relation of गणिद्व and the effects of the birth of a real son subsequent to an adoption have also been treated of.
The relation of aatinda has been described of two types. First, the connection through aatinda i.e., oblation of funeral cake to common ancestors which terminates in the natural family and is established as extending to three generations in the adoptive family as result of his adoption there. Second, the consanguineal connection based on the ties of common blood, which persists in the natural family even after he has been given away in adoption.

Rights of the adopted son over property both in the natural as well adoptive families are treated of in the 8th chapter. An adopted son inherits not only to his adopter but also to the kinsmen of the latter, both ex parte paterna and ex-parte materna. He relinquishes his rights over the property of his father after his adoption in another family, but he is not invested of the property which has already been vested in him absolutely, before his adoption.

The dvyānusavayāna who is a son of two fathers under a special compact between the father and the adopter, inherits to both of them. Where the natural father has no other son or dies without leaving such heir, the general adopted son succeeds also to him.

The legal fiction of adoption was extended to treat the adopted son as having been born in the adoptive family from the time of his actual birth, and, furthermore, his rights were related back to the death of the husband of the adopting widow. The chapter concludes with a brief treatment.
of the doctrine of relation back and its effects.

The thesis has been concluded in the 9th chapter which also shows the relevance of the works under study to the statutes of adoption.