Marriage and Family

Acknowledging Women's Rights

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[−] Abstract and Keywords

This chapter deals with the title of dispute traditionally called *strī-pum-dharma* which seeks to regulate the mutual conduct of men and women both within, and outside marriage. Dharma śāstra, in all its stages of evolution, adopts an overly protective attitude towards women, and prescribes that they must always remain under the ‘manly’ protection of fathers, husbands, sons or other male members of the family. Smṛtis as well as medieval authors are terrified at the very thought of women taking liberties. Ideally, they would want them to be confined within the four walls of their homes. The whole tradition is extremely paranoid about women getting corrupted by contact with outsiders. Yet, vyvahāra sections of dharma śāstra texts are much more pragmatic and willing to accept these transgressions as fait accompli and suitably accommodate those
transgressions.

Keywords: dharma śāstra, strī-pum-dharma, family law, manly protection, women liberties, vyavahāra

In our contemporary understanding of law, family law covers areas like marriage, obligations of spouses, dissolution of marriage and maintenance, adoption, and most importantly the law on partition and inheritance. In the traditional scheme of dharma śāstra the law on adoption is discussed under dattāpradānikam, inheritance under dāyabhāga and the remaining topics are discussed under strī-pum-dharma. In this book, the law on inheritance has been discussed separately under Property, Family and Women. A short discussion on adoption is given at the end of this chapter.

The principal concern of this chapter is with the title of dispute traditionally called strī-pum-dharma which seeks to regulate the mutual conduct of men and women both within, and outside marriage. Dharma Śāstra, in all its stages of evolution, adopts an overly protective attitude towards women, and prescribes that they must always remain under the ‘manly’ protection of fathers, husbands, sons or other male members of the family. Smṛtis as well as medieval authors are terrified at the very thought of women taking liberties. Ideally, they would want them to be confined within the four walls of their homes, not even communicating with any male other than their husbands upon whom rests ‘the pious duty to ensure that their wives do not transgress the dharma laid down for them.’ The whole tradition is extremely paranoid about women getting corrupted by contact with outsiders. Yet, it goes to the credit of vyavahāra sections of dharma śāstra texts that they are much more pragmatic and willing to accept these transgressions as fait accompli and suitably accommodate those transgressions.

(p.43) Jurisdiction of the State in Matrimonial Matters
Under the earlier dispensation, disputes between husband and wife were expected to be settled within the family than be taken to courts of law, and Vījñāneśvara has cited an anonymous authority to the effect that disputes between teacher and student, father and son, husband and wife, and master and servant cannot be raised before the king.¹ Nārada also advised couples not to raise disputes born out of jealousy, or personal likes and dislikes in public, either before the king, or before members of their own families.² Asahāya, his commentator asked them to clear their hearts between themselves, and not to raise any dispute against each other before the king or members of the family.³

It is important to note that medieval authors opened the doors of the courts for matrimonial cases. Commenting on the contents of strī-pum-dharma, Vījñāneśvara says that this vivāda pada deals with disputes between husband and wife, and that the king must see to it that they do not transgress their dharmas. He, then, drastically modifies the rule of the anonymous author, and says that this does not imply an absolute prohibition. He adds that legal proceedings between these pairs can in fact sometimes become necessary and desirable.⁴ At another place he has said that the king could take suo motu cognizance of such matters upon learning about them from any source.⁵ Caṇḍeśvara also accepts this rule.⁶ Texts also cite smṛtis to list several offences for which a wife could be punished.
A study of the texts of the period reveals that the state could interfere in matters regarding desertion, bigamy, and maintenance of the wife. Though all the texts also contain detailed prescriptions regarding a woman’s conduct, the need for keeping women under strict control, and the husband’s or the father’s or the son’s duty to keep women under control, these sections do not disclose any legal rights or obligations. They are more in the nature of moral preaching. Another very favourite topic of the authors is the duties of a devoted wife (pativrata). The Vivādaratnākara takes a head down plunge into the ‘super natural’ and the ‘other worldly’ when it comes to threatening women. ‘A woman who does not fulfill her duties falls into the worst of hells or is reborn as a leech or a mother of pearls or a bitch or a she ass’, it declares. Thankfully, such statements are few and far between. Out of a total of one thousand eight hundred and seventy three rules listed by the author, only eleven refer to the other world, or to other births, or to such threats. The rest are secular and temporal.

**Husband’s Authority to Punish the Wife**

In many cultures husbands have given, and continue to give to themselves the right to beat their wives for various ‘offences’. The Manu Smṛti does not deny this ‘privilege’ to the husband though it does seek to place some restrictions on it. It says that the husband may beat his wife if she commits any mistake, though this verse, and the next seek to check arbitrary exercise of this power, and allow him to beat her only with a piece of rope, or a bamboo stick, and that too only on the back, and never on the head or else, warns Manu, he would be punished as a thief.\(^7\)

Medhātithi was fully conscious of the possibility of misuse of this provision, and imposed several restrictions on this rule. Firstly, he clarified that the purpose of this rule was to bring the errant wife on the right path, and not to grant to the husband the right to beat up his wife. Secondly, it follows that other means of disciplining her such as admonition should also be employed, and beating should be resorted to only rarely in proportion with the offence,\(^8\) and thirdly, he described the vanśa dalam as venutvak, i.e. bamboo skin, taking out all sting from this rule.

Kullūka too has tried to tone down this rule. He says the bamboo stick should be very small.\(^9\) He further adds that this verse gives immunity to the husband from legal action under the law on sāhasa, but this immunity is conditional, and should he act otherwise, he would be admonished, and fined by the king as per the law.\(^10\)

Caṇḍeśvara has also commented on the expressions ‘on the back’ and ‘not on the head’. By these he understands that one should not hit any delicate part of the body.\(^11\)

Texts of the period ascribe a rule to Manu, or Yama or Vasiṣṭha, to the effect that the husband had no right to disfigure or maim his wife—or to keep her in confinement even if she was guilty of unchastity.\(^12\) It is very significant to note that these verses are not available in the extant versions of the Manu smṛti. The Dharma Kośa (II p: 1058 foot notes 1 and 2) shows that these verses cannot be traced to the Manu smṛti. This might indicate that strong opposition had emerged to the self proclaimed privilege of husbands, and that medieval authors had to come out strongly against them, and had to recognize new rules
from their contemporary tradition which ascribed them to Manu, and other authorities to lend greater weight to them. This is also in accordance with the general design of the medieval works to check private exercise of the power to punish, and to vest this power exclusively in the hands of the state.

Fine on the Wife

Manu Smṛti laid down that fine could be imposed on the wife for drinking, or going to the theatre despite being stopped. Kullūka has said in his comments that, only the king has the right to award the punishment prescribed by the texts, because these rules occur in the Vyavahāra section of the dharma śāstra. Medhātithi's clarification is even more interesting. He says that the fine prescribed in the said verse is to be paid by the husband because 'the husband is the wife's master.'

Desertion

On plain reading, some of the earlier sūrī texts make desertion of the wife by the husband a very simple affair. Desertion could take several forms: (a) nirvāsana, niṣkāsana or nirdhamana, i.e. turning out of the house; (b) adhivedana, i.e. taking a second wife; and (c) tyāga or parityāga or visarjana, i.e. abandonment.

The early sūrīs prescribe several grounds on which the wife could be so punished. Here is a list showing those grounds and the consequences for the wife:

1. being hateful towards the husband (YS I.70)—adhivedana
2. ignoring the sick or mentally unstable husband (MS IX.77)—tyāga for three months and denial of ornaments, slaves and maids etc.
3. drinking (MS IX.77); (YS1.73)—adhivedana; YS I.70—adhivedana, drinking despite being stopped (MS IX.84) fine of six krṣṇalas
4. being of inappropriate conduct—adhivedana
5. being inimical to the husband (MS IX.77)—adhivedana
6. being chronically ill (MS IX.77)—adhivedana; (YS I.70)—adhivedana
7. being violent (MS IX.77)—adhivedana
8. being wasteful (MS IX.77)—adhivedana
9. being barren (MS IX.81)—adhivedana in the eighth year; (YS I.70)—adhivedana
10. giving birth to still born babies (MS IX.81)—adhivedana in the tenth year

11. giving birth to daughters (MS IX.81)—adhivedana in the eleventh year; (YS I.70)—adhivedana
12. being of insolent speech (MS IX.81)—immediate adhivedana, (YS I.70)—adhivedana
13. denial of conjugal rights (MS IX.81)—nirvāsana
14. acting independently (DK VK II.1058)—tyāga
15. going to theatre ((MS IX.84)—fine of six krṣṇalas
16. getting polluted (MS XI.177)—incarceration and purificatory rites
17. second time pollution (MS XI.177)—Chāndrāyaṇa vrata
18. unchastity (YS I.70) cessation of rights, frugal maintenance; having alliance with husband's disciple or teacher or with a lowly person (Vyāsa-DK.II-1111)—
tyāga
19. getting pregnant from another (YS 1.70)—tyāga
20. causing injury to foetus (YS 1.70)—tyāga
21. causing injury to husband (YS 1.70)—tyāga; (Vyāsa-DK.II-1111)
22. mahāpātaka (YS I.70)—tyāga
23. being deceitful (YS 1.70)—adhivedana

Thus, Manu\textsuperscript{16} lays down that if a woman was given to drinking, prone to violence, otherwise incompatible with her husband, of unrighteous conduct, or suffering from some disease, or was barren, or gave birth to still born children, or only to female children, the husband could take another wife. He further said that, if the wife was given to using harsh and abusive language, the husband could take a second wife. Yājñavalkya also prescribed that a man could abandon his wife, if she was a vyabhicārini, or if she became pregnant from her illegitimate alliance, or if she killed her embryo, or was guilty of a great sin (mahāpātaka).\textsuperscript{17} Vāsiṣṭha lays down that a woman who had an alliance with her husband’s pupil or teacher or father, or with a person of very low birth could also be abandoned.\textsuperscript{18} Nārada lays down that a woman who wasted all her strādhana, or desired to kill her husband, or killed her embryo should be turned out of the house.\textsuperscript{19}

However, medieval texts place several restrictions on this seemingly unbridled right of the husband to punish the wife. Given the fact that a Hindu marriage is a sacrament, a divinely ordained relationship, and hence irrevocable by man, they declare that man has no right to snap it, or to refuse to fulfill the obligations cast upon him by this divine relationship.

They lay great emphasis on the husband’s duty to maintain his wife. Reliance is placed on MS XI.176 to prescribe that even a woman given to promiscuity cannot be abandoned, but has to be kept in a separate house, and maintained at a subsistence level. They altered the very meaning of the expression ‘tyāga’, and held that it did not mean abandoning the wife, and snapping all ties. In different situations it could mean giving up conversation with the wife, not having conjugal relations with her, not letting her participate in Vaidika and smārta rituals with the husband or lodging her in a separate dwelling.

Commenting on the expression ‘tyāga’ (abandon) in YS 1.73 Aparārka said ‘abandonment means giving up sexual relations or even conversation or not involving her in a couple’s joint-duties and not turning out of the house’.\textsuperscript{20}

Vijñāneśvara also said in respect of the same, ‘abandonment is of (conjugal) pleasures and ritual and (does not) mean turning out of home’.\textsuperscript{21}

Devana, a later smṛti writer prescribed that tyāga meant giving up of tīrtha and not karma.\textsuperscript{22} The expression tīrtha is explained as sambhoga (conjugal enjoyment) by Devana\textsuperscript{23} and as yoni (conjugal relation) by Candēśvara.\textsuperscript{24} Mādhava and Devaṇa cite Vāsiṣṭha to prescribe what a husband could do if he felt like giving up the relation with his wife. He could withdraw from vyāvaḥ, tīrtha gamana and dharma.\textsuperscript{25} Vyāvaḥ means
conjugal pleasures, the expression tirtha gamana i.e. pilgrimage signifies all purāṇic rituals and dharma refers to all Vaidika rituals.\textsuperscript{26}

Thus, the three laid down that tyāga at the worst meant not having conjugal relations, and not throwing out of the house. Devaṇa has specifically said that, if a woman is deserted on grounds of disease or giving birth to daughters or being barren or mentally unstable or reaching menopause and not for her evil conduct, she continues to enjoy all rights of the wife, and the husband cannot divest her of her right to perform the duties to be carried out jointly with him (sahādhikārā).\textsuperscript{27} It is significant to note that Medhātithi had taken a stricter view. He had said that the husband had the option to maintain the woman guilty of vyabhicāra. Referring to YS.I.70 he said that if the husband did not want to maintain such a wife he might abandon her.\textsuperscript{28} Similarly he interpreted nirundhyāt eka veśmani (keep confined to a house) of MS to say that it applied to the first offence, but if the woman persisted with her unchaste conduct, the only option with the husband was to abandon her.\textsuperscript{29} Medieval authors have charted on a different path to protect a woman suspected of unchastity. Devaṇa specifically rebuts Medhātithi's opinion that a Vyabhicāriṇī need not be maintained, ‘the view of the Manuvṛtti that only a chaste wife is to be maintained and not an unchaste one is false,’ he declares.\textsuperscript{30}

Authors have restricted the authority of the husband even in respect of gravest of offences like adultery or even uninhibited wantonness. Devaṇa has laid down that the wife married according to prescribed rites cannot be abandoned except in case of vyabhicāra\textsuperscript{31} (unchastity). He further qualifies this by adding that vyabhicāra is to be understood as ‘svachhanda vyabhicāra’,\textsuperscript{32} i.e. wilful or unrestrained unchastity. This expression might be interpreted to mean that a woman shall be guilty of vyabhicāra only if she is given to unrestrained and repeated promiscuity. Casual flirtation may not constitute an offence under this provision. Or alternatively this might mean that her own mens rea (sva-chhanda i.e. own desire) should be established. Explaining the expression ‘vipradu śtām’ (polluted or evil) in MSXI.176 Medhātithi has said it means ‘icchayā vyabhicāriṇīm’, i.e. ‘one who willingly transgresses’, and therefore forced assault or molestation will not make her guilty. That tyāga can be done only in very grave circumstances is also proved by a citation from Vasiṣṭha that a woman who has an alliance with her husband’s pupil, teacher or father, or with a person of low birth shall be abandoned.\textsuperscript{33}

Devaṇa relying on Vasiṣṭha, has further said that brāhmaṇa, kṣatriya, and vaiśya women who cohabit with a śūdra but do not conceive can become pure again by prāyaścitta. He seems to treat even cases of ‘willing transgression’ as being fit for purification. He then extends this principle to all such situations where redemption is possible by a prayaścitta. Therefore, in such situations tyāga will not be permissible.\textsuperscript{34}

Rights of a Superseded Wife

Nārada had provided that if a man abandoned his wife for reasons other than the ones specified, he would be heavily punished.\textsuperscript{35}

This verse has been cited by Lakṣmīdhara, Devaṇa, Caṇḍeśvara and Mādhava.
Caṇḍeśvara has not commented on it all. Devaṇa has cited Yājñavalkya to further provide that where a man abandons his wife who is obedient, efficient, mother of sons, and sweet natured, he must be made to pay one third of his property to her as compensation. A man with meagre resources should at least pay for the wife's maintenance.  

(p.49) Mutual Abandonment

Nārada also had a provision for mutual 'tyāga'. He said if the husband and wife were both hostile to each other, it would be in order if they abandoned each other.  

Nārada's rule did not find favour with Devaṇa who restricted it to lower castes thereby ruling that men and women of higher castes did not have this option. Asahāya also did not favour dissolution of marriage with mutual consent. In his comments on this verse he said that the rule did not apply to a legally married wife, but only to one not legally married. A different reading of this verse is found in the Vivādaratnākara which generally prohibits mutual abandonment, but allows the husband to abandon his promiscuous wife.  

Maintenance of the Deserted Wife

Medieval texts have introduced a significant change in the earlier smṛti law on the husband's obligation to maintain a deserted wife.

The YS 1.70 laid down that a woman guilty of vyabhicāra had to be maintained albeit at a very frugal level of subsistence. Caṇḍeśvara cites Nārada to say that her head should be shaved, and she should be provided with coarse grains, and coarse clothing, and should be made to clean the house or carry sweepings.

Devaṇa almost rejects Yājñavalkya's rule by interpreting it in his own way. He first distinguishes between an utkata-vyabhicārīni (incorrigibly promiscuous) and an anutkata-vyabhicārīni (who is not so but gets strayed). Then, adopting a very sympathetic view of both, he says that while the latter must be maintained as a satī (chaste woman) the former also must be given due maintenance till she completes her penance and becomes pure again (to be accepted back into the family). Caṇḍeśvara also says that the various punishments prescribed for unchastity should be awarded according to the gravity of the offence. In other words he also upholds the view that neither abandonment is the sole punishment for all kinds of deviations, nor should all abandoned wives be treated with equal harshness. As already indicated above, Medhātithi did not see this rule as mandatory, and provided that the husband had the option to maintain the woman guilty of vyabhicāra. Referring to YS. 1.70 he said that if the husband did not want to maintain such a wife he could abandon her. Similarly he interpreted 'nirundhyāt eka vēśmani' of MS to say that it applied to the first offence, but if the woman persisted with her unchaste conduct the only option with the husband was to abandon her. It is noteworthy that later digests did not accept his prescriptions, and took a much more liberal view.

Nirvāsana
Expressions like nirvāsana or vivāsana or nirdhamana which mean turning out of the house have also not been taken in their literal sense. As with tyāga, these also mean maintaining in a separate dwelling with provision for the wife's maintenance.

Adhivedana or Super Session
The earlier smṛtis had prescribed that if the wife was addicted to intoxicants, of unrighteous conduct, inimical to the husband, sick, violent, extravagant, barren, gave birth to still born children or only to daughters, of impolite speech, denied conjugal joy to the husband, the husband could take a second wife.45

While accepting these provisions medieval texts have highlighted the husband's duty to treat the first wife with respect, and to provide her with due maintenance.46 Devana cites Yājñavalkya to provide that in case of second marriage the husband must pay to the first wife an amount equal to what is spent on his second marriage.47

Repudiation of Marriage by a Woman and the Right to Remarriage
Manu48 prescribes a waiting period of eight, six and three years respectively for a woman whose husband goes away for the purpose of dharma, knowledge, and fame or worldly pleasures. Nārada49 said in unambiguous words that a brāhmaṇī could go to another man after waiting for the husband for eight years, if she had children, and four years if she had no children. The waiting period according to him was less for a kṣatriya, and even lesser for a vaisya woman. A verse ascribed to the Mahābhārata, or alternatively to the Agni Purāṇa or Nārada Smṛti or Brhaspati recognizes (p.51) the wife’s right to remarry under five conditions—when her pati is lost, dead, is impotent, or becomes a recluse or a political refugee or a patita.50

This verse has led to complex hairsplitting among dharma śāstra writers even in the early period. The conservative view is opposed to the idea of second marriage for women. Yet, there is a feeble but pragmatic opinion which allows women to have another partnership, though technically it may not, always and by all writers, be called marriage.

It may be interesting to note that in the fifth chapter of his work, Manu expresses himself strongly against a woman's remarriage. In several verses in the ācāra section he advises her to be loyal to the husband both during and after his life. He says that a woman should serve during his life time the man to whom her father gives her, or the brother gives with the permission of the father, and should not transgress him even after his demise.51

The eighth chapter, which deals with vyavāhāra, however, freely admits several possibilities of such transgression both during, and after the life of the husband. Here one comes across the concepts of punarbhū, i.e. a woman who has married again, and paunarbhava, i.e. the son of a punarbhū. Manu describes him as the son of a widow, or a parityaktā, i.e. a woman abandoned by her husband, and who marries another man.52 That son is a valid heir of his mother's new husband.

It is important to note that vyavāhāra rules are backed by the authority of the state whereas ācāra rules are not always so. In the ninth chapter which also deals with vyavāhāra, he recognises that it might not always be possible for a woman to follow the
strict code of conduct of the smṛtis. He is willing to protect the rights of the wife who ‘hates her impotent or sick or mentally deranged husband’, and says that even she cannot be abandoned, nor denied her share in husband’s property. The ancient practice of niyoga is condemned by Manu as an animal act. He allows it only under severe restrictions, and that too only for the purpose of begetting a son for the deceased husband, and yet the son so born is deemed to be the son of the deceased, and is allowed to inherit his property.

In his ācāra section Yājñavalkya too is not favourably inclined towards a woman’s remarriage, particularly of a widow. He wants her to be of ‘good conduct’ and self controlled, and to involve herself in the good of the husband. ‘Such a woman wins acclaim in this world and upon death obtains the highest state i.e. mokṣa, he declares.’ However, he does mention the punarbhū in his ācāra section itself, and the paunarbhava (p.52) son in the vyavahāra section. Thus, one may observe that in spite of their opposition to a woman’s remarriage the classical texts had to concede the possibility, and make suitable provisions for it. They have not encouraged or supported it either. It may also be specially mentioned that no rule under the vyavahāra section makes marriage by, or with a widow a culpable act.

In the post smṛti period Medhātithi seems to be against woman’s remarriage, and hence interprets the expression ‘pati’ in the Mahābhārata verse as ‘the protector’ meaning thereby that if the husband is dead, lost or is impotent, or becomes a patita, or a recluse, the wife would live under the protection of some other competent male member of the family including her own sons.

Mādhava’s comments on this verse are very interesting. He dismisses it by declaring that it does not apply to the Kali age. Vijñāneśvara follows Yājñavalkya to prescribe a life of asceticism for the widow as that according to him leads her to mokṣa.

Caṇḍeśvara has listed all these as options appearing in the order of decreasing ‘merit.’ He appears to suggest that the best course open to a widow is to commit sati, the next best option is to live the life of a recluse. The third best option is to have a son through niyoga with the deceased husband’s brother, or with his sapıṇḍa. However, he is open to the idea of the woman being given in marriage by elders to someone outside the family in which case she will be called a parapurvā. She will be called a svairiṇī if she chooses someone of her own liking.

Commentators and authors of medieval digests sometimes make very meaningful omissions. All the rules which allowed a woman, whose husband has gone to a distant land, and of whom nothing is heard, to remarry after a prescribed waiting period, have been carefully omitted.

Three more verses from Nārada deserve to be specially noted in this context. These verses have been included by Lakṣamaṇa Sāstri loshi in the Dharma Kośa, but omitted by all medieval authors reviewed in this work. These deal with the qualifications of brides and bridegrooms, and then prescribe that if these disqualifications become known after
marriage both the bride as well as the groom are free to abandon each other.\textsuperscript{61} If this omission is deliberate then it is obvious that these authors were not willing to recognise the woman's right to abandon her husband.

It is important that these texts have filled their pages with rules prescribing for women a life of self denial, and total dependence upon (p.53) male members of their husband's families. One may therefore conclude that medieval dharma śāstra became more rigid in the matter of woman's right to seek freedom from a failed relationship, and to remarry. A man's right to desert his wife, or to repudiate the relationship is also drastically curtailed while the right of the widower to marry again is upheld.

Adoption

All the texts under review discuss rules of adoption in the section on \textit{dattāpradānikam}, i.e. non-delivery of what is given. It principally deals with invalid gifts. Medieval works do not contain separate sections on adoption, P.V. Kane has also observed that adoption begins to be treated as an important legal problem only in the seventeenth century when specialised texts on adoption were compiled.\textsuperscript{62} During the British period a very large number of cases originated from adoption related problems. P.V. Kane's treatment of the law of adoption is largely based on these cases. The present work, on the other hand, focuses on the evolution of the law in the early medieval digests and commentaries. Medieval works under review hint at the beginning of some of the legal questions which became very significant at a later date.

One may begin with Dr. Kane's observation that no leading smṛti contains any details on this matter. Manu mentions an adopted son in the list of twelve types of sons, and defines a \textit{datrima} as the one whom either mother, or father gives away in times of distress.\textsuperscript{63} Yājñavalkya\textsuperscript{64} recognizes a \textit{dattaka}, defining him as one given away by his father or mother; but strangely he also provides that a son cannot be given away.\textsuperscript{65} Nārada,\textsuperscript{66} Brhaspati\textsuperscript{67} and Kātyāyana\textsuperscript{68} have included the son in the list of what may not be given away (\textit{adeya}).

All the digests cite contradictory rules regarding the validity of giving a son. A rule from Nārada lays down that a son cannot be given away even in times of distress whereas, another one ascribed to Kātyāyana says that a son may be given away in such times.\textsuperscript{70} It appears that by citing both the rules the authors have shown the two extremes of legal thought on this subject. Caṇḍeśvara tries to reconcile this by saying that a son not willing to be separated from his parents cannot be given in adoption.\textsuperscript{71}

Devaṇa Bhaṭṭa and Mādhava try to resolve this problem by holding that a son who can bear separation from his parents can be given away.\textsuperscript{72} Varadarāja recognizes the possibility of giving away a son, though only (p.54) in acute calamities, and not under day to day problems of life.\textsuperscript{73} Thus, at least this much can be said, that the texts under review had to make a special effort to establish the legal possibility of giving away a son in adoption. One may compare this with the later Vaidika thought where the father was given absolute ownership rights over the son including the right to sell, and give him away to any one the father pleased as evinced by the legends of Śunaḥ Şepa, and
Naciketā and also by the discussion in Śābara bhāṣya about the requirement to donate all one’s possessions including sons, and wife at the Viśvajit sacrifice. In fact Śabara has argued against the father’s absolute rights over the son. It is suggested that early dharma śāstra borrowed the prohibition against giving away a son from this opposition to father’s right to donate the son at the performance of Viśvajit, but the desire for a male successor to continue the family line, to offer water, and pīṇḍas to ancestors, and to inherit family property must have made the later dharma śāstra texts to recognise the fact of adoption. It may be noted that Śabara had, in the context of Viśvajit expressed himself against giving away not only the son, but also the daughter, and wife, but the dharma śāstras refer only to the son. This is because they were concerned only with the issue of the adoption of the son as a legal problem, and the question of the daughter, or the wife was outside the purview of the section on dattāpradānikam.

Authors under study further circumscribe parent’s right to give a son in adoption. Relying on Vasīṣṭha they all hold that the only son cannot be given away. Mādhava says that the general prohibition against giving the son actually applies to the only son. This condition is introduced ostensibly because the natural parents need a son for the same reasons as the adoptive ones.

Mother's Right to Give a Son in Adoption

On plain reading Manu’s and Yājñavalkya’s definitions of a datrima son referred to above prescribe that father, and mother both were given right to give a son in adoption.

Medhātithi remarked that since the son belonged to both, neither should give him, if the other was unwilling. Kullīka says either mother or father may give a son in adoption with each other’s consent. A parallel stream of thought is visible in Viśvarūpa, who commenting on YS.II. 130 said that a son may be given in adoption by the parents, or by the father, or by the mother with his permission. The texts under review (p.55) exhibit both the streams. The Vivādaratnākara says that both father and mother are individually competent to give a son in adoption, the difference is that if the father is present then the mother can only give without his consent, but if he is not present then she may give even without his consent. Thus Caṇḍesvara’s stand is that a mother’s right is limited only if the father is present but in his absence her right becomes absolute. The Śmṛti Candrikā cites Manu without any comments and Vasīṣṭha's rule saying that since a person is born out of the semen of his father, and the blood of his mother, they both have the right to give, sell, and abandon him again without its own observations; but then he cites Vasīṣṭha’s rule that, a woman is not competent to give or take a son in adoption, and specifically remarks that though the mother has full rights over the son, yet a woman not being a free person, it is not appropriate for her to give a son without the husband’s consent. Thus, according to Devana a mother has a limited right.

Mādhava cites Yājñavalkya’s rule II. 130 which recognizes a mother’s equal right to give a son in adoption, and he does not mention Vasīṣṭha’s restriction indicating that the mother’s equal right was recognised in the region, and among the groups whose law he sought to codify.
The Vyavahāra Niṁnaya\textsuperscript{85} on the other hand relies on Vasiṣṭha to limit mother’s right. One may thus say that the attitude of the law makers had not hardened yet, and Caṇḍeśvara in the north, and Mādhava in the south advocated a liberal approach. The possibility of a widow giving a son in adoption was advocated by Vijñāneśvara who held that the mother could give a son in adoption by herself, if the father was dead or had gone away,\textsuperscript{86} but the digests under consideration have not commented directly on this issue though it became a very controversial matter at a later period.

Notes

Notes:
(1.) Cited by Mitākṣarā on YS 11.32

Guroḥ śiṣye pituḥ putre dampatyoḥ svāmi-bhṛtyayoḥ I

virodhe tu mithasteḥām vyavahāro na sidhyati II

(2.) DK 1.2 page 1102

Īrṣyāsūyasamutthe tu saṁrambhe rāgahetuke I
dampaṭī vivadeyātām na jñātiṣu na rājani II

(3.) Ibid.,

parasparameva chittaviśuddhim kuryātām, na svajane na rājani vivādaḥ kartavyaḥ

(4.) Mitāksarā on YS 11.32

tadapi guru-śiṣyādīnām ātyantika-pratiṣedha-param na bhavati; teṣāmapi kathaṁcit vyavahārasya īṣṭatvāt

(5.) Mitāksarā in introduction to YS 11.295

yadyapi strī-puṃsayoḥ parasparam arthi-pratyaarthitayā nṛpa-samakṣam vyavahāro nisiddhāḥ, tathāpi pratyaṅkeṣaṇa karna-paramparāyā vā vidite tayoḥ parasparāticāre daṇḍadinā dampatiś nija-mārgē rājñā sthāpanīyau.

(6.) VR P: 409

yadyapi strī-puṃsayoḥ anyonyamarthi-bhāvena rājasabhāyām vyavahāro nisiddhāḥ, tathāpi pratyaṅkeṣaṇa karna-karṇikayāpi jñāte paraspara-vṛtti-vyatikrame daṇḍadinā jáyāpati nija-dharma-mātre rājña sthāpanīyau, anyathā daṇḍaniyau

(7.) MS VIII.299–300

Bhāryā putraśca dāśaśca preṣyo bhrātā sahodaraḥ I
Prapti-paradhastadyah syu rajyav venulalena va II

Prsthatastu sarirasya nottamange kathaagna

atonyathah tu praharan praptah syaccaurakibisam II

(Apart from the wife, this verse also mentions the son, younger brother and servant as ones who can be beaten.)

(8.) Medhatithi on MS VIII.299–300

Margopsthapana-vidhirayam; na tadhana-vidhireva
tena vagaandadyapy kartavyam;
aparadhahurupena kadacittadanam

(9.) Kuluka on MS VIII.290—ati-laghu-venu-salakaya

(10.) Ibid.,

Siksharham tadana-vidhanad-atra daanda-apavada

uktavyatirekena praharahe ngaananda-dhananda-ruat caurandam prapnuyat (MS VIII.300)

(11.) VR P: 270—na marman—ityarthah

(12.) VR P: 426 and SC II P: 577

Svachhandaga ca ya naari tasyastyo vidhiyate I

na caiva strivadham kuryannya caivangavikaranam II

svachhandavyabhicarinyava Vivassvamstyoamabrvit I

na vadhama na ca vairupyam bandham strinam vivarjyey II

(13.) MS IX.64

Pratisiddhapi cedyaa tu madyam-abhyudayesvapi I

Preksamamajam gachhed-ya sa daandyakrsalani sat II

(14.) vyavahara-prakaranad rajna daandaanlyaa

(15.) daandaascayam bhartra diyate satyapi raja-vrttitve strinam bhartaa prabhuhi iti vijnayate

(16.) MS IX.80–81
madyapāsādhu-vṛttā ca pratikūlā ca yā bhavet I
vyādhitā vādhivettavyā hiṃsrā’rthaghñī ca sarvadā II
vandhyāṣṭame’dhivedyābde daśame tu mṛta-prajā I
ekādaśe stri-jananī sadyastvapiya-vādinI
(17.) YS 1.72
Vyabhicārādṛtau śuddhirgarbhe tyāgo vidhiyate I
garbha-bhārtr-vadhādau ca tathā mahatī pātake II
(18.) Vasiṣṭha cited by Vījñāneśvara in YS 1.72
Catrasrastu pariyājyā śisyagā gurugā ca yā I
patighnī ca viśeṣaṇa jūgītopagatā ca yā II
(19.) Nārada in DK 1.2 P: 1099
stri-dhana-bhraṣṭa-sarvasvāṃ garbha-visraṃsinīṁstathā I
bhartuśca vadhamicchantīm striyam nirvāsayed grhāt II
(20.) sambhoga-saṁsparśa-sambhāṣaṇa-sahādhikāra-viṣayas-tyāgaḥ kāryaḥ, na punar-grhāt-nīkāsana-rūpāh
(21.) Vījñāneśvara on YS 1.72
tyāgaśca upabhoga dharma-kāryayoh, na tu nīkāsanan grhāt
(22.) SC II p: 579
vyādhitām striprajām vandhyāmumattāṃ vigatārtavāṃ I
aduṣṭām labhate tyaktum tīrthānna tveva karmanāḥ II
(23.) SC II p: 579—tīrthāt sambhogāt
(24.) VR p: 424—tīrthād yonītaḥ
(25.) vyavāye tīrthha-gamane ca dharmebhyaśca nivartate
(26.) tīrthagamana-sābdentātra smārta-karma pradarśītam, dharma-sābdena ca śrautaṃ
(27.) SC II p: 579 Devāṇa cites Devala—
vyādhitām strīprajām vandhyāmūmunmattām vigatārtavām I

aduṣṭām labhate tyaktum tirthāna tveva karmanāḥ II and comments—vyādhyādīnā
tyājyāsā sambhoga-mātrasya tyāgo na sahādhikārādīnām

(28.) Medhātithi on MS IX.95

commenting on YS 1.70 hṛtādhikārāṃ malinam .... Medhātithi says ‘tacca satyāṃ saktau patyuricchā; anicchāyāṃ tu tyāga eva

(29.) Ibid.,

yat tu ‘nirundhyādeka-veśmani’ iti asādhvya āpi vihitam tat sakrdvyabhicāre; abhyāse tu tyāga eva

(30.) ‘evaāca Manu-vṛttau sādhvīṃ ityasya padārthāntaram uktam “yadvā sādhvīṃ pativratām bibhṛyāt na vyabhicāriṇīṃ” iti tat tu heyam’

(31.) Ibid., P: 577

ūdhā vivāhā-sarhskṛtā, tasyāstu vyabhicāra-rūpa-nimittāntareṇa nāsti tyāgaḥ

(32.) Ibid., tacca svacchanda-vyabhicāriṇā-viṣayam

(33.) Ibid., quotes Vasiṣṭha
catasrastu parityājyayāḥ śisyagā gurugā ca yā I

patighī ca viśeṣeṇa jungitopagatā ca yā II

(34.) Ibid., P: 578

Yatrādhovarṇa-gamané pāṇa-vyasane dhana-dhānya-vikraye ca prāyaścitteṇa śuddhirnāsti-iti śastraḥ avagamyate tātraivā visarjana-vikāhānam

(35.) VR P: 423; SC II P: 576

anukūlāmavāgduṣṭām daksāṃ sādhvīṃ praṇāvatīm I
tyajan bhāryāmavasthāpyo rajāṇa daṇḍena bhūyasā II

(36.) SC II P: 576

ājñāsampādānīm daksāṃ viśvām priyavādīnim I
tyajan dāpyastraṭyāṁśamadravyo bharanām tathā II

(37.) anyonyam tyajatodharmaḥ syādanyonyam vikurvatoḥ I
(38.) vivāha-saṃskāra-vihīnayoh hīna-jāti-stri-puṁsaryoranyonya-virodhānanyonyam
   tyajatoḥ dharmaḥ syāddoṣo na syāt

(39.) DK I.2 P: 1099
   na tūdhāya iti vacanād avivāhitāvishayametat

(40.) VR P: 424
   anyonyam tyajatorāgaḥ syādanyonyam viruddhayoḥ I
   stripuṁsayornīghāyā vyabhicārādṛte strīyāh II

(41.) YS 1.70
   hṛtādhikārām malinām piṇḍa-mātropajīvinīm I
   paribhūtāṁ adhaḥ śayyāṁ vāsayed vyabhicārinīm II

(42.) VR P: 426
   vyabhicāre strīyā maunḍyamadhaḥ śayameva ca I
   kadannāca kuvāśaśca karmma cāvaskarojhanam II

(43.) SC II P: 568
   tatranutkaṭa-vyabhicārinī sativa bharaṇiyā
   utkaṭa-vyabhicārīnyapi paścattāpākhya-prāyaścitādikārā-viśeṣena siddhi-paryantam
   avasyam bharaṇiyā

(44.) VR P: 526
   atra ca strīvyabhicāra eva tyāgādikam guru-laghūktam vyabhicārāṇāmeva tattad
   viśeṣamāśritya vyavasthāpanyam

(45.) MS IX.80–81
   Madyapāsādhuvṛttā ca pratikūlā ca yā bhavet I
   vyādhitā vādhivettavyā hīṃsārthaghnī ca sarvadā II
   Vandhyāṣṭamedhivedyabde daśame tu mṛtaprajā I
   Ekādaśe strījananī sadyastvapriyavādīnī II

(46.) YS 1.74 cited by SC II P: 572; VR p: 422
   adhivinna tu bhartavyā mahadeno’nyathā bhavet
SC II P: 572 bhartavyā ca pūrvavat

(47.) YS 11.148 in SC II P: 575
adhibinna-striyai dadyād ādhivedanikam samam I

(48.) MS IX-76
prośito dharma-kāryārtham pratīkṣoṣṭau naraḥ samāḥ I
vidyārtham śad yaśortham vā kāmārtham trīṁstu vatsarān II

(49.) DK I.2 P: 1100
aśṭau varśanyudklṣeta brahmani prośitam patim I
aprutasat tu catvāri par Antonyam samaśrayet II

(50.) DK 1.2 p: 1112; VR p: 449
naṣṭaḥ pravrajitaḥ klībah patito rājakīlbiṣi I
lokāntaragato vāpi parityājyāh patiḥ striyāh II

(51.) MS V-151
yasmai dadyāt pita tvenām bhrātā vānumate pituḥ I
tam śuṣrūṣeta jīvantam samsthitam ca na laṅghayet II

(52.) MS IX-175
yā patyā vā parityaktā vidhavā vā sviyechhayā I
utpādayet punarbhūtvā sa paunarbhava ucyate II

(53.) MS IX-79
unmattam patitam klibamabijam pāparoṇinam I
na tyagosti dvīṣantyāśca na ca dāyāpavartanam II

(54.) YS I-87
patipriyahite yuktā svācārā vijitendriyā I
seha kārtimavāpnoti pretya cânuttamām gatim II

(55.) YS I-67
akṣatā ca kṣatā caiva punarbhūḥ saṃskṛtā punaḥ I

(56.) YS II-130

akṣatāyāṃ kṣatāyām vā jātaḥ paunarbhavaḥ sutāḥ I

(57.) Medhātithi on MS IX.76

(58.) HDS II P: 343

(59.) Mitākṣarā on YS I-87

(60.) VR: This discussion is spread over three tarangas as the sub-sections are called in VR. They are mṛtabhartṛkā dharmāḥ i.e. duties of a widow (taraṅga 48), niyoga (taraṅga 49), and parapūrvavādhiḥ i.e. woman's remarriage (taraṅga 50).

(61.) DK I.2 PP: 1097–98

(62.) HDS III PP: 663–664

(63.) MS IX.168

mātā pitā vā dadyātām yamadbhiḥ putramāpadi I

sadrśam prītisāmyuktam sa jñeyo datrimaḥ sutāḥ II

(64.) YS II.130

Dadyān mātā pitā vā yam sa putro dattako mataḥ I

(65.) Ibid., II.175

svam kuṭumbāvirodhena deyam dārasutādṛte I

(66.) Nārada—DK I.2 P: 798

anvāhitam yācitatamādhiḥ sādhāraṇam ca yat I

nikṣepaḥ putradāram ca sarvasvam cānvaye satī II

āpatsvapi hi kaṣṭāsukartamādhiḥ sādhāraṇaḥ ca ūcāt I

adeyānyāhurācāryo yaccānyasmay pratiśrūtam II

(67.) Brhaspati in DK I.2 P: 802

(68.) Kātyāyana in DK I.2 p: 804

(69.) VR p: 128; SC II p: 446
(70.) Kātyāyana in VR p: 128
vikrayam caiva dānam ca na neyāḥ syuranicchvah I
dārāḥ putrāśca sarvasvam ātmanyevas tu yojayet I
āpatkāle prakartavyam dānam vikraya eva vā II

(71.) VR P: 129 dāra-putrayoh ichāmādāya also SC II P: 446 putrā api matr-pitr-viyogānicchavo na neyāḥ syuh

(72.) SC II P: 445 aneka-putrēsvapi māṭr-pitr-viyoga-sahana-kṣama eva deyāḥ; also PM P: 226 aneka-putrēsvapi māṭr-pitr-viyoga-sahana-kṣama eva deyāḥ

(73.) VN p: 228 apattaratamyena dānādānivyavasthā

(74.) Sen P.N. General Principles of Hindu Law P: 255

(75.) Vasiṣṭha in VR P: 129 & Mitākṣarā on YS II.130
na tvekam putram dadyāt pratigṛhṇīyādvā;
sa hi santānāya pūrveśām

(76.) PM P: 226
sutasya-adeyatva-protipādakāni vacanāni eka-putra-viṣayānī ițyavagamyate

(77.) Medhātithi on MS IX.168
na hi ubhayorapatyam anyatarānicchāyām dātum yuktam

(78.) Kullūka on MS IX.168
māṭā pītā vā parasparānujñāyā yam putram .. dadyāt sa datramākhyah putro vijñeyah

(79.) pīṭṛbhyaṃ, pīṭṛā, māṭrā vā tadanujñāya datto dattakah; tathā ca Vasiṣṭhah ‘na tu strī putram dadyāt pratigṛhṇīyādvā anyatranujñānād bhartuh’

(80.) VR p: 574
Piturmātuśca dvayorapi putra-dāne’dhikārāḥ; iyāmstu viśeṣaḥ yat sati pitari tadanujñānāt mātuḥ dāṭrīvam astī; asati tadabhāve’pi

(81.) MS IX.168 cited in SC II P: 668
māṭā pītā vā dadyātam yam adbhiḥ putramāpadi I
sadrśam priti-samyuktam sa jñeyo datrimah sutah II
śukla-śonita-sambhavaḥ puruṣaḥ mātr-pitr-nimittaḥ, tasya pradāna-vikraya-parityāgeṣu mātāpitarau prabhavataḥ

(83.) SC II P: 446

nanu mātuḥ prabhutvepi putra-dānam ayuktam, asvatantravāt iti satyam svatantra-puruṣānuṣṭhitayā tu yuktameva

(84.) PM P: 347

(85.) VN P: 288

(86.) Mitākṣarā on YS II.130

mātrā bhartuḥ anujñayā, prọṣitē prete vā bhartari, pitrā vā, ubhābhyaṁ vā

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