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ATIDESHA (ANALOGY)

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10.1 *Atidesha*

The *Mimansa* system has an interesting doctrine known as *Atidesha* (principle of transference).[1] According to Jaimini, "If, what is prescribed as a duty with regard to one object, applies to another object, this is called *Atidesha*". In the context of *Vedic* sacrifices, this doctrine results, in its application from *Prakriti* to *Vikriti.*[2] *Prakirti* is that sacrifice of which every component (*Anga*) is described by the *Sruti*. In contrast, *Vikriti* is that sacrifice, of which detail is not described by the *Sruti*. In such a case, of the principle of *Atidesha*, the components of a *Prakirti* are to be taken as intended for *Vikriti* also. Thus, rules for daily *Agnihotra* (which are prescribed in detail) are to be taken as applicable to monthly Agnihotra also, though the rules regarding the latter are not set out in detail.

10.2 Explanation by Sabara Swami

As explained by Sabara Swami, the eminent writer on *Mimansa*, *Atidesha* takes place where a duty (in connection with a *Vedic* sacrifice) is taken out of that place and is applied elsewhere.[3] According to him,[4] when duties are transferred from a standard sacrifice(*yagna*) to another of the same character, that is called *Atidesha.*

अतिदोशो नाम ये परत्र

विहित्ता धर्मा: तम् अतीत्यअन्यत्र

तेषा हेश: ।

10.3 Analogy in the modern legal system

Analogy, or processes of reasoning which are substantially similar to analogy, are found in modern legal systems also.

In judicial decisions, the similarity of situations induces the judge to apply the rule followed earlier in a similar situation. In a sense, this is an application of the analogical approach. Occasionally, this approach is placed on a more formal footing by the legislature itself, by enacting a provision whereunder a set of legal rules applicable to situation X or to class of persons X, is required or authorised to be applied in situation or in regard to class of persons Y also. The most well known example of such a legislative provision is section 141 of the Code of Civil Procedure, 1908 by which, provisions of the Code which are applicable to suits, are also made applicable, as far as may be, to (original) proceedings other than suits.

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1. Sarkar, pages 198-222.
2. Sarkar, page 200.
3. Sarkar, pages 201-202.
4. Sarkar, pages 203-204. and 201 footnote 2

10.4 Constructive trusts

In the context of *Atidesha*, it is also pertinent to mention the important part played in the modern law by the epithet "constructive", prefixed to so many concepts. As a writer has put it,[1] it is common procedure for lawyers to attach the label "constructive" to a term or concept which is being extended beyond its natural meaning or subjected to a strained interpretation.

While extension of the scope of a statute by analogy is thus permissible in many cases, one has to remember that analogy is not permissible where the statute whose scope is proposed to be extended, is a penal one. The rule is, that a person should not be penalised under a doubtful law. The classical statement is that of Mr. Justice Brett.[2] "Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it (the penalty) shall be incurred under the present circumstances. They must fail, if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty".

10.5 Classes of *Atidesha*

Later writers on the *Mimansa* have made a classification of *Atideshas* into the following classes[3]:-

(a) *Shastratidesha* - reference as regard the principle.
(b) *Karyatidesha* - reference as regards the actions.
(c) *Nimittadesha* - reference as regards cause.
(d) *Sangatidesha* - reference as regards denomination.
(e) *Rupatidesha* - reference as regards form.

10.6 *Atidesha* in modern law: A Bombay case

The device of analogy has been resorted to more than once, in modern cases under Hindu Law. We have an interesting example of this in a Bombay case,[4] decided by Mr. Justices Fawcett and Parker. The question was, whether, under the Hindu law, a sister of a prostitute is entitled to succeed to the prostitute's property as a *sapinda* before the property goes to the Crown by escheat. The Bench (upholding the sister's right) observed as under:-

> "The rule of *Atidesha*, whereby principles laid down with reference to one case are applied to analogous cases, was recognised by Jaimini in his *Mimansa,* Books VII and VIII of Jaimini's *Mimansa*. See *Subramaniam* v. *Ratnavelu*, I.L.R. 41 Mad.44. In considering, therefore, the right of a sister to succeed to a female prostitute, the texts relating to her right to succeed to

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1. David Cowley, "Constructive Manslaughter: New Limits" (1983) 133 Law Journal 533.
2. Dickenson v. Fletcher, (1873) L.R. 9 C.P. 1,7.
3. Sarkar, pages 203-204.
4. Narayan Pundlik Valanju v. Laxman Daji Sivsekar (1927) I.L.R. 51 Bom. 784.

sapratibandha days of a male may be considered as applicable by analogy, viz., the text of Manu, Chap. IX, verse 187. If the analogies of Hindu Law are applied to a prostitute mother, the particles of the mother's body abound in them and they are sapindas of each other, because they are connected with each other through the body of the mother."

10.7 A Madras Case

Before the Madras High Court also, the same method was adopted.[1] The question was, whether an illegitimate son of a permanently kept concubine could succeed to the properties of his putative father. Mr. Justice Kumaraswamy Sastry stated

"Even assuming that the order of succession to a sonless Hindu, given by Manu and Yajnavalkya and propounded by Vijnaneswara in Chapter II, Section 1, Placitum 2 would not, "in terms, apply owing to the word (Pita) being confined to the legitimate father and to the want of *sapinda* relationship between a *Sudra* and a *dasiputra*, I see nothing to prevent succession to the illegitimate son being traced by analogy to the rule laid down in verses 135 and 136 of Yajnavalkya, explained in Chapter II, Section 1, placitum 2 of the *Mitakshara* especially."

Mr. Justice Kumaraswamy Sastry quoted the statement of Manu, that the father of every one of the classes of sons enumerated by him succeeds to the property of his heirless son. Mr. Justice Kumaraswamy Sastry then observed as under:-

"The principles of *Atidesha*, whereby principles laid down with reference to one case are applied to other analogous case, were recognised by Jaimini in his *Mimansa*, Books VII and VIII of Jaimini *Mimansa*. I would, for the foregoing reasons, answer the question referred to in the affirmative."

10.8 Position in France

Analogy is frequently resorted to in continental countries. In France, it seems to be a permissible method of interpretation. However, its use in criminal law is subject to certain special considerations. Troper & others, "Statutory Interpretation in France" in MacCormick and Summers, Interpreting Statutes (1991), 171, 200, 201. Article 4 of the French Penal Code of 1810 provides that "no misdemeanor, no felony, can be punished by sanctions that have not been stipulated by the law before it was committed". To a large extent, then, criminal law is to be deemed to be a closed system. And yet, in France, the use of analogy in criminal law appears to be permissible where the statutory language is elastic and this is particularly so in the case of economic crimes or in cases where technological innovations make such a course necessary.

1. V. Subramanaya Ayyar v. Rathnavelu Chetty & 12 others. (1908) ILR 41 Mad. 44 (FB)

10.9 German Law

In German law, the question of application of analogy has been considered in the context of statutory interpretation. A recent study - Alexy and Drier, "Statutory Interpretation in the Federal Republic of Germany" in MacCormick and Summers (eds.), Interpreting Statutes (1991), page 89 - supplies the following information. Section 1 of the first draft of the BGB (German Civil Code) sought to provide as under:-

> "In cases for which the law contains no rules, those rules are to be applied analogically which apply to legally similar cases. In default of such rules, the case should be decided according to principles embodied in the spirit of the legal system."

This was not actually adopted in the final version, as the principle was treated as accepted.

In criminal cases, the scope for analogy is said to be almost non-existent in Germany because of the provision in the Constitution that a deed can be punished only if the punishability was determined by statute before the deed was committed. The Federal Constitutional Court of the Federal Republic of Germany has held that

> "the need for legal certainty excludes... analogical or customary justifications of criminal sanctions. Here, 'analogy' must not be understood in the narrower, technical sense, rather, each application is excluded which exceeds the content of a statutory norm of sanction... The possible meaning of the wording of a statute marks the outer limit of admissible judicial interpretation... this meaning of the wording is to be determined from the citizen's point of view." (BVerft GE 71, 108 (115).

10.10 Italian Law

In Italy, the admissibility of arguments based on analogy depends on the distinction between civil and criminal law, as in many other countries. Torre and others, "Statutory Interpretation in Italy" in MacCormick & Summers (eds.), Interpreting Statutes (1991), 213, 218 to 220, 225, 226. Establishment of the correct meaning of rules may involve the filling of gaps; and, in Italy the aim of gap filling, is considered to be the finding (i) either of a rule to be used to fill the gap in the case at issue, or (ii) of a principle to be applied to the case at issue. The former is called analogia legis while the latter is called analogia juris. Italian legal theory has it, that interpretation as an activity may lead to the following three possible results:-

(1) *Restrictive interpretation.* The legislature said more than it was his intention to say (*'plus dixit quam voluit'*). The interpreter, via interpretation as an activity, arrives at an interpretation as result, which restricts the *prima facie* meaning of the rule by reducing it to the original intention of the legislator.

(2) *Declarative interpretation.* The legislator said exactly what it was his

intention to say (*'idem dixit quam voluit'*). The interpreter arrives at an interpretation which confirms the *prima facie* meaning of the rule by declaring that it corresponds to the original intention of the legislator.

(3) *Extensive interpretation.* The legislator said less than it was his intention to say (*'minus dixit quam voluit'*). The interpreter arrives at an interpretation which extends the *prima facie* meaning of the rule by expanding it to the original intention of the legislator.

10.11 Analogy in Swedish law

In an article by Peczenik and Bergholz, "Statutory Interpretation in Sweden", in MacCormick and Summers (eds.), Interpreting Statutes (1991) 311, 318, 319, 320, it has been stated tha tthe doctrine of *analogia legis* is important in the Swedish practice of interpretation. By virtue of this doctrine, a statute should be applied not only to cases covered by its linguistic meaning, but also to relevantly similar cases. Of course, this doctrine is subject to certain limitations, to be noticed presently. There may be circumstances requiring analogy not to be used. Those circumstances constitute what is called an *argumentuem e contrario.* The judge has to weigh the circumstances to choose between analogy and the contrary arguments. In civil law, analogy is appropriate where there is a fairly detailed statutory regulation. Analogy in civil cases may not be appropriate where the language is abstract. Again, in criminal law, the permissibility of the use of analogy is offset by the principle of "legality", which demands that no action shjould be regarded as a crime without statutory support and no penalty may be imposed without a statutory provision. Obviously, where mathematical criteria are laid down, it would not be permissible to resort to analogy so as to extent the operation of the statute to a case not literally covered by it. For example, Chapter 9, Section 1 of the Swedish Parents and Children Act says that a person under eighteen years of age is a minor. Obviously, one cannot extend this provision to cover persons who are above the age of eighteen years but who resemble persons of the age of seventeen years.

10.12 General picture

It appears that analogy is often used in the continental countries, including those mentioned above. Again, in Argentina, in the field of civil legislation, there is an open reception of *analogia legis* and *analogia juris.* In fact, the doctrine is expressely stated in article 16 of the Civil Code of Argentina. Zuleta-Puceiro, "Statutory Interpretation in Argentina" in MacCormick and Summers (eds.), Interpreting Statutes (1991) 29, 47, 62. In contrast, in the common law system, there is no frequent mention of analogy. However, this does not, and cannot, mean that the use of analogy is totally unknown. In fact, in the United States, the argument from analogy is sometimes employed in statute law. It is well recognised that a word should be interpreted in a given way, so that the court can treat similar cases similarly under related statutory provisions. Thus, in *Moragne* v. *States Marine Lines,* (1970), 398 U.S. 375, 392, a wrongful death statute was applied by analogy in maritime law. Even in England, it is well recognised that the meaning

ascribed to a word or phrase in one statute may be extended by analogy to another statute dealing with similar subject matter. Thus, where the question is whether the expression "any person" as occurring in legislation dealing with arson must be limited to a person other than the accused, the point can be argued on the analogy of the established interpretation of the same expression in relation to offences against the person, where criminal harm must be a harm to a person other than the accused. *R.* v. *Arthur*, (1968) 1 Q.B. 810.

10.13 Position in India

In India also, in the case of statutes which are to deal with the same subject matter, the interpretation placed on one particular word in a particular statute can be employed for interpreting the same word or concept as used in another statute dealing with analogous subject matter. Such an approach cannot be called a merely technical one. It bears a good deal of rational justification. Not only does it encourage coherence and unity, but it also promotes equality before the law.