CHAPTER – II

CONCEPT OF ADOPTION AND WELFARE OF CHILD

All adults stand accused .... The society responsible for the welfare of children has been put on trial. There is something apocalyptic about this startling accusation; it is mysterious and terrible like the voice of the last judgement “what have you done to the children that entrusted to you”?

Maria Montessori
(The secret of childhood)

Social Institution - Adoption exists in various forms throughout the world and dates back to antiquity. Childlessness, the wish for a heir and compassion have each played their part in establishing it as an important social institution. Formerly it was often regarded as a means of furthering the interests of the adopters. More recently, in this country amongst others, the concept and purpose have changed. Attention now focuses primarily on the child: in principle, his needs, his right to love, security and a normal family upbringing are more clearly recognized. This has resulted from a greater awareness that children who have suffered the loss of their parents care must be adequately compensated if their proper development is not to be jeopardized. In its turn this has led to more concern about how homeless and deprived children are cared for. Adoption is often seen as the most desirable provision if, the child cannot be reunited with his own family.¹

¹ Adoption Law and practice – National institute for social work training services – Iris Goodacre Pub. George Allen and Union Ltd. 1966, p. 15
“There can be no doubt that adoption is generally much more satisfactory solution than any form of institutional care or even fostering.”²

This was the claim of the Hurst Committee which reported in 1954.

“The aims of English practice are adequately summarized in the following definition of adoption, it is the method provided by law of establishing the legal relationship of parent and child between persons not so related by birth, with the same mutual rights and obligations that exist between children and their natural parents.”³

It was further observed:

“Ideally care is taken to protect the three parties concerned – children, natural parents and adopters from risks which may lead to unhappiness. Children for eg ‘must be protected from adoption by people who are unsuited to the responsibility of bringing them up or want children for the wrong motives.’ Similarly, the ‘natural parents must be protected from hurried or panic decisions to give up their children and from being persuaded to place them unsuitably. In their turn the adopters must be protected from understanding responsibilities for which they are not filled or which they have not appreciated...⁴

Adoption appears to be increasingly popular. The demand for babies exceeds supply and the number of agencies⁵ concerned with

⁴ Hurst Report p.4.
⁵ Agencies is used to include adoption societies and local authority children's departments.
the placement of children for adoption has grown. The importance of employing qualified child care staff is more widely recognized and in general measures which protect children awaiting adoption have been further refined. The legal disqualifications previously inherent in the adoptive relationship have been almost completely eliminated.

Adoption of children is a socio legal concept. It had existed in India and abroad since ancient times. Adoption primarily meant that a parent child relationship was established where none existed. The child of one set of parents became the child of another set of parents, as if it were a natural born child. This process of adoption may be recognized by law which confers on the adoptive parents the rights and duties of a natural parent. Thus statutes in many countries of the world have the same purpose namely to establish by means of a solemn act a fictitious relationship between two persons analogous in law to that created by legitimate descent.6

Adoption as understood at present by the projection of social work is a modern concept which has developed gradually over the years. It's primary aim is to secure a home for a child in which it can be nurtured. Adoption as now understood is child oriented and mainly concerned with the welfare of the child. Its practices contain certain safeguards both for the adoptive parents, the child, and the natural mother. These practices are based on the knowledge derived from the social sciences specially the growing science of child development which has emphasized the importance of parent – child relationship and the provision of a proper family for the healthy nurturing of the child. It has been looked upon as a welfare measure cutting across all barriers of race, caste, culture, creed and even nations, seeking to provide a home to needy, unwanted children and children to parents who are suitable for caring for such international

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adoption cutting across all national barriers is now in vogue, in India.

In the ancient world, the practice of adoption prevailed both in the east and the west. It prevailed in Greece and Rome, the two civilizations which have influenced deeply western thought and culture and in which the western legal system has its origin. Perhaps the legend of Romus and Romulus gave legitimacy to adoption. In fact, special feature of Roman law was the intervention of the state and requirement of official sanction before adoption took place.

In ancient times, adoption was primarily concerned with giving the family direct heir’s and thus strengthening the family. The motives were family oriented, children were adopted for the purpose of continuance of the family, inheritance of property and in ancient India for religious purposes. These adoptions were largely for the nearest kith and kin and from the same caste. These were not carried out for the safeguard and welfare of the child. It was only gradually especially in the 20th century, that the concept of child welfare began to emerge, as a result of such factors, as the exploitation of children and the growth of social sciences, social reform and social work. One of the most important causes for the growth of adoption specially in the west was the World War I and II. The desire to provide homes for war orphans and homeless children due to the world wars led to the adoption of these children. Thus adoption was an answer to a crisis situation, and was considered a welfare measure for the care of children. The growing science of child development with its emphasis on the stable emotional ties with parents for the normal growth of children led to the consideration of adoption as a means of providing permanent parent child relationships for children deprived of natural parents. Due to the pressure of public opinion and wishing to regularize defacto adoptions, several countries either passed their first law of adoption
or changed existing laws to make them compatible with modern concepts of child welfare.

The concern in India was the importance institution of sonship of a son which was the main motivation for adoption right from ancient times. The son enabled the father to pay off the debt he owned to his ancestors. He helped him to gain immorality. The son, grandson and great grandson presented ‘pindas’ to the ancestor and thus helped in giving salvation. The Aurasa or the son begotten by a man on his own needed wife had the highest position. But besides, the aurasa eleven or 12 subsidiary sons are recognized in which Dattaka had an important place. It is noteworthy that in this list of sons, sons begotten as a result of illicit relationships of women are given some status including maintenance and property rights. Thus in ancient times in India, just as in feudal England and in early Roman times, illegitimate sons though having a lower status did have some recognition and protection from society.

The ancient simritis had many rules regarding persons who could give in adoption who may adopt a son and who may be adopted. But these rules were not uniform for all castes and all regions of India. Hence they were a constant sources of litigation.

The many smiritis and diverse customs created confusion and much litigation. Thus the Hindu Adoption and Maintenance Act, 1956 was passed.

The World child is used in various senses. It may be used as a term of relationship: whose child is he? The person whose child he is stands in parental relationship with him. This is recognized as a relationship of parent and child. The law confers certain powers and rights on the parent in respect to the child and saddles him with certain obligations and responsibilities. The term child is also used as a person who, on account of his young age, is considered to be of immature intellect and imperfect discretion and is therefore unable
to comprehend the consequences of his own act. Such a person is called a ‘minor under the Indian law.’ In that sense childhood is contrasted with adulthood. On completion of certain period of his life a person becomes an adult or major.

The term child can be used in the following three senses:

(a) As a term denoting relationship
(b) As a term indicating capacity, and
(c) As a few of special protection under welfare legislations.

Our main concern is with welfare legislations for the child. The constitution of India contains provisions for the protection of young age. The relevant articles under Articles 15, 23, 24, 39, 45, 46 and 47. The Govt. of India also has had a national policy for the welfare

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8 Constitution of India - Article 15: Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth-
(1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition to-
(3) Nothing in this article shall prevent the State from making any special provision for women and children.
(4) Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

Article 23: Prohibition on traffic in human beings and forced labour-
(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Article 24: Prohibition of employment of children in factories, etc.-
No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

39. Certain principles of policy to be followed by the State- The State shall, in particular, direct its policy towards securing-
(e) that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength:
(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

45. Provision for free and compulsory education for children.
of children 1974. A Bill in 1980 was also introduced called as the adoption of children Bill 1980. India is also signatory to several international conventions for the welfare of the children. For example

1. World declaration on the survival, protection and development of children.
2. Declaration on social and legal principles relating to the protection and welfare of children with special reference to foster placement and adoption nationally and internationally 1986.
5. Declaration on social and legal principles relating to the protection and welfare of children.
6. 1989 UN convention on the rights of the child

The provisions of the UN convention on the rights of the child 1989 apply for four main areas of children rights, namely, survival, development, protection and participation.

**The rights to Survival:** The survival rights include provision of adequate food, shelter, clean water and primary health care. These are the basic rights to ensure the survival of a child.

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The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution. For free and compulsory education for all children until they complete the age of fourteen years.

46. **Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections.**- The State shall promote with special care the educational and economic interests of the weaker sections of the people, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

47. **Duty of the State to raise the level of nutrition and the standard of living and to improve public health**-

The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavor to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.
The Rights to Develop: Development rights include access to information, education, cultural activities, opportunities for rest, play and leisure, and the right to freedom of thought, conscience and religion.

The Right to protection: The child must be assured of protection not only from the violation of the above rights, but also from all kinds of exploitation and cruelty, arbitrary separation from the family, and abuses in the justice and penal system. Protection is also vital for especially vulnerable groups among children like abandoned children, displaced children etc. Children must also be protected against use and sale of drugs, as well as in time of armed conflicts.

The Right to Participation: participation rights include the right to express opinions and to have these opinions taken into account in matters affecting the child's own life, and the right to play an active role in the community and society through freedom of associations, etc.

The above sums up the various rights contained in the Convention aimed at serving the best interests of the child everywhere. The Convention thus constitutes a radical departure from previous practices where the rights of the child were found scattered and lacking global consensus.

In Dec. 2000 the parliament in view of its international obligations passed the Juvenile justice (care and protection) Act 2000 to protect and safeguard the interests and welfare of such children and to give effect to the minimum standards. By the Amendment in the juvenile justice act, the law makers have tried to spell out the role of state as facilitator rather than a doer. The very fact that the Act has been amended demonstrates the willingness of governmental machinery to ensure that children in difficult circumstances are the responsibility of everyone and by amending the same, it has given a new face to the juvenile justice system in India. The new Act has
been revered with spirit to show greater sensitivity to the needs and rights of a child. The amendment has been introduced, named as the juvenile justice (care and protection) Amendment Act, 2006 with the objective to make a call for adoption of child friendly approach. The amendment has further widened the ambit of the definition of child in need of care and protection by including ‘abandoned’ and ‘surrendered children’ and ‘a juvenile found begging’, ‘a street child’ or a ‘working child’.9

The Act is silent on inter-country adoption. The Act empowers juvenile justice board to give child in adoption whereas it is child welfare committee that deals with children in need of care and protection. Of particular importance are S.40, S.41, S.42 Juvenile Justice (Care and protection of children Act.) 200010


S.40 Process of rehabilitation and social reintegration. The rehabilitation and social reintegration of a child shall begin during the stay of the child in a children’s home or special home and the rehabilitation and social integration of children shall be turned out alternatively by (i) adoption, (ii) foster case, (iii) sponsorship, (iv) sending the child to an after care organization.

S.41 Adoption (1) the primary responsibility for providing care and protection to children shall that of his family. (2) Adoption shall be resorted to for the rehabilitation of such children as are orphaned, abandoned, neglected and abused through institutional and non-institutional methods. (3) In keeping with the pressure of the various guidelines for adoption issued from time to time by the state government, the board shall be empowered to give children in adoption and carry out such investigations as are required for giving children in adoption in accordance with the guidelines issued by the state government from time to time in this regard. (4) The children’s home or the state government run institutions for orphans shall be recognized as an adoption agencies both for scrutiny and placement of such children for adoption in accordance with the guidelines issued under subs section (3). (5) No child shall be offered for adoption – (a) Until two members of the committee declare the child legally free for placement in the case of abandoned children; (b) Till the two months period for recognition by the parent is over in the case of surrendered children; and (c) Without his consent in the case of a child who can understand and express his consent, (b) The Board may allow a child to be given in adoption: (a) to a single parent, and (b) to parents to adopt a child of same sex irrespective of the number of living biological sons or daughters.

S.42 Foster Care (1) the foster care may be used for temporary placement of those infants who are ultimately to be given for adoption. (2) In foster care, the child may be placed in another family for a short or extended period of time, depending upon the circumstances where the child’s own parent usually visit regularly and eventually after the rehabilitation, where the children may return to their own homes. (3) the state government may make rules for the purposes of carrying out the scheme of foster case programme of children.
The right of the child is such a broad topic that neither time nor space will permit to do full justice to the subject. Child rights have evolved over the years within the international community. Developments related to child issues were codified in comprehensive universal documents – the convention on the Rights of the Child, and it is to be implemented at national, regional and global levels thereby providing protection of the rights of children. Tracing the history of development of child rights, in traditional society, the child was integrated in the society through its family. Society’s traditions and customs prescribed patterns of behaviour of both parents and children. The parents principal duties were to monitor, protect and educate the child, while the children were expected to obey and respect their parents, and look after them in old age. However, there was no question of rights as we understand them nowadays. The Geneva Declaration laid down a number of basic principles on the Rights of Children which provided them with special protection. This was to form the basis of the ten-point Declaration on the Rights of the Child adopted by the United Nations General Assembly on November 20, 1959. The UN Declaration, which formed the basis of the drafting of the Convention on the Rights of the Child, restated the 1924 League of Nations Declaration while adding new provisions including the right to shelter, nutrition, medical care and education and to be brought up in a family setting in an atmosphere of happiness, love, understanding as well as protecting children against all forms of exploitation.

Englantyne Jebbs11 of England who was the first person to initiate the international movement for providing the child with a status must be happy in her grave that both at the national and

international level a great interest is being shown in the matter of welfare of children.

**Institution of Sonship**—A consideration of the history and development of Hindu society and of Hindu sociology brings into prominence one fact. It is the supreme importance, which the Indo Aryans attached to their sons. Constant struggles with neighbours and an imminent fear of a general war may have contributed, inter-alia, to this desire for a son. And that is found recorded in the Hindu literature in all its branches. In short, possession of good, strong and healthy sons who would make sturdy and capable fighters was the one national desire entertained by all kinds of people. It is this universal desire for sons which had grown into a national feature that artificial ways were found to supplement nature when she was unpropitious and sons born were unavailable, for a man devoid of issue must manufacture a son by all endeavours.\(^\text{12}\)

The Hindu lawyers do not regard the male line extinct or a Hindu to have died without male issue until the death of the widow, who after her husband's death is competent to take steps for continuation of the line.\(^\text{13}\)

In the view of Paras Diwan,\(^\text{14}\) sonship has had a great importance in Hindu law. Every Hindu was enjoined to have his own natural born son, failing which he could have some other types of son. Adopted son was one such type of son. Further, some types of sons were recognised under custom. To have a son was considered a 'must' for every Hindu. Begetting a son was one of three debts that a Hindu was required to discharge in this world. Just as a marriage was considered a purely secular act, so was sonship. Son is called a

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\(^\text{12}\) Hindu Law by J.R. Gharpurf IV Edi 1931, p. 98.
\(^\text{13}\) PC, 46 IA 97. 21 Bom.
putra, because the son relieves his father from hell called put. Baudhayana declared

"Through a son one conquers the world, through a grandson one obtains immortality and through the Great Grandson one ascends to the highest heaven."16

It is a remarkable feature of Hindu jurisprudence that throughout the Hindu period, right from the vedic age to this date, Hindus have always desired to have an aurasa (i.e. natural born) for the spiritual benefit and the continuation of the family yet right from the vedic age to this date secondary sons have, in the form or another, existed and have been recognized. Yet there were disapproved. The following passages are found in the Rig Veda:

"O Agni, no son is he who springs from others."17

Another passage runs:

"A son begotten of another, though worthy of regard is not to be contemplated even in mind as fit for acceptance, for verily, he returns to his house, therefore let there come to us a son new born, possessed of food and victorious over foes."18

Dr. Paras Diwan19 further said that it is an astounding aspect of Hindu jurisprudence that, on the one hand, the sacredness of the institutions of sonship and marriage is emphasised, need for morality and chastity of the wife is emphasised in most unequivocal terms, and on the other, recognition is accorded to as many as thirteen types of sons most of them are born outside the lawful wedlock, and more than half of them are called sons at the sacrifice

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15 Manu V. 138.
16 Baudhayamana 2, 16.6 See also Manu IX. 137-138; Vishnu XV 44, 46 Yajnavalkya 1, 78.
of morality and high principles. Such sons existed under some customs and probably their existence could not be ignored and the devotion of our sages to systematization was so great that they placed them in the classification of sons. All sages have in no unmistakable terms condemned a sonless who thinks it is better to have a substitute of a son than to have no son. Whatever be the reasons, they were always looked down upon; the injunction was not to have them Manu, most unambiguously, said,

"These eleven, the soil born and the rest, the wise one calls substitutes of a son are taken with a view to the failure of a religious duty."\textsuperscript{20}

After explaining the reason, Manu declared:

"The one who times to cross the hell with the help of bad sons obtains result similar to those obtained by one who tries to cross the water with the help of a sieve."\textsuperscript{21}

According to Mayne, "the probable explanation therefore, appears to be that, with the exception of the kshetraja who was sui-generis, son born of the wife's adulterous connection was not in law the son of the husband, if either the mother of the child or the child was not cast off, the child had to be fitted into the legal system for purposes of maintenance and guardianship. The son had also to be fitted into the religious system and the question for which set of manes (pitras) he had to offer funeral oblations had to be solved. The ingenuity of ancient Hindu lawyers was exercised in attempting to solve it. In the case of off-spring begotten by another, the son was assigned to the begetter or to the husband of the mother, if he adopted him, or to both in the peculiar case of Kshetraja.\textsuperscript{22}

The Hindus never considered an illegitimate son as \textit{filus nullius}, some of the illegitimate sons were fitted in the system of

\begin{itemize}
\item \textsuperscript{20} Manu IX 180.
\item \textsuperscript{21} Manu IX 16.
\item \textsuperscript{22} Hindu Law and usage (11th Ed) 116. Mayne.
\end{itemize}
sonship, and those who were still left out were never denied maintenance. The one who was, directly or indirectly, responsible for the birth of the child, had to provide maintenance for it. It is in this background that these various types of sons are to be understood.

According to our sages the number of sons is 12 or 13, some omit the putrikaputra, some shaudra. (born of a Sudra wife) According to Manu, sons are classified into 2 categories. (I) They are kinsmen as well as heirs while in category (II) they are only kinsmen.

Category I (i) Aurasa (ii) Kshetriya (iii) Dattaka (iv) Kritrima (v) Gudhotpanna (vi) the Aavindha

Category II (vii) Kanina (viii) Sahadra (ix) Krita (x) The paunnarabhava (xi) Svayamadatta (xii) Sahodhra (xiii) Shudra

Manu had omitted the putrikaputra, in early Hindu law, he was considered next to the aurasa son and most of the sages assign him that place. Most of the above sons became obsolete in the post smriti period. The aurasa, the putrikaputra and dattaka remained. During the British Raj, only the aurasa, and Dattaka remained. In the opinion of Asha Bajpai "All the smritikans recognise sons other than Aurasathough they differ as to the position to be assigned to each category. None of the classification appears to be based on any intelligible principle. Gautama and Baudhyana gave the same classification. Vasistha, Harita and Narda gave a different classification. Yagnavalkya's order differs from that of Gautama,
Baudhyana and Manu. The Arthashastra of Kautliya however states a rational rule. The variance in ranking is reflective more of the customary practices of the age and place relevant to the particular text.

In the course of time, a newer morality made marriages more strict with the result that the number of subsidiary sons fell leaving in the field only two types the legitimate aurasa or natural born son and Dattaka, the adopted son. The Dattaka came to be clothed with all the attributes of a son and consequently the importance of adopted sons increased for celebration of name and perpetuation of lineage.

If the primary object of adoption was to gratify the manes of the ancestor’s by annual offerings it was necessary that the offeror should be as much as possible a reflection of a real descendent he had to look as much like a son as possible and certainly not to be one who could never have been a son. Thus strict rules governing adoption were evolved. They were supposed to be based on a phrase of Saunaka that he ‘must be a reflection of a son’. The restrictions flowing from the maxims had the effect of eliminatin most of the

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37 While a son begotten by oneself (Aurasa) can claim relationship with him and his kinsmen, a son begotten by another can have relationship only with the man who accepts him a son Arthas, 11, 7, 4, 13-14 (Jolly’s ed.)

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<th>Aurasa</th>
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forms of adoption and the two to survive were the *Dattaka* form which was prevalent throughout India and the *Kritrima* which was confined to Mithila and the adjoining district.\(^4^0\)

*Atri* (verse 52) declares that a man alone who has no son should always secure a substitute for a son with all possible effort for the sake of securing the offering of pindas (funeral and Sraddha cakes) and water.\(^4^1\)

The objects of adoption were two fold; it was religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral takes and libations of water, to the manes of the adopter and his ancestors. It is secular, to secure a heir and to perpetuate the adopter's name.\(^4^2\) When a Hindu gives a boy in adoption his act is according to the Hindu shastras in the nature of a secret gift voluntarily made. It is on that account that Manu requires the gift to be "confirmed by pouring water". A daughter given in marriage called 'Kanyadan' and a son given in adoption which is called 'putradan' stand in this respect on the same footing. Both are gifts for religious and secular purposes.

Mayne contends\(^4^3\) that the spiritual motive was not so largely responsible for the increasing vogue of the *Dattaka* as generally imagined. Adoption of a son to the last owner was a simple and intelligible device. Mayne says that adoption partook more of a secular character than a religious one. His basis his intention on three factors:

1. The requirement that adoption could be made only after giving intimation to the king.

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2. The ancient smritikars have assigned a very low position to the adopted son.

3. Even with respect to the performance of religions rites, he was not on an equal footing with the aurasa son.

That the religions motive for adoption never altogether excluded the secular motive is evident from ancient texts. In the ceremonies for adoption given by Baudhayana, the adopter receives the child with these words

“I take thee for the fulfillment of religions duties, I take thee to continue the line of my ancestors.”

The Dattaka Mimamsa quotes a text that a man should adopt a son for the sake of the funeral cake, water and solemn rites and for the celebrity of his name. The author of the Dattaka Chandrika admits that even where there is no spiritual necessity, a son may and even ought to be adopted for the celebration of name and the due perpetuation of lineage.

Thus the objects of adoption were mixed, being religious and secular. But the courts however seem to have regarded the secular object of adoption as secondary to the religious motive. The judicial attitude is reflected in the observation of the Lords of the Privy council in Balgangadhar Tilak v. Shrinivas Pandit as: “Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the childless father’s family but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit the soul of the deceased passing from Hades into paradise.” In Amarendra Mansingh Vs. Sanatan Singh the learned judges of the Privy Council observed among the Hindus a peculiar religious significance

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45 Dattaka Mimamsa VII 30-38.
46 Dattaka Chandrika 1, 22.
47 AIR 1915 PCJ.
has been attached to the son through brahminical influence although its origin was perhaps purely secular.\textsuperscript{48} The Supreme Court of India in \textbf{Hem Singh vs. Hamam Singh} later observed.” Under Hindu law, adoption is primarily a religious act intended to confer spiritual benefit on the adopter.\textsuperscript{49}

**CONCEPT OF ADOPTION**

“Endless are the heavenly regions for those having sons, but a sonless man has no heavenly region”

Vasishta

“A Brahmin by birth is a debtor in three ways; to the rishis for reading their sacred books, to the gods for performing sacrifices and to the paternal ancestors for progeny: he is free from those debts, if he has a son, performs these sacrifices and studies the sacred books”

Revelation\textsuperscript{50}

According to N.R. Raghavachariar\textsuperscript{51} the origin of the custom of adoption is lost in antiquity and may well have been no more than the natural desire for a son as an object of affection, a protection in old age, and at the last a heir. However this may be, it is certain that through all the centuries which have seen the spread of Brahminical influence, and among all classes which have come under its sway, a peculiar religious significance has attached to the son. According to the Hindu scriptures a man is born with three debts – debt to rishis, debt to gods and debt to pitras or ancestors. He is absolved of the debt owed to the rishis by the study of the Vedas, of the debt to gods by sacrifices and of the debt to the ancestors by the birth of a male child. He is so essential to the spiritual welfare of the souls of his

\textsuperscript{48} AIR 1933 PC 155.
\textsuperscript{49} AIR 1954 SC 581.
\textsuperscript{50} Raghavchariars Hindu Law-Principles and precedents published by Madras Law Journal Office 8th Edi. 1987, p. 78.
immediate ancestors that an extensive class of subsidiary sons was admitted to the family, all of whom could perform the necessary ceremonies, though only some of them were allowed full rights of inheritance. Of these, only the adopted son is now recognized, and he, in the absence of an aurasa or natural born son, is clothed with all the attributes of a son and is from the date of adoption regarded as having been born in his adoptive family. It is clear that the foundation of the Brahminical doctrine of adoption is the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnization of the necessary rites. Adoption may be defined as the formal affiliation as the son of a person of one who is in fact not his son. The practice of adoption is due not only to the timorous superstition of the Hindus that by leaving a male child in this world, one can secure oneself from the torments of the next but also to the secular desire for the perpetuation of family properties and names. The substitution of a son of the deceased for spiritual reasons is the essence of the thing and the consequent devolution of property a mere accessory to it. The validity of an adoption has to be judged by spiritual rather than temporal considerations and devolution of property is only of secondary importance.

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According to Mayne\textsuperscript{57} when the texts say that a man should adopt after giving intimation to the king,\textsuperscript{58} it is evident that the adoption partook more of a secular character than of religious one as such intimation was obviously necessary in the case of relatively large possessions. The religious motive for taking a son in adoption could not have been very great if Vishnu, Yajnavalkya and Narada could assign him only a very low place. While his identity with the immediate agnatic family is now fully established, it is noteworthy that the adopted son’s sapinda-relationship in the adoptive family extends only to three degrees and not to the usual seven degrees, and the period of pollution extends only to three days and not to the usual ten days. What is even more important is that on the anniversary of his adoptive father’s death, he performs the sraddha in the ekoddishtha form in honour of the deceased only i.e. consecrated to a single ancestor and he does not, like the aurasa son, offer divided oblations to the fourth, fifth and sixth ancestors, even when he performs the sraddha in the usual way.\textsuperscript{59} While the continuance of the prohibition to marry in his own natural family is intelligible on grounds of consanguinity, that he should occupy a position greatly inferior to the son from the religious point of view, shows that the recognition of the institution of adoption has been more due to secular reasons than to any religious necessity.

The religious motive for adoption never altogether excluded the secular motive. The propriety of this motive was admitted by the Sanskrit writers themselves. In the ceremonial for adoption given by Baudhayana, the adopter receives the child with the words: “I take thee for the fulfillment of religious duties. I take thee to continue the


\textsuperscript{58} The comment that ‘kind’ includes the chief of a town or village emphasizes it as adoption becomes commoner.

The whole passage is translated by Dr. Buhler in his article on Saunaka, Journ. As Sec. Bengal, 1866, and in his edition of Baudhayana, VII, 5, 11.

The Dattaka Mimamsa quotes a text that a man should adopt a son “for the sake of the funeral cake, water and solemn rites, and for the celebrity of his name”. And the author of the Dattaka Chandrika admits, that even where there is no spiritual necessity, a son may, and even ought to, be adopted, for ‘the celebration of name, and the due perpetuation of lineage’. In fact, the earliest instances of adoption found in the Hindu legend are of daughters. The Kritrima form of adoption, which is still in force in Mithila, has no connection with religious ideas. Among the tribes who have not come under Brahmancal influence, we find that adoption is equally practiced; but without any of the rules which spring from the religious fiction. One Sanskrit pursuit actually laid it down that Sudras could not adopt, as they were incompetent to perform the proper religious rites. As a matter of fact they always did adopt; but were expressly freed from the restrictions which fettered the higher classes. They not only might, but did adopt the son of a sister, or of a daughter, who was forbidden to others. So in the Punjab, adoption is common to Jats and Sikhs, but with them it is simply the appointment of a heir. Similarly in Western India amongst the Talkbada Koli caste and Kadwa Kunbi caste, though no religious significance attaches to adoption, the right to adopt has

60 The whole passage is translated by Dr. Buhler in his article on Saunaka, Journ. As Sec. Bengal, 1866, and in his edition of Baudhayana, VII, 5, 11.
61 Dat. Mima., VII, 30-38.
63 Dat. Mima. VII, 30-38. The Thesawaleme shows that such adoptions were practiced among the Tamil races of Southern India. In Jaffna, the Tamil people adopt both boys and girls, and so little is there any idea of a new birth into the family, that the adopted son can marry a natural born daughter of the adopting parents; and, where both a boy and a girl are adopted, they can inter-marry. The secular character of the transaction is even more forcibly shown by the circumstances that the person who makes the adoption must obtain the consent of his heirs. If they withhold it, their rights of inheritance will be unaffected. Thesawaleme, II, I, 4, 5, 6.
64 Vachaspati, cited in Dat. Mima., 1, 26.
son, in contravention of a rule which is both religious and legal, cannot be held to indicate anything but an overmastering secular motive. It is, however, undeniable that, in the vast majority of cases amongst the Hindu there is a religious motive, if varying in degree,\textsuperscript{73} though it is equally undeniable that the secular motive is in almost all cases the more dominant. The question whether an adoption is inspired by secular or religious motives has naturally arisen in the case of adoptions by widows, made long after their husband’s deaths. In many of the cases, it cannot be said that such adoptions by widows are made from religious motives. They are often made to divert the course of succession or to dispossess an heir in whom the inheritance has already vested. Religious motives in such cases are in fact conspicuously absent.

At the same time, it is unsafe to embark upon an enquiry in each case as to whether the motives for a particular adoption were religious or secular. An intermediate view is possible, namely, that while an adoption in itself may be a proper act, inspired in many cases by religious motives, courts are concerned with an adoption, only as the exercise of a legal right by the widow and not as the fulfillment by her of a religious duty; and that point of view, as from that of conflicting rights.\textsuperscript{74} The controversy, however, must be taken to have been set at rest in favour of the conventional view by the judgment of the Judicial Committee in \textbf{Amarendraman Singh v. Sanatan Singh} case\textsuperscript{75} which, reiterating “the well established doctrine as to the religious efficacy of sonship”, gives full effect to it.

\textsuperscript{73} Medhatithi’s gloss upon Manu’s text. IX, 138, (a son is called putra because, he delivers his father from the hell called put), is that it is only a declamatory statement. According to him, put does not mean hell but only the four kinds of elemental life on the earth: “And from this is the father delivered by his son, as soon as he is born; which means that he is born; which means that he is born next in a divine life.” Jha Medhatithi Bhashya, Vol. V.123.

\textsuperscript{74} Krushna Kahali v Narana Kahali 1991 Ori 134.

\textsuperscript{75} (1933) 60 IA 242: 12 Pat 642. Aravamudha v. Ramaswami (1952) 1 MLJ 251, 257-258 where the secular clement of the act of adoption is emphasized.
The Supreme Court also observe that the substitution of a son of a deceased, for spiritual reasons, is the essence of adoption and the consequent devolution of property is a mere accessory to it. The validity of the adoption has to be judged by spiritual rather than temporal consideration and the devolution of property is of only secondary importance.\(^76\)

The objects of adoption are two-fold:

1. the first was religious, to secure spiritual benefit to the adopter and his ancestor, by having a son for the purpose of offering funeral cakes and libations of water to the means of the adopter and his ancestors;
2. the second was secular, to secure a heir and perpetuate the adopters' name.\(^77\)

Under Hindu law, adoption is primarily a religious act intended to confer spiritual benefit on the adopter and some of the rules have therefore been held to be mandatory and compliance with them regarded as a condition of the validity of the adoption. On the other hand adoption is secular in character as under the customary law of Punjab. The rules relating to ceremonies, preferences in selection, requirement that the adoption should be either with the consent of the reversioners or the authority of the husband are only directory and an adoption made in contravention of such rules is not invalid.\(^78\)

The object of adoption is mixed being religious and secular.\(^79\)

According to Mulla\(^80\) the objects of adoption are twofold: the first is religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of waters to the soul of the adopter and his ancestors.

\(^76\) Chandrasekhara Mudaliar v Kulandaivelu Mudaliar 1963 SC 185: (1963) 2 SCR 440.
\(^77\) Mangilal v. Bhagirath 1997 (2) HLR 235 (MP).
\(^79\) Hukum Tej Pratap Singh v Collector of Etah 1953 All 766: ILR 1952 (1) All 60: (1951) All LJ 315.
\(^80\) Mulla Hindu Law, 18th Ed., pp.778.
The second is secular, to secure a heir and perpetuate the adopter’s name.\(^8{1}\)

The Supreme Court, agreeing with earlier decisions of the Privy Council, has expressed the view that the validity of an adoption is to be determined by a spiritual rather than temporal considerations, and that devolution of property is only of secondary importance.\(^2\)

When a Hindu gives a boy in adoption, his act is, according to the Hindu shastras, in the nature of a sacred gift voluntarily made. It is on that account, that Manu required the gift to be ‘confirmed by pouring water’. A daughter given in marriage, which is called kanyadan and a son given in adoption, which is called putradan, stand in this respect on the same footing. Both are gifts for religious and secular purposes.\(^3\)

In the view of Asha Bajpai\(^4\) Atri (verse 52) declares that a man alone who has no son should always secure a substitute for a son with all possible effort for the sake of securing the offering of ‘pindas’ (funeral and Sraddha cakes) and water.\(^5\)

The objects of adoption were two fold: the first was religious, to secure spiritual benefit to the adopter and his ancestors by having a son for the purpose of offering funeral cakes and libations of water, to the manes of the adopter and his ancestors. The second, is secular, to secure a heir and to perpetuate the adopter’s name.\(^6\)

When a Hindu gives a boy in adoption his act is according to the Hindu Shastras in the nature of a secret gift voluntarily made. It is on that account that Manu requires the gift to be “confirmed by

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\(^1\) Sitaram v Haribar (1911) 35 Bom. 169, 179-180, 8 IC 625; Bai Gangadhar Tilak v Sbriniwas (1915) 42 IA 135, 154, 39 Bom 441, 470, 29 IC 639, AIR 1951 PC 7; Lal Gukum Tej Pratap Singh v Collector of Etah (1952) 1 All 60, AIR 1953 All 766.


\(^3\) Sitaram v Haribar 35 Bom 169, 179, 180, 8 IC 625.

\(^4\) Adoption Law & Justice to the Child, 1996, pp.52.


pouring water”. A daughter given in marriage which is called ‘Kanyadan’ and a son given in adoption which is called ‘Putradan’, stand in this respect on the same footing. Both are gifts for religious and secular purposes.\textsuperscript{87}

In the dattaka form a boy was given before the sacrificial fire, as a gift from his natural parent or parents to the adoptive parents or parent in order that he performs the adoptive parents funeral rites and the commemorative ‘Shraddhas’ for paternal ancestors. With this religious motive as the driving force, the Dharmashastraś were able to insist upon the adopted child being assimilated as far as possible to the Aurasa whose substitute he was to be on a condition that certain rather strict conditions of adoption were observed.\textsuperscript{88}

Mayne contends that the spiritual motive was not so largely responsible for the increasing vogue of the Dattaka as generally imagined.\textsuperscript{89} Adoption of a son to the last owner was a simple and intelligible device.

According to Mayne adoption partook more of a secular character than of religious one. He bases his intention on three factors: According to him\textsuperscript{90}

\begin{enumerate}
\item The requirement that adoption could be made only after giving intimation to the king i.e. When the texts say that a man should adopt after giving intimation to the king it is evident that the adoption partook more of a secular character than of a
\end{enumerate}

\textsuperscript{89} When owing to wars and other causes families tended to become extinct or rights to large estates and principalities were in jeopardy on the extinction of leading families and when claims had to be advanced before the rulers of the country for the recovery of estates, adoption must have become a fertile expedient for reviving or enforcing such claims.
religious one as such intention was obviously necessary in the case of relatively large persons.’

(II) The ancient Smritikars have assigned a very low position to the adopted son i.e. ‘The religious motive for taking a son in adoption could not have been very great if Vishnu, Yagnvalkya and Narada could assign to him only a very low place while his identity with the immediate agnatic family is now fully established’

(III) Even with respect to the performance of religious rites, he was not on an equal footing with the aurasa son i.e. ‘It is noteworthy that the adopted son’s sapinda relationship in the adoptive family extended only to three degrees and not to the usual seven degrees and the period of pollutions extended only to three days and not to the usual ten days. What was even more important was that on the anniversary of his adoptive fathers death, he performed the ‘Shraddha’, in the ekodishtha form in honour of the deceased only i.e. consecrated to a single ancestor unlike the Aurasa son he does not offer divided oblation to the fourth fifth and sixth ancestors even when he performs the ‘Shraddha’ in the usual way – Dattaks Mimamsa.91 While the continuance of the prohibition to marry in his own natural family can be understood on grounds of consanguinity, that he should occupy a position greatly inferior to the son from the religious point of view shows that the recognition of the institution of adoption has been more due to secular reasons that due to any religious necessity.’

That the religious motive for adoption never altogether excluded the secular motive is evident from ancient texts. In the ceremonies for adoption given by Baudhayana, the adopter receives the child with the words. “I take thee for the fulfillment of religious

91 VI, 32, 29, VII, V, IX, 8.
duties; I take thee to continue the line of my ancestors”. The Dattaka Mimamsa quotes a text that a man should adopt a son for the sake of the funeral cake, water and solemn rites and for the celebrity of his name. The author of the Dattaka Chandrika admits that even where there is no spiritual necessity, a son may and even ought to be adopted for the celebration of name and the due perpetuation of lineage.

It can be concluded that the objects of adoption were mixed, being, religious and secular. But the courts however seem to have regarded the secular abject of adoption as secondary to the religious motive. The judicial attitude is truly reflected in the observation of the Privy Council that “Among Hindus the ceremony of adoption is held to be necessary not only for the continuation of the childless father’s family but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit the soul of the deceased passing from Hadas into Paradise”.

In another case the Privy Council observed “Among the Hindu a peculiar religious significance has been attached to the son through brahminical influence although its origin was perhaps purely secular. The Supreme Court of India later observed “Under Hindu Law, adoption is primarily a religious act intended to confer spiritual benefit on the adopter.”

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93 Dattaka Mimamsa VII, 30-38.
94 Dattaka Chandrika, I, 22.
95 Bal Gangadhar Tilak v Shrinivas Pandit, AIR 1915 PC 7.
96 Amarendra Mansingh v Sanatan Singh, AIR 1933 PC 155.
3. TEXTS OF ADOPTION

 According to Mayne the whole Sanskrit law of adoption is evolved from a few texts and a metaphor. The metaphor is that of Saunaka, that the boy to be adopted must bear the reflection of a son. The texts are those of Manu, Basishtha, Baudhayana, Saunaka and Sakala. Manu says: “That boy, equal by caste, whom his mother or his father affectionately gives, confirming the gift with a libation of water, in times of distress to a man as his son, must be considered as an adopted son (Datrima)”. “Of the man who has an adopted (Datrima) son possessing all good qualities, that same son shall take the inheritance, though brought from another family”, “An adopted son shall never take the family name and the estate, of his natural father; the funeral cake follows the family name and the estate, the funeral offerings of him who gives his son in adoption cease as far as that son is concerned”. Vasishtha says, “(1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause. (2) Therefore the father and the mother have power to give, to sell, and to abandon their son. (3) but let him not give or receive in adoption an only son. (4) that must remain to continue the line of ancestors. (5) Let a woman neither give nor receive a son except with her husband’s permission. (6) He who

59 Dat. Mima., V. 15. It seems possible that this metaphor is itself a mistake. Dr. Buhler translates the verse. "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". See Journall Ass. Soc. Bengal, 1866, art. Saunaka Smriti. The translation, given in the Dattaka Mimamsa, is, however, followed by Mr. Golapchandra Sarkar, at p.308 of his work on adoption, and by Mr. Mandlik, p.52, in his translation of the Mayukha where the passage occurs in full, and was accepted in preference to that of Dr. Buhler by Banerji, J., in Bhagwan Singh v Bhagwan Singh (1895) 17 All 294, 321 FB Edge, C.J., was of the opposite opinion, Mariammal v Govindammal 1985 Mad 5: 97 Mad LW 490: (1984) 2 MLJ 20.
60 Manu. IX, 168, 141, 142. The translation of Sir W. Jones which appeared in previous editions runs thus: "He whom his father or mother gives to another as his son, provided that the donee have no issue, if the boy be of the same class, and affectionately disposed, is considered as a son given the gift being confirmed by pouring water".

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desire to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt offerings in the middle of the house, reciting the Vyahrritis, and take as a son a not remote kinsman, just the nearest among his relatives."  

To the same effect is Baudhayana in his Grihayasutra. Saunaka lays down rules substantially similar but the following which is not covered by the other writers is important: “The adopter having taken the boy by both hands, with the recitation of the prayer ... having inaudibly repeated the mystical invocation ... having kissed the forehead of the child; having adorned with clothes, an so forth, the boy, bearing the reflection of a son; ... accompanied with dancing, songs and benedictory words, having seated him in the middle of the house ..... ; and having performed the homa or burnt sacrifice with the holy texts, should complete the remaining part of the ceremony. The adoption of a son, by any Brahmana, must be made from amongst sapindas ...; or on failure of these, an asapinda may be adopted; otherwise let him not adopt. Of Kshatriyas, in their own class positively: and (on default of a sapinda kinsman) even ion the general family, following the same guru; of Vaisyas, from amongst those of the Vaisya class; or Sudras, from amongst those of the Sudra class. Of all, and the tribes likewise, (in their own) classes only and not otherwise. But a daughter’s son, and a sister’s son, are affiliated by Sudras. For the three superior tribes, a sister’s son is nowhere (mentioned as) a son. By no man, having as only son, is the gift of

101 Vas., XV, 1-6 cited by Lord Hobbouse in Sri Balusu Gurulingaswami v Sri Balusu Ramalakshamanma (1899) 26 IA 113, 130: 22 Mad 398, 410.
103 The sentence, “For the three superior tribes, a sister’s son is nowhere (mentioned as) a son” is given in the Dat. Mima. (II) 74, V, 18 but not in the Vya. May: see also Jolly, T.L.L., 162.
a son to be ever made. By a man having several sons, such gift is to be made, on account of difficulty”. Sakala says: “Let one of a regenerate tribe destitute of male issue on that account adopt as a son the offspring of a sapinda relation particularly; or also next to him one born in the same general family. If such exist not let him adopt one born in another family; except a daughter’s son, and a sister’s son, and the son of the mother’s sister”.  

The texts apply only to the dattak form. The two texts read along with the metaphor of Saunaka that “the adopted son must be the Dattaka Mimamsa of Nanda Pandita and the Dattaka Chandrika of Devanda Bhatta, two treatises on the particular subject of adoption are the chief authorities governing questions of adoption, though 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 an infallible guide in the Mithila and Beneras Schools [Collector of Madura v. Mootto Ramalinga].

The law of adoption before statutory amendments was rightly said to have been based on a few texts of Dharmasastra literature and a metaphor of Saunaka. The metaphor of Saunaka, is that the boy to be adopted must bear ‘the reflection of an aurasa son’. The texts are those of Manu, Vasishtha, Baudhayana, Saunka, and Sakala. According to Saunaka the boy to be adopted bearing the reflection of an aurasa son should be adorned and brought into the house where the Homa should be performed.

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104 The entire passage from the Saunaka Smriti is cited in parts ion the Dat. Mima, in several places (V, 2-21; II 2, 74). V. Mayukha, IV, V.8-10 (Gharpure’s edn., 69, 70; Mandlik’s edn., 52, 53).
105 The text of Sakala is quoted in Dat. Chand., I, II, and also in Bhagwansingh v Bhagwansingh (1899) 26 IA 153, 160: 21 All 412, 418.
106 12, M.I.A. 397.
107 Mayne’s, Treatise on Hindu Law and Usage” 11th ed. 1950, p.188.
108 Putrachhayavaham, Saunaka; Dat. Mima, V.15; It seems possible that this metaphor is itself a mistake. Dr. Buhler translates the verse, ‘He then should adorn the child, which (now) resembles a son of the receiver’s body that is, which has
Generally the text of Manu which has influenced the development of the law of adoption in Hindu Law is Chapter IX of the Code of Manu. This text is: That (boy) equal (by caste) whom his mother or his father affectionately give, (confirming the gift) with (a libration of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima).\(^{109}\) The commentators of Manu have made different remarks on this text.\(^{110}\) This text of Manu only states the manner and the mode of adoption and nothing more.

The other text deals with the problem of inheritance and allows the adopted son to take the inheritance after the Aurasa son and the
appointed daughter's son. There is another text of Manu which states the secular and religious consequences of adoption.

**Vasishtha on Adoption:**

It is Vasishtha Smriti, which elaborates the rules of adoption. The judicial interpretations of these various texts of Vasishtha have given rise to the modern law of adoption. The judge made law, which emanates from the interpretation of the texts of Vasishtha and other sages occupies the central place in any treatise on the Hindu law of adoption. Chapter fifteen of the Vasishtha Smriti take a detailed look at the law of adoption. The first five texts of chapter fifteen of the Vasishtha Smriti have been subjected to judicial scrutiny and have given rise to the leading principles of the law governing the Hindu law of adoption before the enactment of The Hindu Adoptions and Maintenance Act, 1956. These texts are:

"Sonitasukrasambhavah puruso matapitranimittakah
tasya pradanavikrayatyagesu matapitrau prabhavatah
na tvekam putram dadyatpratigrahniyadva"

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111 Of the man who has an adopted (Datrima) son possessing all good qualities, that same (son) shall take the inheritance, though brought from another family. Vas. XV, 9-10; Baudh. Parisishta 16. Medh., Kull., and Ragh, refer this rule to the case where a man has a legitimate son and an adopted son, and think that in such a case the latter, being eminently virtuous, shall receive, like a kshetraga (see verse 146), a fifth or sixth part of the estate. Medh. Remarks that some think he is to half, but that their opinion is improper, and finally that Upadhyaya, i.e. his teacher, allots to the adopted son less than to the kshetraga. Kull, and Ragh. State that Gov. took the verse to mean that an eminently virtuous adopted son shall inherit on failure of a legitimate son and of the son of the wife, but that this explanation is inadmissible on account of verse 165. Nevertheless Ragh. Reproduces Gov.'s opinion. Nar. Says, 'It has been declared that an adopted son receives a share like the chief son, when he is eminently virtuous', Nand reads at the end of the second line, samprapto'sya na putrakah, 'shall take the inheritance, (provided) the (adoptive father) has no son'. Manu IX, 241, S.B.E. Vol.25, p.355.

112 An adopted son shall never take the family (name) and the estate of his natural father; the funeral cake follows the family (name) and the estate, the funeral offerings of him who gives (his son in adoption) cease (as far as that son is concerned).

sa hi santanaya purvesam
na stri putram ddadyatpratigrahniyadva anyatranujnanad bhartuh"

Man formed of uterine blood and virile seed proceeds from his mother and his father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to sell, and to abandon their (son). But let him not give or receive (in adoption) an only son; For he (must remain) to continue the line of the ancestors. Let a woman neither give nor receive a son except with her husband’s permission.114

Vasishtha laid down substantive rules of law of adoption alongside the accompanying ceremonies associated with adoption. These requirements are in fact contemplated to give publicity to the adoption. He says:

He who desires to adopt a son, shall assemble his kinsmen, announce his intention to the king, make burnt-offerings in the middle of the house, reciting the Vyehritis, and take (as a son) a not remote kinsman, jut the nearest among his relatives. But if a doubt arises (with respect to an adopted son who is) a remote kinsman, (the adopter) shall set him apart like a Sudra. For it is declared in the Veda, ‘Through one he saves many’.115

Baudhayana on Adoption:

Baudhayana Smriti also laid down practically the same law and procedure as Vasishtha did.

Man, formed of virile seed and uterine blood, proceeds from his mother and father (as an effect) from its cause. (Therefore) the father and the mother have power to give, to abandon, or to sell their (son). But let him not give nor receive (in adoption) an only son; For he (must remain) to continue the line of the ancestors. Let a woman

115 Vasishtha XV, 608, S.B.E. Vol.14, pp.75-76.
neither give nor receive a son except with the permission of her husband. He who is desirous of adopting (a son) procures two garments, two earrings, and a finger-ring; a spiritual guide who has studied the whole Veda; a layer of Kusa grass sand fuel of Palasa wood and so forth. Then he convenes his relations, informs the king (of his intention to adopt) in (their) presence, feeds the (invited) Brahmanas in the assembly or in (his) dwelling, and makes them wish him 'an auspicious day', 'hall', (and) 'prosperity'. Then he performs the ceremonies which begin with the drawing of the lines on the altar and end with the placing of the water –vessels, goes to the giver (of the child) and should address (this) request (to him), ‘Give me (thy) son’. The words), 'I take thee for the fulfillment of (my religious duties; I take thee to continue the line (of my ancestors). Then he adorns him with the (above-mentioned) two garments, the two earrings, placing of the (pieces of wood called) paridhis (fences round the altar) and end with the Agnimukha, and offers (a portion) of the cooked (food) in the fire. 

Saunaka on Adoption:

Saunaka also has laid down rules similar to those ion Vasishtha and Baudhayana but he makes a few additions to the substantive rules of law, e.g.:

“Brahmananam sapindesu kartavyah putrasangrahah,  
Tadbhavesapindo va anyatra tu na karayet,  
Kstriyanam savajatau va gurugotrasamopi va,  
Vaisyamam vaisyajatesu sudranam sudrajatisu,  
Sarvesameva varnanam jatisveva na canyatah  
Dauhitro bhagineyasaca sudrasyapi ca diyate,  
Brahnanaditraye nasti bhagineyah sutak kavcit,  
Naikaputrena kartavyam putradanam kadacan,

The adoption of a son by a Brahmana must be made from amongst sapindas. In the absence of sapindas adoption may be made of an asapinda otherwise let him not adopt. Of Kshatriyas, in their own class positively; and (on default of a sapinda kinsman) even in the general family, following the same guru; of Vaisyas, from amongst those of the Vaisya class; of Sudras, from amongst those of the Sudra class. Of all, and the tribes likewise, (in their own) classes only; and not otherwise. But a daughter’s son, and a sister’s son, is nowhere (mentioned as) a son.

**Saunaka on Adoption:**

The other important text the interpretation of which has considerably influenced the development of the law of adoption is the text of Sakala:

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“Sapindapatyakancaiva sagotrajamathapi va
Aputrako dvijo yasmata putratve prikalpayet
Samanagotrajabhave palayet anyagotrajam
Dauhitram bhagineyanca matrasvasrsutam vina”
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Let one of a regenerate tribe destitute of male issue on that account: adopt as a son the offspring of a sapinda relation particularly: or also next to him, one born in the same general family. If such exist not, let him adopt one born in another family: except a daughter’s son, and a sister’s son, and the son of the mother’s sister.

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118 Mayne, op cit. n-2, 189.

119 This text of Sakala has been quoted in Dat. Chan. I-II, vie Mayne, op cit n-2 pp.189-190; G.C.S. Sarkar, Hindu Law, 6th ed., 1927, p.221.
The text of Sakala is referred to by the Judicial Committee of the Privy Council in *Bhagwan Singh v. Bhagwan Singh*.120 The law of adoption as practiced amongst Hindus is, therefore, multifaceted. The first requirement is the capacity to make an adoption. The corollary of the capacity to make an adoption is the capacity or the authority to give in adoption. The capacity to take and give in adoption is followed by the subject of adoption, i.e., who may be adopted. It necessitates an enquiry into the qualification of the boy intended to be adopted. The next step is the fulfillment of formalities, mentioned in the texts of *Baudhayana*189 and *Saunaka*1810 for adoption. The fifth aspect of adoption is the effect of adoption, and lastly the proof of adoption. The law of adoption requires step by step consideration of the aforesaid requirements of adoption.

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120 1899, 26 I.A. 153, 160.: (1855) 17 All., 294.
189 Baudhayana
1810 Saunaka