CHAPTER – III

ADOPTION UNDER HINDU LAW

Adoption is a process to incorporate a child permanently into family, with all the rights of a natural child, in which he was not born. The concept of adoption as a welfare measure is of recent origin traditionally, a child was adopted for temporal and spiritual purposes and more recently to satisfy the emotional and parental instincts of the adopters. Orphans, abandoned and destitute children were confined in the four walls of an institution. Today, however, an increasing number of such children are being rehabilitated in good homes by adoption. This gradual change in the attitude towards adoption has not seen the enactment of a uniform Adoption Act.

India even today, after more than sixty years of independence is without any lex loci for non-Hindus in matters of adoption. Non Hindus are resorting to the Guardians and Wards Act, 1890 for adoption but that Act only confers guardianship. Amongst Hindus, adoption is only under the Hindu Adoptions and Maintenance Act, 1956, but that is silent in respect of adoptions by foreigners. The Supreme Court judgment of 1984\(^1\) and the subsequent judgments of September, 1985 and December, 1986 sought to streamline the procedure and provide checks and safeguards for adoption by foreigners. The court also directed the ICCW and ICSW to scrutinise all adoption cases of foreigners. Despite these judgments, different procedures continue to be followed in different parts of the country. Like most other social institutions, adoption is essentially a product of historical and evolutionary processes. Diverse economic needs and social demand.

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Adoption is a legal procedure which permanently terminates the legal relationship between a child and his or her biological parents and initiates a new parent-child relationship. This definition indicates the transfer of the child from old kinsmen to the new. The child ceases to be member of the family to which he belongs by birth. The child loses all rights and is divested of all duties with regard to his natural parents and kinsmen. In the new family, the child is like a natural born child with all the rights and liabilities of a native born member. This definition does not quite cover the aspect that orphan, abandoned, foundling and destitute children can also be adopted. Of course, very early in the society, when such type of children could not be adopted, the definition could be termed as adequate.

Encyclopedia Britannica describes adoption as a family experience. It is a way of conferring, "the privileges of parents upon the childless and advantages of parents upon the parentless." It legally establishes a parent-child relationship between persons not so related. The child is absorbed into the family of the adopters and is treated as if it were their own natural child. By adoption, an artificial but a permanent family relationship is created between the child and the adopter. It provides families for children who otherwise would remain parentless and permanently deprived of the physical and psychological benefits of family life.

Adoption can be considered as an important mechanism for the care of children on a permanent basis, away from or in substitution of care by natural parents. It is to be distinguished from foster care. Foster care indicates nominal and temporary care as opposed to permanent parentage.
Under Hindu Law, adoption is the taking of a child of another as a substitute for the failure of his own natural children of the same sex. When a Hindu adopts, what is presumed to have occurred is that a fictitious birth has taken place in the family of the adopter. So a relationship of legitimacy is created between the parents and the child.

Institution of adoption is prevalent today in one form or the other in almost all the legal systems of the world barring a few countries. The historical roots of the institution of adoption are traceable into antiquity. Notwithstanding the recording of stray cases of adoptions in earlier civilization, Greek and Roman practices form the first example of persistent use of adoptions.

Early savage and barbarous societies were strengthened by artificial kinship. Artificial kinship was well recognised and widely practised at that time. By this method, strangers were co-opted into the clan or kindred.

Shastric law permitted Hindus to acquire different types of artificial sons on the failure of natural born sons. Of these only two Kritrima and Dattak forms were recognised in medieval period, The Kritrima form was prevalent in Mithila and adjoining areas while Dattak form was popular all over India. It is the Dattak form which came to represent the modern concept of an adopted son.

The Old Hindu Law of adoption was parent based and not child based welfare of the child was not its concern. It aimed primarily at protecting the rights of the parents. While the adoption of orphans, illegitimate children and girls was prohibited, the adoption of grown up married men was permitted. The idea of protecting orphans and

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destitute children or providing them with a spouse and a family was totally absent in the legal philosophy behind this law.

Under the old Hindu law, only a son could be adopted. A son's adoption was permitted for two purposes, namely, to continue the family line and to offer oblations to the deceased ancestors. As per the Hindu religion, a son was considered necessary for his father to enter heavenly abode after death. A daughter could not be adopted except under a custom as she was not competent to perform either of these two functions. A male Hindu who had reached the age of discretion and was of sound mind could adopt a son even without the consent of his wife provided he was not having any Hindu son or grandson or great grandson either natural born or by adoption. After the death of her husband, however a widow could adopt a son to her husband in some parts of India. The Hindu Adoptions and Maintenance Act, 1956 was content with filling some obvious lacunae in the existing law.

The Hindu Adoptions and Maintenance Act, 1956 continued the old practice in a modified form. The Act has failed to protect the interest of child as it has not provided for any enquiry to be conducted into the family background of the adoptive parents and their suitability or their ability to look after the child. It has also overlooked the inability of the mother of an illegitimate child to take such child in adoption. It, by and large, retains the old system of extra-judicial adoptions. Even registration of adoption has not been made compulsory. Thus, the Hindu law of adoption continues to be archaic and incapable of protecting the interests of the child.

In order times, captives taken in war were made slaves by the conquered race. These slaves gradually became a part of the social system. Sometimes a slave was entrusted with the management of
the family of his master. The position of slave was similar to that of sons and wives. Manu says, "The wife, the son and the slave—all these three are known as incapable of owning wealth or property; whatsoever they earn belongs to him whom they themselves belong." 

Though slaves could be bought in abundance, they could never be substituted in place of children. The desire to have a child is innate in all human beings. In the absence of natural offspring from wedlock, people resorted to other artificial methods to fulfil this desired end. With the increase in the importance of the son and to save the family from disruption, it became necessary to bring into the family foreign members who would carry on the tradition of the family. As such in the ancient society, slaves were bought freely and maintained at the cost of the patriarch. It was, therefore, natural that artificial relations of consanguinity be created for the welfare of the family. This is fiction of adoption was looked upon with disfavour neither by law nor public opinion.

The predominant idea involved in an adoption was the transfer of dominion or patera potestas from the natural father to the adoptive father. Adoption or investment of the boy with the status of sonship depended entirely on the sweet will of the adopter. Simply because a son is given and accepted will not make him a son of the adopter. The Hindu Commentators insisted upon some additional formalities in order to know the intention of the adopter. The observance of the religious ceremonies mentioned as additional formalities was the point of distinction between adoption and slavery.

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10 In many cases social investigations were delegated to country departments of charity or welfare. During investigations adoption babies were matched by the social workers to the family's genetic, physical and intellectual make up and were to be as close as possible to the child that the adoptive couple could not bear.
11 Mc Namara Joan, Adoption Adviser, 1975, p. 34.
12 A child having special problem was rarely considered appropriate for adoption.
Adoption under old Hindu Law: According to Mayne\(^{14}\) 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.\(^{15}\) The texts are those of Manu, vasishtha, 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”.\(^{16}\)

Vasishtha says,

“(1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its...

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\(^{14}\) Hindu Law & Usage revised by Justice Ranganath Misra Former Chief Justice of India, 15\(^{th}\) Ed., 2003, pp.443.

\(^{15}\) 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”. Journal 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.

\(^{16}\) 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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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 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 Vyahrritis, and take as a son a not remote kinsman, just the nearest among his relatives.”¹⁷

To the same effect is Baudhayana in his Grihayasutra.¹⁸ 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 a sapinda may be adopted; otherwise let him not adopt.”¹⁹

¹⁷ Vas., XV, 1-6 cited by Lord Hobhouse in Sri Balusu Gurulingaswami v Sri Balusu Ramalakshamamma (1899) 26 IA 113, 130: 22 Mad 398, 410.
¹⁹ Mayne’s Hindu Law and usage revised by justice Ranganath Misra and Dr. Vijender Kumar, Pub-Bharat Law House, New Delhi, 16th Edi., p. 476
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; 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.20 By no man, having as only son, is the gift of a son to be ever made. By a man having several sons, such gift is to be made, on account of difficulty”.21

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”.22

The texts apply only to the dattak form. 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.23 According to Saunaka the boy to be adopted bearing the reflection of an aurasa

20 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.
21 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).
22 The text of Sakala is quoted in Dat. Chand., I, II, and also in Bhagwansingh v hagwansingh 1899) 26 IA 153, 160: 21 All 412, 418.
23 Mayne’s, Treatise on Hindu Law and Usage” 11th ed. 1950, p.188.
son should be adorned and brought into the house where the Homa should be performed.

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 libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima)”.25

The commentators of Manu have made different remarks on this text.26 This text of Manu only states the manner and the mode of adoption and nothing more.27

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.28 There is another text of Manu which states the secular and religious consequences of adoption.29

24 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 come to resemble a son by the previous ceremony of giving and receiving’. See Journal As. Soc. Bengal, 1866, art. Saunaka Smriti. The translation, as 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, F.B. Edge, C.J., was of the opposite opinion, ibid, p.386, vide Mayne op. cit. n.2. p.188.


26 Sadrisam, ‘equal (by caste)’, (Kull., Nar., Ragh., Nand.), means according to Medh, ‘equal by virtues, not by caste’, ‘His mother or his father’, i.e. ‘after mutually agreeing’ (Kull.), ‘the mother, if there is no father’ (Ragh.), Medh, and Nand, read mata pita ka, ‘his mother and his father’, ‘but Medh, adds that va is the proper reading, ‘Affectionately’, i.e. ‘not out of avarice’ (Medh.), or ‘not out of fear and so forth’ (Kull., Nand.), or ‘not by force or fraud’ (Ragh’). In times of distress, i.e. ‘if the adopter has no son’ (Kull., Ragh), or ‘if the adoptee’s parents are in distress’ (Nar.), S.B.E. Vol.25 p.362.


28 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. Parishishta 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
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 dadyatpratigrahniyadvana
sa hi santanaya purvesam
na stri putram ddadyatpratigrahniyadvana 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.31

Vasishtha laid down substantive rules of law of adoption along with 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 Vyahritis, and take (as a son) a not remote kinsman, just 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’.32

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 it 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 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 gras 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)

32 Vasishtha XV, 6-8, S.B.E. Vol.14, pp.75-76.
Brahmanas in the assembly or in (his) dwelling, and makes them wish him ‘an auspicious day’, ‘hail’, (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 other answers ‘I give (him)’. He receive (The child with these 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 and the finger ring, performs the rites which begin with the 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.\textsuperscript{33}

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

\begin{quote}
"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,
Bahuputrene kartavyam putradanam prayatnatah."\textsuperscript{34}
\end{quote}

The adoption of a son by a Brahmana must be made from amongst sapindas. In the absence of sapindas adoption may be made

\textsuperscript{33} Baudhayana, Parisistha, 2-12, S.B.E. Vol.14 pp.334-335.
\textsuperscript{34} The above text of Saunaka is based on the Vya-M, Nir S.Datt. Mi., Datt Ch. Sans. Kau., and Dr. Buhler’s text prepared from several mss. And published in the Journal of the Bengal Asiatic Society. Vol. 35 at pp.158-159.
of an a sapinda 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 are affiliated by Sudras. For the three superior tribes, a sister’s son is nowhere (mentioned as) a son.35

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

“Sapindapatyakancaiva sagotrajamathapi va
Aputrako dvijo yasmata putratve prikalpayet
Samanagotrajabhave palayet anyagotrajam
Dauhitram bhagineyanca matrasvasrsutam vina”.36

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.37

The text of Sakala is referred to by the Judicial Committee of the Privy Council in Bhagwan Singh v. Bhagwan Singh.38 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

35 Mayne, op cit. n-2, 189.
36 Ibid.
37 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.
38 1899, 26 I.A. 153, 160.: (1855) 17 All., 294.
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\textsuperscript{39} and Saunaka\textsuperscript{40} 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.

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 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”\textsuperscript{41}. In another case the Lords of 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”\textsuperscript{42}. The Supreme Court of India later observed “Under Hindu Law, adoption is primarily a religious act intended to confer spiritual benefit on the adopter”\textsuperscript{43}.

Asha Bajpai\textsuperscript{44} says the adoption law of the ancient period can be examined through the four elements viz.

(1) the capacity to give
(2) the capacity to take

\textsuperscript{39} Supra n.11.
\textsuperscript{40} Supra n.12.
\textsuperscript{41} Bal Gangadhar Tilak v Shriminas Pandit, AIR 1915 PC 7.
\textsuperscript{42} Amarendra Mansingh v Sanatan Singh, AIR 1933 PC 155.
\textsuperscript{43} Hem Singh v Hamam Singh, AIR 1954 SC 581.
\textsuperscript{44} Adoption law and justice to the child-Asha Bajpai Pub-NLSUI – Bangalore – Edi. 1996, p. 55.
1. **Capacity to give in Adoption:** The primary right to give in adoption was that of the father who could do so without consulting the mother. But the mother, could not, without the husband’s permission, give her son in adoption while the father was alive and capable of consenting. The mother alone could give her son in adoption if the father was dead or if he was incapable of giving consent or had entered the order of ascetics, provided, he had not expressly or impliedly prohibited her to do so. If both parents were dead, no one else not even the paternal grandfather or the step father or a brother could give a son in adoption.

2. **Capacity to take in adoption** – A male Hindu of sound mind could adopt to himself and adoption by a bachelor or widower was valid. The man who wanted to adopt had to be without a male issue living at the time of adoption. Male issue meant three direct descendants in the male line. But the existence of a great-great grandson or of a daughter’s son or of an illegitimate son who may inherit was no bar to adoption. When an only son become an outcast or renounced the Hindu religion, the father was entitled to adopt another as his son.

3. **Hindu Woman’s power of Adoption** – At no time did Hindu Law permit a Hindu woman to adopt a boy or a girl for herself. An unmarried woman could not adopt at all. But as a widow subject to certain restrictions and conditions, she was empowered to adopt a

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45 Manu IX, 168, Yaj II 130.
48 Accordingly, if a man has a son, grandson or great grandson, actually alive, whether natural or adopted, he is precluded form adopting.
49 Maharajah of Kolhapur v. Sundaram (1925), 48 Mad 1.
50 For the purpose of adoption was spiritual benefit to a man after his death and a woman having no spiritual needs to be satisfied were not allowed to adopt. Somamma v. Erappa 1950 Mysore 77.
boy for and on behalf of her deceased husband. In fact, after death, the only person who could act as his agent to adopt a son for him was his widow.51

Every Hindu male of sound mind who had attained the age of discretion could authorise his wife (except in Mithila) to adopt a son to him after his death even if he had not attained the age of majority. The authority to adopt could be given by the husband even if he was an undivided member of Mitakshara joint family at the time of his death.52 Therefore, a Hindu widow who had attained the age of discretion and was of sound mind could adopt a son to her husband. But, as regards the power of the widow the greatest divergence of views prevailed. The basic text53 said that

“A woman should not give or take in adoption except with the assent of her husband”.

Four interpretation had been placed on this Sutra of Vasistha.54 These were:

1. A widow could not adopt at all because at the time of adoption it was impossible to have the consent of the husband (who was then dead) and because a woman could not perform the ‘home’ with ‘vedic’ mantras and could not repeat the vedic passage about acceptance (which were required by Vasistha and Saunaka).55

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51 A husband can authorize only his widow to adopt a son to him Amrita Lal v. Sumomy, (1898) 25 Gal. 662.
53 Nor let a woman give or accept a son, unless with the assent of her Lord Vas, 15, 5. Kane, P.V. History of Dharmashastras, (1973), Vol.III, II edition, Bhandarkar Oriental Research Institute, Poona.
55 The Dattaka Mimamsa and writer of Mithila such as Vacaspati held this view.
2. A widow could adopt under an authority from her husband given during his lifetime.56

3. In Madras a widow could adopt without her husband’s authority, provided she secured the consent of the father-in-law or (if the latter was dead) of all coparcenors of the husband, if her husband had died as a member of a joint family and if the husband was separate at the time of his death then the consent of the father-in-law or (if he were dead) of a substantial majority of her husband’s nearest sapinda.

4. A widow could adopt without the husband’s express authority to adopt.57 According to this view, the husband’s authority to adopt was always to be presumed unless he had prohibited his widow expressly or by necessary implication from adopting.58

“Nor let a woman give or accept a son unless with the consent of her Lord” - Vasistha

<table>
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<tr>
<th>Mithila</th>
<th>Bengal, Benaras</th>
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<tr>
<td>Widow cannot adopt at all.</td>
<td>Widow may adopt under an authority</td>
<td>A widow may adopt without her husband’s</td>
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Interpretation of different schools

The idea was that the permission of the husband was not required to be given just at the time of adoption and that it could be given long before the actual adoption.

The Vyavaharamayukha, the Niranayasindhu, the Samskarkaustubha the Dharmasindhu that were regarded as authoritative in Bombay and Western India held that the passage of Visistha referred only to a wife whose husband was alive. Mahalingayya v Sangayya AIR 1943 Bom 397. Rakhmabai v Radhabhai, (1968) 5 Bom HC AC 181 (FB). Lakshmbai v. Saraswatibai (1899) 23 Bom 789. Krishnawa v Ramagowda AIR 1941 Bom 350.
Therefore, summarizing a woman’s power to adopt, it can be said that she could do so only for and on behalf of her husband.

Two situations arise in this aspect:

1. Adoption during the lifetime of the husband.
2. Adoption after his death (as a widow). Here the theoretical base is the same. She can do so only for the husband and with his consent. There are divergent interpretations on the requirement of consent in various schools as follows:

**Mithila School:** No consent possible after the death of her husband and also widow incapable of performing the attendant ceremonies.

**Bengal School:** A widow can adopt only on the authority of the husband given during the lifetime. The difference between these two schools is that in the Mithila School consent to the specific adoption was required. Whereas, in the Bengal School a general consent is sufficient.

**Western India School:** Consent may be given by co-parcenor (when deceased husband was united with them) or by the father-in-law or other near ‘sapindas’ (when he was separate).

There is a large volume of case law on the construction of the widow’s authority to adopt, about the rights of the co-widows in the matter of adoption and about the limits of their power. Some of the propositions laid down in these cases are as follows:-
1. Although, as general rule an adoption by a widow is good without the consent of her husband’s kinsmen, yet when such adoption has the effect of divesting the estate already vested in a third person it would appear to be necessary to give validity to such adoption.\textsuperscript{59}

2. The widow had the power to adopt in the absence of her husband’s authority without the consent of his kinsmen whether the husband was divided or undivided.\textsuperscript{60}

3. The consent of a coparcener (who was still in the mother’s womb) could not be obtained and hence the adoption was invalid.\textsuperscript{61}

4. Where parties were not natives of the area governed by the Bombay School but originally came from other parts of the country where an adoption by a widow required an authority, from the husband, the power which a widow had under the lex loci to make an adoption without her husband’s authority could not be invoked unless it was clearly established that the law of origin had to be renounced in favour of law of domicile.\textsuperscript{62}

5. Between express authority at one end and express prohibition at the other, there is the large space of implied authority and implied prohibition. The dividing line between the last two categories cannot be laid down by the courts as that must be the question on facts of each case.\textsuperscript{63}

6. Refusal by the husband to adopt in his lifetime does not by itself tantamount to prohibition.\textsuperscript{64}

7. The statement by the testator who gave all his property for charity that he was not going to give authority to his widow to

\textsuperscript{59} Bayabai v. Bala, (1870), 7 Bom. HCR (Appx.)1.
\textsuperscript{60} 1992 FC 216.
\textsuperscript{61} Bala Anna v Akuba AIR 1926 Bom. 584 (DB).
\textsuperscript{62} Vijay Sangji v Shivasangji AIR 1935 PC 95.
\textsuperscript{63} Ishvar Dada v. Gajabai AIR 1925 Bom. 423.
\textsuperscript{64} Sitabai v Govindrao AIR 1927 Bom. 151 (DB).
adopt does not amount to an implied prohibition by him of an adoption by the widow in respect of the property.65

8. The widow could not adopt a son during the lifetime of a son adopted by her husband even though the validity of the adoption is doubtful i.e. it was not competent to a widow to dispute the validity of an adoption by her husband.66

9. The motive of the widow was not material on the validity of an adoption.67

An regards the Madras School the Ramnad’s68 case laid down several important propositions as follows:

1. A widow may adopt without authority from her husband provided the husband had not forbidden her and the consent of the husband’s kinsmen had been obtained.

2. Prohibition could be express or implied.

3. In case of an undivided family the reason why consent was necessary was that it would be unjust to allow a widow to defeat their interests by introducing a new co-parcener against their will.

4. In the divided family the consent of the kinsmen seemed to be required on account of the presumed incapacity of women for independence rather than the necessity of procuring consent of all whose possible or reversionary interest in the estate would be defeated by adoption.

5. Where the husband was separated at the time of his death, the consent of the father-in-law must be obtained failing the father-in-law, the consent of the husband’s sapindas, that is, agnates and cognates was required. The consent of the cognates was not necessary when there were agnates.

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65 Vithagowda v Secy of State AIR 1932 Bom. 442.
66 Bhavi v Narasa Gowda AIR 1922 Bom. 300 (DB).
67 Ramachandra v Mulji (1898) 22 Bom 558 (FB).
68 Collector of Madura v Mooto Ramalinga, (1868) 12 MIA 397 (PC).
6. The consent necessary was not the consent of every ‘sapinda’ however remote.

7. There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow not from capricious or corrupt motives or in order to defeat the interests of this or that ‘sapinda’ but upon a fair consideration of what may be called the family council.

8. The question as to who were the kinsmen whose assent would supply the want of positive authority from the deceased husband would depend on the constitution of the family at the time of the husband’s death.

9. In the case of an undivided family (where the husband was joint at the time of his death) the consent of the father-in-law as the head of the family must be obtained but failing him the consent of the husband’s brothers or other co-parceners in whom the interest of the deceased is vested by survivorship would probably be required.

(a) Acceptance of consideration by the widow, taking or giving a boy in adoption, does not make any difference.69

(b) A custom prohibiting adoption will be valid but it is very difficult to establish such a negative usage. The fact that there is no instance of any widow of the family ever having adopted does not necessarily show that there is a family custom prohibiting adoption by a widow.70

(c) Where there are several widows, if a special authority has been given to one of them to adopt, she, of course, can act upon it without the consent of the others. In the Bombay School where there are several widows, the elder has the right to adopt even

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69 Maharajah of Kolhapur v. Sundram, AIR 1925 48 Mad 497.
70 Famindra Deb v. Rajeswari, (1885) 12 IA 72.
without the consent of the junior widow but the junior widow could not adopt without the consent of the elder unless the latter was leading an irregular life which would wholly incapacitate her.  

(d) A Hindu widow who is living in concubinage and is in a state of pregnancy resulting from such concubinage is incompetent to take a son in adoption to her deceased husband.

4. The capacity to be the subject of adoption

1. The person to be adopted had to be a male. It is now well settled that the adoption of a daughter was invalid under pristine Hindu Law.

2. He must belong to the same caste as his adopting father and by preference, of the same 'gotra'. Thus, a Brahmin could not adopt a 'Kshatriya' or a 'Vaishya' or a 'Shudra'. It was not necessary that he should belong to the same sub-divisions of the caste.

3. He must not be a boy whose mother, the adopting father could not have legally married during her maiden state but this rule had been restricted in many cases to the daughter's son, sister's son and mother's sisters's son. This prohibition did not apply to 'Shudras'. Even as to the three upper castes it had

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71 Mandakini v Adinath (1891 ICR) 18 Cal. 69.
72 Sayamalal v. Sandamini (1870) 5 BLR 362.
73 Gangabai v Anant (889) 13 Born. 690
74 This is based on the Vyavahara Mayukha which relies on the analogy of 'upanayana' thread ceremony only a male of the three upper castes undergoes in his childhood, as stated in the ancient text a astavarsain brhamanam upanayika).
75 The Dattaka Mimamsa (p112-116, VII 30,34) and Dhannasindhu (Ghaper-9) relying upon such instances as that of Shanta, the daughter of king Dasaratha (who was adopted by king Lomapada) and of Pritha who was the daughter of Sura and was adopted by Kumtibhoja say that even a girl may be adopted. This view is sharply criticised by Nilakinhintha in the Vyavahara Mayukha. There are also instances of customary adoption of daughter in certain communities Pannalal in Kumaun local customs states that a girl could be adopted as a daughter in Kumaun by custom.
76 This is known as the 'Viridha sambanda' rule; Minakshi V Ramananda (1888) II Mad 49.
been held that an adoption though prohibited under this rule may be valid if sanctioned by custom.

4. A child suffering from disqualification such as congenital blindness, loss of a limb, chronic disease, impotency etc. was not fit for adoption.77

5. A person who had become a sanyasi could not be taken in adoption unless he had renounced the order.78

6. Illegitimate children could not be adopted nor was the adoption of an orphan valid.79 An only son could not be given and taken in adoption.80

7. As regards the age of the boy to be adopted, there was great divergence among the medieval writers.81 At least four propositions are deducible from the facts.

7.1 If all 'samskaras' from 'Jatakarma' to 'Cuda' (i.e. including it) have been performed in the family of birth that boy cannot be adopted in another family.

7.2 If a boy's 'Cuda' and other later ceremonies are performed in the family of adoption, he is fully an adopted son.

7.3 A boy over five years of age cannot be adopted at all.

77 Therefore it was held in Surendra Narayan Sarbhadhikari v Bhola Nath Roy Choudhari (1944) 1 Cal 139 that a deaf and dumb person cannot be adopted.

78 Culabrao v Nagara (1952) Nag 591.

79 The reason for this restriction is that the adoption being essentially a gift by the natural father to the adoptive father, only the legitimate parent had such authority.

80 Sri Balusu Guruling Swami v Sri Bajusi Ramalalamanna (1899) 22 Mad 398. This condition is recommendatory in nature. Earlier the eldest son could not be given in adoption since as the Mit (on Yaj 11,136) puts it, is the eldest son alone who is the foremost in serving the purpose of a son as regards his father. According to Manu IX, 106, which says a man becomes one having a son by the mere fact of the birth of his first son and becomes free from the debt owed. But later the courts held this rule to be taken to be only recommendatory and the adoption of the eldest son was held valid as that of an only son. Kane P. V., (1993), History of Dharmasastra, Vol. III II Edition, Bhandarkar Oriental Research Institute, Pune.

81 In this connection certain verses of the Kalikapurana, Vyavahara Mayukha and Datataka Chandrika assume importance. The Datta Mayuka says that the best time for adoption is up to 3 years, then from three years to five is the next best and that after five no boy can be adopted.

The Datta Chandrika (p.36) holds that a boy of the three higher classes can be adopted upto 'Upanayana' and that a 'Sudra' boy can be adopted till his marriage.
7.4 A boy whose 'Cuda' has been performed in the family of birth may be adopted up to five years provided the rite called 'Putresti' is first performed in the adoptive family before any other ceremony is performed on the adopted boy.

This divergence is reflected in the case law.82

8. A stranger may be adopted though there are near relatives

4. Formalities and Rituals Under Ancient Law

Religious ceremonies was an essential ingredient in adoption under the pristine law thus emphasising the religious aspect of adoption. Adoption consisted of giving of the boy by the natural father and taking the boy by the adopter with the intention to transfer him to the family of the adopter. The physical act of giving and taking was absolutely necessary for the validity of an adoption in all cases whether the parties were twice born or 'Sudras'.83 Another requisite (in some cases) is the homa called Dattahoma.84 It is not necessary that the 'dattahoma' must be performed immediately after the giving and taking but it may be performed later and its performance could be delegated to others.85 There is a conflict of opinion whether in all cases datta homa was necessary. The

82 In Bengal, Benaras (Ganga Sahai v Lekhraj All 253) and Bihar the courts held that the boy must be adopted before upanayana. The same rule in Madras was prevalent (Virargav v Ramalinga 9. Mad, 148 FB). But there it was further held that if the boy to be adopted was of the same 'gotra' as the adopter, the adoption may be made after upanayana but before marriage. In Bombay, a person could be adopted at any age even after marriage and even after he had children and he could be even older than the adopter. (Dharma v Ramakrishna 10 Bom. 80,84). In the whole of India a 'Sudra' could be adopted only before his marriage but in the Bombay Presidency, the adoption of a married man and of one having even a child is allowed among 'Sudras' (Lingayya V Changalammal Mad 407).

83 Kane P.V. (1973), History of Oharmasastras, Vol.III,11 Edition, Bhandarkar Oriental Research Institute, Pune. The act of actual giving or taking should be delegated to a third person but the power or right to give a son in adoption can be delegated to any person. (Bhagyvandas v Rajmal) (1873) 10 Bom. H.C.241

84 Datta Homa is the sacrifice of the burning of clarified butter which is offered as a sacrifice by fire by way of oblation.


86 Valubai v. Govind (1900) 24 Bom. 218.
ceremony of adoption as described by Baudhyana is probably the oldest on record. 87

Then the other minor ceremonies such as ‘putresji jog’ (sacrifice for male issue) were not necessary to the validity of adoption.

**Legal Consequences of Adoption**

The legal consequences of a valid adoption were the same whether the adoption was made by a Hindu himself, his wife or widow.

A valid adoption had the effect of transferring the adopted person from his natural family into his adoptive family as effectively as if he were born in such family. The boy adopted was for all intents and purposes the son of his adoptive father. The adopted boy lost his status in the natural family and the rights of a son in the family of his birth.

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87 Baud Gr, Sesasutra 11’ 6.4-9 followed by Taittiriyas or followers of the Black, Yajurveda according to Datta Mimamsa KP 177 and Dharma Sindhu, p 161
The ceremony of adoption as described by Baud which is probably the oldest on record is as follows. When about to take in adoption the adopter makes ready or collects the following viz. two pieces of cloth, two earrings, a finger ring, an acharya (officiating priest) who is well versed in the ‘Vedas’, a bundle of 'kusa' grass, fuel sticks of palasa (Butea Frondosa). Then in the midst of invited relatives after informing the ruler, he serves food to Brahmans in the assembly hall or in the middle of the house. The adopter makes the Brahmans pronounce the benedictions. Then he goes into the presence of the giver and begs of him 'give your son'. The giver says 'I give'. The adopter then takes hold of the boy with the words ‘I accept thee for the continuity of my family. Then he decks the boy with the pieces of cloth, the earrings, the finger ring and performs the acts from laying fuel sticks round the alter top upto the offering of oblations into fire, he offers boiled rice into fire with the mantras. (RgV, 4, 10 or Ta s, 1, 4, 46) Then having offered oblations of clarified butter with ‘Vyahritis’ (mystic syllables) he performs the acts from the offering to Agni down to giving of the cow and presents. The adopter gives as daksina (fee) to the priest the piece of cloth and rings with which the boy was decked. The procedure laid down by Saunaka who appears to be much later than Baud is somewhat different and is as follows:
The adopter should fast the previous day, he should offer madhuparka to the officiating priest, should perform all the details from the placing of fuel sticks on the fire upto the purifications of clarified butter with the blades of kusa grass. The giver recites (when begged) the five verses from Rig Veda and the adopter holds the boy with both hands while repeating the mantras, then boiled rice is offered. (RgV4, 10 X, 85,38,X,85,41-46).
The basic text on this point is that of Manu\textsuperscript{88} which may be literally translated as follows. The son given should not take the ‘gotra’ (the family name) and the wealth of his natural father, the pinda’ (the cake of boiled rice offered to deceased ancestors in Shraddhas) and he follows the gotra and takes the wealth of his adoptive father. The plain meaning of the verse of Manu (IX,142) is that when a man gave away his son in adoption, then that son was transferred into another family. On a valid adoption the position of the adopted son in the adoptive family as to rights, liabilities and disabilities were in all respects the same as that of a natural born son of his adoptive father whether they were personal or related to property which is separate or of the joint family.\textsuperscript{89}

Where the widow of a coparcener adopted a son to him, the son become a coparcener and coparcenary interest in the property was created by the adoption co-extensive with that which the deceased coparcener had and it vested at once in the adopted son by divesting those who on the death of the adoptive father had taken it by survivorship as between an adopted son and a natural son (natural son born after adoption) the adopted son does not on succession to his adoptive father share equally with such a son.\textsuperscript{90}

In those parts of India where Dattaka Chandrika is applicable the share was 1/4 the share of the natural son and where Dattaka

\textsuperscript{88} Manu IX, 142.

\textsuperscript{89} The preceding verse states that the adopted son takes the wealth of his adoptive father. The Vyavahara Mayukha explains Manu’s verse and arrives at the conclusion that the four words gotra, rikha, pinda, and saudha are not to be taken literally but they were only used to indicate all those consequences only in relation to the natural father (Manu IX, 141).

\textsuperscript{90} Mitakshara 190, Dayabhaga Book IV, part II, Chapter I The proportion of his share in the various schools is as follows:

<table>
<thead>
<tr>
<th>School</th>
<th>Share of Adopted Son</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Mitakshara School in Bengal</td>
<td>-1/4 share of natural son</td>
</tr>
<tr>
<td>2. Benares School</td>
<td>-1/4 share of the natural son</td>
</tr>
<tr>
<td>3. Sudms in Madras &amp; Bengal</td>
<td>-equal to that of natural son</td>
</tr>
<tr>
<td>4. Dayabhaga School</td>
<td>-1/3 of the whole estate</td>
</tr>
</tbody>
</table>

84
Mimamsa is followed the share was 1/5 of the share of the natural son.

On the adoption of a married person, his wife passed with him into the adoptive family and his son born after adoption though conceived before, but not his son in actual existence at the date of adoption also passed into the adoptive family.

As a general rule where there had been an adoption in form but such adoption was invalid, the adopted son did not acquire any rights in the adoptive family.

**The Doctrine of relating Back** - The principle of relating back is based on a legal fiction that there should be no *hiatus* or break in the continuity of the line of the adoptive father. The rights of the adoptee came into existence only on the date of adoption for purposes of limitation. But an adopted son’s right to set aside an invalid alienation by the adopting widow after her husband’s death can be set aside by the adopted son provided they were unauthorised.

The doctrine of relation back has two exceptions, the first is that it does not apply to the case of succession to a collateral’s property and the second is that it does not divest a person who has taken the property not by intestate succession but by transfer *inter vivos* or by will of the father or other preferential heirs who had taken the estate in the meanwhile.

**Customary Adoptions** - There were certain customary adoptions prevalent in some communities. A custom known as *that of Illatom adoption* prevailed among the Reddi and Kamma castes in the former

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92 Bai Kesarbai v Shirsangi, 34 Bom. LA, 332.
93 Vaidyanatha V Savithri (1948)41 Mad 75.
94 Revabai v Sitaram AIR 1984 MP 102, Vijia Ram Aaj v Ananda 1952 All 564.
Madras Presidency. The custom consisted in the affiliation of a son-in-law in consideration of assistance in the management of family property. The Supreme Court examined the nature of Illatom adoption and its special features. Unlike the other adoptions under the pristine law, no religious significance is attached to an Illatom adoption. The legal consequences ensuing from Illatom adoption as laid down by the honorable Supreme Court can be stated as follows:-

a. An Illatom adoptee is entitled to the full rights of a son after the death of the adoptive father, who is his father-in-law.

b. The right is available even as against the natural sons.

c. But during the lifetime of the father-in-law in the absence of a specific agreement, he has no right to claim partition of the family property.

d. The Illatom son-in-law is not an adopted son, he does not lose any right in his natural family.

e. The property of the Illatom adoptee including the property he has taken in the adoptive family is inherited by his own blood relations to the exclusion of those of his adoptive father.

In Punjab there was a customary appointment of an heir creating a personal relationship between the adoptive father and the appointed heir only. No relationship of the appointed heir comes into existence with the ascendants or collateral of the appointer.

It was customary among the caste of 'naikins' or dancing girls to adopt, daughters. The burden of proving a custom of adopting a daughter was very heavy on the person alleging it.

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95 After the States Reorganisation Act, the custom was found in several areas of Andhra Pradesh, Tamil Nadu and Karnataka which were parts of Madras Presidency.
99 Abdul Rehman v Raghbir Singh 1949 PLR 119.
100 Gupte SV, Hindu Law, AIR Publishers, p. 1024.
The other communities like the Muslims, Christians and Parsis did not legally recognise adoptions but there were some customary forms of adoption among them. Under the Parsis the custom recognised adoption in two forms 'Palukaputra' and 'Dharmaputra'.

On analyzing the adoptions under Ancient Hindu law it can be said it is evident that during the Vedic times sons were adopted only for secular purposes. Instances can be cited of Vishwamitra and Kuntibhoja. Vishwamitra had an aurasa son of his own and Kuntibhoja adopted a daughter.

Later there were adopted sons with two fathers i.e. the natural father and adoptive father. This proved to be inconvenient as also unfair to the uterine brothers and also unsatisfactory in the religious context.

Then the various Smriti-writers recognised different types of sons. But many of these writers gave adopted sons, a low rank, compared to the 'aurasa' son. At no time was an adopted son equal in rank and status to an aurasa son. The adopted sons also did not get equal inheritance rights in the presence of 'aurasa' son. Since adoption was both for religious and secular purposes, adoption of daughter was not recognised.

There were different views relating to the adoption by a widow. But a widow in several parts of the country even after her husband’s death had to act according to her husband’s wishes, and for his benefit. Even in those cases where she could adopt without her husband’s authority, it was required that there should be no prohibition by the husband while he was alive whether express or implied. It was for religious and spiritual benefit for her husband that she was adopting, never for herself or for her own individual happiness. Therefore, adoption made by her to herself did not give

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the adopted child any right even after her death to property inherited by her from her husband. Even the Privy Council in deciding the numerous cases finally held that the spiritual purposes overshadowed the secular reasons. There are also absolutely no instances of unmarried women adopting a child.

Besides, there was no concept of the welfare of the child or justice to the child as the consideration for adoption. Adoption was not for the welfare of the child or to provide a home to the destitute, orphan child, but for the ‘welfare of the father’. There is also no mention of the consent of the child anywhere.102

Another aspect to be noted is regarding the bar against adoption of a disabled child. This bar was in tune with the principle of ‘religious purpose’ of adoption.

Therefore, there is one underlying concept and that is the supremacy of male during those times. The patriarchal values appear to deeply embedded in this concept of adoption, especially after the vedic period.

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