Chapter 5

CHILDREN AND CUSTOMARY LAW

Custom is to society what law is to the state. When the state accords the customs formal recognition, they get converted into customary laws. Customary laws are composed of a large body of rules observed by communities evidenced by long usages and founded upon pre existing rules sanctioned by the will of the community. In this chapter an attempt is made to understand the social milieu in which the children were brought up or taken care of or understood by the family in different social groups. Customs concerned the life of the child, particularly issues connected to the betrothal, practice of early marriage, inheritance, adoption, guardianship and illegitimate children. The first section begins with a discussion on, betrothal and marriage in Punjab. Inheritance and adoption of children is discussed in the second section. In the third section guardianship is taken up. In the fourth section the issue of illegitimate sons is taken. The last section sums up the position of customary law vis a vis children.

There are however some limitations when we study or analyze customary laws for the purpose of ascertaining the position of children in the society, such as, 'child' is a very wider term and when we discuss customary provisions for children, 'children are children for parents for their whole life' in other words children are viewed in relation to their parents. Hence, there is no definite age limits as such in the way that legislation by the state’ has a particular age group. Another major hindrance is that we have to deal with so many castes and tribe and variations in their custom that at times it interrupts our generalizations about the subject. As Sir Meredyth Plowden, made remarks “It seems

expedient to point out that there is, strictly speaking, no such thing as a custom, or general custom, of the Punjab in the same sense that there is a Common Law of England; a general custom applicable to all persons throughout the Province, subject like the English Common Law to modifications in its application, by a special custom of a class, or by a local custom.2

Before the advent of the British, religious scriptures, customs and usages had the force of law. These customs varied with region, religion, social background, level of economic development and even the political order. As early as 1781, customary laws and personal laws were taken into consideration and pandits and maulvis were appointed as interpreters.3 Hindu law based on its texts such as the Smritis, Shrutis, Dharamshastras and Muslims law on Shara was given importance.4 The East India Company was relatively dependent upon unwritten and undefined customs as the basis of adjudication. The insistence on a uniform system pre selected certain customs from a myriad of others, to become customary law. Colonial society thus had two parallel regulating authorities- the formal legislations upheld by the State and the informal system of customs and personal laws recognized by the state.5

In India, as it is generally admitted, Government by legislation, in the modern sense of the expression, is of very recent date. The Hindu rulers and chiefs of various provinces never made any serious attempt to rule their respective states or dominions by legislation. They never framed a code of laws regulating purely private rights. They did not attempt to interfere with the diverse social and domestic rights, duties and interests like marriage, adoption, succession etc., of the people over

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whom they held their sway. It would seem that all these domestic and social matters were severely left to be shaped and moulded by the people themselves or, rather, by accidents. The people, no doubt, guided themselves in these matters by rigidly following their ancient customs and traditions, which the practice of their forefathers consecrated in their eyes. So far, therefore, as India is concerned the importance of customary law is very great indeed.  

The Indian Evidence Act deals with three classes of customs, viz., Public, General and Family or Private. The distinction between Public and General customs, as drawn under the English law, seems to be that the former concern every member of the State or Kingdom, whereas the latter are limited to a lesser though still a considerable portion of the community. According to Sripati Roy, “the question of customs and usages can be treated with reference to the people, the communities, the professions, the guilds, and the trades among which they prevail and are observed. In British India we find three principal communities occupying the country-Hindu, the Buddhists and the Muslims and each of these communities had its own peculiar customs and usage”. At the same time regional impact or intermingling of these customs can not be denied.

In no region, throughout British India, is the reign of custom so paramount as in the Punjab. In pre British times; there was no written record of customs prevailing among various tribes inhabiting the Punjab. The Panchayats, Khaps or Jirgas (caste Panchayats) enforced these customs which were enshrined in the ‘unexpressed conscious’ of the people. When the British set up the Board of Administration, Dalhousie, the Governor General, assured the people of upholding ‘native institutions and practice; and that popular institutions would be

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6 Sripati Roy, *Customs and Customary Law in British India,* 22.
7 Section 48, Explanation, Indian Evidence Act. Quoted by Sripati Roy, 40
8 Ibid, 40
The Punjab Civil Code, which aimed at the collection of rules to bring uniformity in judicial procedure, came into force. In 1859, Punjab was constituted into a regular province under a Lieutenant General. In 1872, the Punjab Laws Act was passed and amended by the Act XII of 1878, which provides that questions regarding succession, special property of females, betrothal, marriage, divorce, dowere, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition or religious usage or institution shall be decided according to any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience and has not been by this or any other enactment altered or abolished, declared to be void by any competent authority.

A majority of agricultural population did not follow Hindu or Muslim law but custom. Revenue authorities were entrusted with the task of preparing records of tribal and local customs. The work was started in 1864 under Princep and many settlement officers were appointed to assist him. Efforts were directed towards the completion of records of tribal customs under the authority of Settlement Officers who compiled a Rivaj-i-am at every settlement. These records were authoritative statements of custom of various tribes. Village headmen and other influential people of all the important tribes were asked questions regarding customs which were explained to them and their answers were recorded. They were also required to quote cases or instances in support of their answers. Manuals or English Codes of Customary laws in accordance with the Rivaj-i-am were issued by the authorities for each district and stood on much the same footing as Rivaj-i-am itself as evidence of custom and were to be preferred to the

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10 Jain, Outlines of Indian Legal History, 292.
11 W.H. Rattigan, A Digest of Civil Law for the Punjab. 14th ed. VII.
12 Ibid.
vernacular one in case of conflict between the two. The pre-colonial general guidelines for the welfare and orderliness of the society, were therefore, later compiled by the British with the help of field work on the customs of the people, so as to know the nature of the regulations adopted for a smooth functioning of the society.

The volumes on customary law have been written for the convenience of courts or in other words colonial court was trying to take decisions according to the customary provisions. So to begin with these customary provisions, which relate to social issues, define the social status of children in the family in the context of betrothal, marriage, adoption, inheritance, guardianship and illegitimate children. It seems that almost all the guidelines directly or indirectly had an impact on this young category of society. In the customary law, we can trace and understand the hold of society on the position of children.

I

Betrothal had been a very important ceremony in childhood itself. The important points of discussion in betrothal are, who had the control of betrothing a child and who took initiative, age of the child, breach of agreement and its causes, and its impact followed by marriage. Among Hindus regular marriage is a sacrament and thus indissoluble, among Muslims the wedding is really an execution of a solemn contract. Hindu dharmasastras have permitted marriages at an early age. A child below the age of puberty has been permitted to marry with the consent of the guardian. Marriage usually followed the mangni (betrothal) which is also called Kurmai in the most parts of the Punjab. Customary Law provides us information about set of rules followed various communities and regions for the betrothal and marriage of the child in the period under study.

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The father had the control of betrothing his children whether boy or girl in their tender ages. Among the children the girls' betrothal by the family members was held more important than the boys. The father of the girl had the first right to betroth, after his death generally the mother or the elder brother would take this responsibility. In the eastern parts of the province, the girl's mother could effect betrothal consulting with agnates or the father's place was generally taken up by the brother if of age or by the uncle. However in the western parts the sequence was as; elder brother, if of age, paternal grandfather, father's brother, mother and remoter agnates, or the two latter, should betroth within the tribe. Among the lower castes the mother generally had a full right over her daughter's betrothal. Thus the betrothal of a girl held more social significance than that of a boy.

The initiative in betrothal in the eastern parts of the province specially among the Hindus laid with the girls family however, among the Mohammedans; generally the boy's people took the initiative. In the western parts of the province, for both the Hindus and Muslims, the girl's people or specially the father of the girl took the initiative. However, there were exceptions such as in Muzzafargarh, Dera Gazi Khan and Peshawar where the boy's people took initiative. In the Watta Satta, both sides could take initiative in betrothal whereas if the girl is being sold, the boy's father took initiative. Thus, there was a general tendency or pressure on girls' people rather than those on boys' people.

16 op.cit. Vol X. 3
19 Customary Law of the Peshawar District. XVII. 5-6.
Customary law also throws light on the ‘age of betrothal’ of children that was mostly prevalent. In eastern Punjab the Gujars of Rupar put the lowest age of betrothal at 5 weeks, many tribes putting the maximum age at 40 years. In Kaithal the Rajputs assert that betrothal cannot take place before the age of 10. In Lahore Jats and Arains betroth from 4 to 6 years, Rajputs from 12 -14 and Dogras from 5-20 years. In the west, the Baloch followed the practice of betrothal between 5-16 years. In Dera Gazi Khan 12 was the usual age while 5 was lowest. In Peshawar, betrothal may be affected at any age but girl must be 2 years younger than the boy. Further, Muslims as a rule betroth at a later age than Hindus for eg., the Hindus in western Punjab Jhelum and Shahpur betroth from 5 to 12 years while Muslims from 10-15. Further, among Muslims if the parties were first cousins they were betrothed before 2 or 3 years. When betrothal is pun or satta watta where no money consideration takes place the parties were 5 to 6 years old. Betrothal was common among well-to-do at a very early age. Thus, there was a custom of betrothing children at a very young age. There was a tendency early betrothal among high castes than the lower. However for betrothal there were no separate rules for the girls and boys on the age.

The contract of betrothal was not irrevocable. There were many instances when the contract was broken. Leprosy, impotence, blindness, or mortal disease in either party was the accepted norms for the breach of betrothal. Immorality on the part of the girl was seen as a valid cause sometimes the boy too was not spared for this.

23 op.cit. Vol X. 3
25 op.cit. 1899.XVII.
26 op.cit. Vol.XIX.17.
27 'pun' means piety and satta watta means exchange
29 op.cit. Vol.XIII.5
31 op.cit. Vol.V.45
However, sometimes contract was considered much more binding on the girl's relations than on those of the boy and this is expressly stated in the Lahore customary law that a Jat boy can break of his betrothal at pleasure whereas girls cannot. Among some tribe the girl was considered as valuable piece of property and that betrothal was a contract to transfer her ownership to the boy's family, when she reaches marriageable age after the death of her prospected husband.

As for marriage, children were married at a very early age. In the customary law of the Province, there are many coded instances, where marriage ceremony was held in the ages of 3 years to 17-18 according to the prevailing custom. The important points of discussion are; who gave consent to marriage, practice of endogamy, which is indirectly related to the logical bent of mind of parents of daughters to marry their daughter in early age so as to avoid problem of seeking bridegroom in their respective higher clans or castes and prohibited degrees of marriage.

As a general rule a virgin, whether of age or under it, could not contract a valid marriage without the consent of her guardians. However, it is valid by Muslims Law if the girl was grown up, all the Jats and Sayyids of tahsil Dera Ghazi Khan, follow Muslims law, which allowed an adult girl to contract a valid marriage, Awans, Gondals and Rahja were of the view that a woman can consent to her own marriage without her guardians' assent. For boys contracting marriage was possible but not generally appreciated. This is equivalent to saying that

32 op.cit. Vol.XIII. 4
33 op.cit. XV. 24-25.
34 Customary Law of Multan District. 21-23.
35 On the other hand, in Ludhiana, and other districts there were many cases quoted amongst the Rajputs and other Muhamden tribes in which a grown up girl had contracted a marriage without her parents's consent, of course such action was not admitted as lawful by the representatives of the tribes. Vol.V.44 and 48, where Awans are specified as furnishing instances of grown up girls contracting valid marriages. Vol.VIII. 5, 6.of Ambala and XIII, 3
36 op.cit. Vol.XV.30-20
37 The Janjuas of Pind Dadan Khan say that though a marriage contracted an adult male would be valid even if contracted without his guardians' consent, the issue
for a marriage the consent of the same person is necessary as for a betrothal. As a general rule a wholly legitimate marriage of a child can only be contracted within the caste, but this rule was disqualified by so many important exceptions that it is almost doubtful whether it can accurately be called general. In the next place the characteristic rule of hypergamy, was so widespread in the Punjab which permits a man to take a bride from a lower caste, but forbade him to give a daughter to a husband of a lower caste.38

Certain alliances were prohibited according to the general custom most importantly the angas or arms, commonly called the four gots39 were to be avoided. This meant the got of the father or one’s own, got that to the mother’s father and 3rdly that of father’s mother, and lastly that of the mother’s mother.40 However, there are many instances as many as 48 examples in the Multan Customary Law, where marriage being forbidden only in the father’s got.41 Despite some relaxations there was prevalence of the custom of endogamy which indirectly gave rise to early marriages. Parents of the girls of higher castes were worried not to loose the prospects of the higher castes bride-grooms in favour of the lower castes brides.

Thus, the child’s future in society, such as for its marriage age, choice of life partner and his social milieu remained in the hands of the father, mother or father’s family, who took decisions in keeping with custom. Impact of this custom is that as the Census records show a considerable proportion of children were married at very tender ages despite the restraint measures by the government by 1929 on child marriage. These varying customs also afford a striking illustration of the

38 H.A.Rose. Compendium of the Punjab Customary Law. The civil and Military Gazette Press. 1907.10
39 got or gotar a specific symbol of a tribe.
40 H.A.Rose. Compendium of the Punjab Customary Law. 10
41 Customary Law of the Multan District. 12.
position enjoyed by girls or boys family in different parts of the Province and amongst the different communities and tribes.

II

Inheritance is another issue discussed in customary law. Inheritance of father’s property by his children is an important theme from different perspectives. Firstly, to know how the property was divided among the sons, secondly, to know the daughters rights in her fathers’ property, and than to know the rights of adopted son, step sons and illegitimate sons in the ancestral property.

The heirs to the land of a deceased man were his sons, other male lineal descendants, his widow, his father’s widows or his son’s widows. Among the sons the general rule is equal partition, by the rule of pagvand or bhaibant, but to this rule there are three classes of exceptions. First is the rule of chundavand or equal division between the groups of son by each wife, Second is primogeniture, in the English sense is confined to families which may be classed as formerly ruling or semi-independent. There are good many instances among various tribes of the eldest son receiving an extra share. In the east of the Punjab this custom is apparently unknown, (Except in Kangra) but in Sialkot it begins to emerge, and in Shahpur the Hindus, certainly not here a ruling caste, have the custom of the sawai (lit, “1 ¼”) whereby the eldest son gets one-fourth more than each of the younger sons; but this custom, which is found chiefly among Aroras, was exceptional. In Dera Gazi Khan this rule was known as the sawaya and was prevalent among the Hindus of Rajanpur and the Jampur. And third was an unequal division among the sons at the discretion or by the favour of the father. Closely associated with the custom of ‘primogeniture’ in the restricted sense was

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42 It is related to the Pagri or Turban and equal division of property among brother.
43 The ‘chunda’ is the knot of hair on a woman’s head, and ‘chundavand’ means equal division between the group of sons by each wife. Thus if A leave 3 sons by his three wives, B, C and D, his property will be divided into three equal shares, although B may have six sons, C four, and D only one. H.A.R. Compendium of the Punjab Customary Law. 41.
that by which a father is permitted to select one son, who was worthy, and bestow on him an enhanced share of the property, diminishing the shares of the other sons. This custom is virtually unknown in the eastern Punjab.  

‘Pagvand’ rule was followed among the Sidhu Musalman Jats, Hindu Jats of Gurdaspur, Hindu Rajputs of Hoshiarpur, Gondals of Bhera and Sargodha and Rindwanas of Shapur while, Salahriya Rajput of Sialkot, Malkotra Rajputs of Hoshiarpur, and Kangra, Gakhars of Jhelum Gagiani, of Peshawar, Hindu Jats of Sialkot, Hindu Jats of Delhi and Jagirdar Jats of Ambala followed the Chundawand rule. Under the Hindu Law the son was a coparcener, an owner of the ancestral property along with his father and other members of the joint family. Under the Customary Law, the son had no right of ownership in his father’s lifetime. He had only a reversionary interest in the property, and a right to protect that interest by interfering to prevent unnecessary alienations.  

As a general rule, among Hindus, in the east of Punjab, daughters had no right of inheritance in their father’s property, because on marriage, which is an indispensable object in a girl’s life, she passes out of her father’s family and enters that of her husband. However among Muslims the daughters enjoyed a better position than they did among Hindus and in the western Punjab and trans-Indus, daughters stood in almost the same position among Hindus, owing to Muslims influence. Muslims Law permits daughter’s to inherit.

When we analyze the daughter’s right to inherit the property of her father, we come across three things, one is, when the girl was strictly excluded from inheritance, or given maintenance in the case she was unmarried. Second was the case when the girl had right to inherit, when

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44 H.A.R. Compendium of the Punjab Customary Law, 46
46 op.cit. Vol VIII. 11.
47 Ibid.139.
there were no collaterals left for inheriting and third was when she remained unmarried for her whole life or a married daughter lived in her father’s house after her marriage (ghar jawai), in some cases even for default of sons and orphan daughter’s also inherited.

For the first instance, in the Kaithal even a got-bhai or collateral, however remote, would exclude daughters, in Ambala Jat and Gujars say the same. In the Ferozepore and Ludhiana (Hindus) daughters never inherit. In the second type, daughters inherited in Ambala on the failure of collaterals, Gurdaspur and Sialkot in the absence of near collaterals, Muzzafargarh collaterals within seven degrees and for Kangra after Kinsmen. Ludhiana, Lahore, Gurdaspur, Rawalpindi, Chamba Kulu this rule was followed. Lastly, when the girl was given right to inherit, on being living unmarried, or living with her father’s house after her marriage, or default of a son or orphan daughter. Jhelum—a daughter can hold the property but only till death, in Peshawar the rule is that unmarried daughters inherit in the absence of male descendants. In the Sialkot, Jhelum, Rawalpindi, Multan, Muzaffargarh, and Kangra same custom was followed.48

For ancestral property daughters were generally excluded by ‘near collateral’ Ghorewaha Rajputs of Garhshankar Tahsil of Hoshiarpur, Muslims Naru Rajputs of Hoshiarpur and Jullundur, Arora Rajputs of Jhang district, in favour of collateral in Muzaffargarh, Muttazai Pathans of Basti Mithu Sahib, Lodhi Pathans of Ambala, Hindu Jats of Ludhiana, and Jullundur, Kalasra Jats of Muzaffargarh, Biloch Khosas and Sipras of Shapur. There were tribes among whom the daughter was excluded inspite of self-acquired property of her father was Hindu Rajputs of Rohtak, Sayyads of the Shapur, Kambohs of Amritsar, Handal Jats of Amritsar, Gariwal Jats of Ludhiana, Sandhu Jats of Amritsar, and Arains

48 Information from Punjab Customary Law Manuals.
of Lahore (paternal aunt’s son had preferential claim) 49

Punjab Record no. 32 of 1895 a full bench held that in a village community where a daughter succeeds, either in preference to or in the event male heir was incapable due to any reason, she simply could act as a conduit to pass on the property as ancestral property to his sons and their descendants, and does not alter the character of the property. 50

More importantly a daughter succeeds to the self-acquired property of a sonless proprietor in preference to his collaterals. Tribes where daughters were not excluded were, Arains of Sharakpur tahsil, Hindu Rajputs, Ghorewaha Rajputs and Arains of Hoshiarpur tehsil, (though property situated in Lyallpur, custom of Arains in Hoshiarpur district taken into consideration), Hindu Rajputs and Rajputs of Manj Tribe in Ludhiana, Khattars of Attock, Muhammdan Jats of Sialkot and Gujranwala, Qureshis of Multan City, Hindu Jats of Lahore and Ambala, Gill Jats of Amritsar and Ferozepore, Wirk Jats of Gujranwala , Usman Sheikhs of Gurgaon, Chopra Khatri of Jullundur, Pathans of Mianwali, Brahmans of Hoshiarpur, Dhani Brahmans of Montgomery, Gaur Brahmans of Palwal, Gaur Brahmans of Thanesar, Khokhars of Montgomery, Aggarwal Banias of Hissar, Muhammdan Rajputs and Saraogi Jain of Ambala, not depending mainly on agriculture, Sipras of Shapur, Awans of Rawalpindi to the extent that daughters son excludes collaterals, Mummdans Rajputs of Hoshiarpur and Akali Nihangs of Taran Taran. 51

In Gujrat all Muslims (except Rajputs in Kharian and Phalia) say that if a sonless land-owner puts his daughter with her husband in possession of the land, either verbally or by deed, then the daughter and her children will, after his death, become its owners. In such a case the collaterals’ consent was not required, more especially if the (son -in-law)

has been put in as a ghar-jawai.\textsuperscript{52} Even if daughter needs a share, she receives it, if it is not given her, she sues and obtains it. \textsuperscript{53}

In addition to it a proprietor whether in the presence of his sons or without can make gifts to his daughter with some general guidelines or with the consent of agnates in some circumstances as gift to daughter whose husband is \textit{khanadamad}, if she had rendered services, he could gift his daughter a portion of the ancestral holding in return for services rendered. On 25\textsuperscript{th} June 1897 held that a gift of ancestral land in favour of Khanadamad was invalid.\textsuperscript{54} Punjab Record No. 14 of 1906 held that among \textit{Sahari Pathans} of Tahsil Shakargarh a gift of 1/3 red of his ancestral land by a sonless proprietor to his daughter in the presence of a brother of the donor was valid by custom. Another of 1\textsuperscript{st} May 1907 held that a gift of ancestral land made in favour of daughter without the consent of the collaterals was invalid by custom.

The step-son, i.e., the son of a widow by her first husband, has as a rule, no rights whatever in the property of his mother's second husband. In the Ambala, Ludhiana, Ferozepore, Amritsar, Gurdaspur, Sialkot, Shahpur, Muzzafargarh, this rule is followed. They are, however given maintenance or minor portions for e.g. 1/20 share of the property as in Sialkot. In Dera Gazi Khan 1/4 share is given following Muslims Law.\textsuperscript{55} While in the hills the son born to a woman in the house of a second husband is regarded as his own son, among the Kanets and lower castes, whoever the actual father may have been, such a son is called \textit{ronda} in Kullu and succeeds like any other son, but it is not clearly laid down that a \textit{pichhlag} (or step-son born before the second covertures) would succeed his step-father.\textsuperscript{56} This privilege of the widow received an extraordinary extension in the right conferred on her children by a mere

\textsuperscript{52} C.L. Tupper. Vol II. \textit{Punjab Customary Law}. Calcutta. 1881.201.
\textsuperscript{53} Ibid.
\textsuperscript{54} C. L. Tupper's \textit{Punjab Customary Law}. Vo. III. 53
\textsuperscript{55} Ibid.
\textsuperscript{56} The 'pichhleg' is expressly excluded in Kangra Proper: \textit{Punjab Customary Law II}.184.
liaison, provided that they are born in the late husband’s house. Thus, among the Gaddis of Kangra such a child succeeds without reference to its real father, ‘born within the four walls’ of he deceased husband’s house. However, illegitimate children had no right to inherit.

Thus, in the Punjab the Pagwand and Chundawand customs were followed for the inheritance of property. However, primogeniture the (rule of favouring the eldest son) and unequal division was also resorted to. Son was an owner of the ancestral property along with his father and other members of the joint family. Under the Customary Law, however, he was having no right of ownership in his father’s lifetime. He had only a reversionary interest in the property, and a right to protect that interest by interfering to prevent unnecessary alienations. As far as the daughter was concerned, she was denied the rights on the ancestral property, however she had the right to the self acquired property of her father but this rule had also many exceptions. Besides this, they also inherited on being living unmarried, or living with her father’s house after her marriage, or default of a son or orphan daughter. In addition to, it she could receive gift from her father with the consent of collaterals in the ancestral property. Step-sons and illegitimate sons were also denied rights of inheritance generally.

The Hindus attached no less importance to the institution of sonship than to the institution of marriage. Baudhayana declared, “through a son one conquers the world, through a grandson one obtains immortality, and through a great-grandson one ascends the highest heaven.” The Hindus call “son” as putra, ‘because the son delivers his father from hell called ‘put’. Thus to have a son was considered to be must for every Hindu. It was one of the three debts that a Hindu is

57 A very sharp distinction appears to be drawn between the ‘pichhlag’ and a child at the time of her second marriage.
58 C.L.Tupper, Vol II. Punjab Customary Law, II.242
required to discharge in this world. Recognition was accorded to as many as thirteen types of sons a great majority of them were either born outside the wedlock or obtained by sacrifice of moral values. All Hindu sages have condemned them. In course of time most of these secondary sons became obsolete and during the British period there remained only the natural born son and adopted son.60

However, adoption in Punjab was a purely secular arrangement, totally unconnected with religion. “there can be no doubt that, among those Aryan races who have practiced ancestor-worship, the existence of a son to offer up the religious rites has always been a matter of primary importance. Where no natural-born son exists, a substituted son takes his place. This naturally leads to the practice of adoption. Apart from all religious considerations, the advantages of having a son to assist a father in his life, to protect him in his old age, and to step into his place after his death would be equally felt, and were equally felt, by other races. The Sudras practiced adoption, for even the Brahmanical writers provide special rites for their case. The inhabitants of the Punjab and North-West Provinces, whether Hindus proper, Jains, Jats, Sikhs, or even Muslims, practice of adoption, was without religious rites, or the slightest reference to religious purposes” 61

In Amritsar all Hindus and almost all Muslims allow a sonless proprietor to adopt, and this appeared to be also the case in Ludhiana,62 Gurdaspur, Lahore and Sialkot. In Shahpur the custom of adoption was virtually confined to Hindus and the Muslims Awans.63 In Muzaffargarh it was being gradually introduced, but only among Hindus.64 In Jampur and Rajanpur the Jats recognized adoption, even if the adopter had a son.

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62 op.cit. V.66
63 op.cit. Vol. XV.57
64 *Customary Law of Muzaffargarh District*, op.cit.XX.39.
The Muslims who recognized adoption consider that a man can adopt a second son during the lifetime of the first, but the Hindus follow the rule, universal throughout these areas, that a man cannot adopt a second son unless his first is incapable of succeeding him. In Barmaur, Lahul and Churah. (Chamba) adoption is recognized. In Kullu adoption was chiefly resorted to by Kanets and Bairagis. Nevertheless, adoption was very rare even among Hindus, while among Muslims it was often alleged to be non-existent. In Ludhiana all Rajputs, whether Hindu or Muslims asserted that adoption was unknown among them. In Jhelum, Jampur and Sangarh adoption was practically unknown, even amongst Hindus.

In Dera Ghazi Khan it did not exist among the Baloch neither Jats nor Sayyids recognize it at all.

In the Punjab, adoption was common to the Jats, Sikhs, and even to the Muslims, just as in other parts of India, but with them the object was simply to make an heir. The religious notion of a mystical second birth was not imported into the transaction. No religious ceremony was used. There was no exclusion of an only son, or of the son of a daughter, or of a sister, nor was there any age limit. Thus it has no connection with the adoption by Hindu Law.

In the British period quest to have a ‘son’ or ‘heir apparent’ was fulfilled by adopting a son. In the Punjab, no elaborate ceremony of any kind was required for a valid adoption; and even from the point of view of strict Hindu Law the Datta Homan ceremony was not essential. The main points of discussion are, prevalence of custom, who can adopt, share of the adopted son in his adoptive father’s property, and natural father’s property.

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65 op.cit.XX 22.
66 Among the Bairagis this refers to spiritual adoption, the chela (adoptes) having a preferential right to the inheritance since Bairagi are not supposed to marry.
67 H.A.R. Compendium of the Punjab Customary Law 59-67
68 op.cit. XIX.52.
69 Kaikhosru J. Rustomji. A Treatise on Customary Law in The Punjab. 289
Further, in the Punjab there were two types of adoption prevalent, one was formal the other one was informal. The formalities required to make an adoption valid were few and simple. It was known as *god-lena* or ‘taking into the lap’ when the boy is an infant, and in Shahpur an adopted son was termed *putrela* by Hindus, and to adopt was *putrbana*; to make a son.  

These are apparently the only technical terms associated with the custom. The term *palk* was used for informal adoption. The *palk*, or boy who was merely adopted in the sense that he has brought up in his adoptive father’s house, either because the latter had no children, or from other motives of affection or charity, differing essentially from the formally adopted son. This custom was well established among Hindus (a case of a Brahman thus ‘adopting’ a Mohammedan Gakkhar boy being instanced); and less so among Awans). To such a son the adoptive father can make over a portion of his property during his life time. Adoption of a son as heir was often permissible, but a girl was apparently never adopted as an heiress to property of any kind. However, the presence of a daughter’s son was no bar to an adoption.

Variations ranges for formal adoption from the—resembling the ceremonies performed on the birth of the son to, distribution of *gur*, publicity of the assets which shows the maintenance of the adopted son is sufficient to that of a registered deed beside some religious observations. A few and simple ceremonies in the region were as, in Kaithal the distribution of *gur* which follows the public announcement before the brotherhood. In Ambala publicity taken with the maintenance of the adopted son was sufficient. In Ludhiana publicity

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70 *op.cit.* Vol. XV.57  
72 C.L. Tupper, *Punjab Customary Law*, Vol. 19, & XV.57. (But if his only son or male descendant (e.g.) an out caste, a man may adopt.  
73 *op.cit.* Vol.VIII.16.  
74 *op.cit.* V.25  

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alone was the essential thing. In Sialkot however, Hindus draw a chauk (a type of rangoli) on the ground, and gur is distributed among the assembled kin, though the chauk observance was not essential. Hindus of Rajanpur usually collected the brotherhood and worship Ganesh. In Ferozepore, Hindus of Rajanpur usually collected the brotherhood and worship Ganesh.75 In Ferozepore, Hindu Jats say that there must be a registered deed or that a feast must be given to the kindred and a cow or Rs. 1-4-0 bestowed on a Brahman; while Muslims say a deed was enough, or that it suffices for the adopter to have the boy circumcised and married.76 In Gujrat Hindus regard no adoption as valid without the observance of the shagun rite when the adopter takes the boy into his lap.77 In Amritsar it is actually stated that the ceremonies to be performed at a son’s adoption are, in whole or part, the same as those performed at the birth of a son.78 Judicial decision on 23rd July 1898 the court held that a man who is too poor to give a feast can effect adoption by executing a deed in the presence of the baradari (tribal relatives) and held that an adoption is invalid by custom unless all necessary ceremonies are duly performed.79 Thus for Ferozepore, Gujrat, Sialkot and that of Hindus of Rajanpur and Amritsar had a concern for religious rites on the time of adoption, while others restrict it to publicity of maintenance of the adopted son and some to mere announcement.

Adoption of a son is only logically permissible to a man, who has no male lineal descendant capable of inheriting.80 Contrary to the Hindu Law the adoption of an only son was allowed. In some cases however, it was not resorted, the only reason for the prohibition would be the natural objection of a man to part with his only son. Further, it was the...
general rule, that a man who had one son could not adopt another, that a man who has adopted a son was debarred from adopting a second.81

There were no general restrictions as to the age or condition of the boy adopted. He was usually minor and unmarried, but it was rare to find any disqualification attaching to the absence of these conditions for example in Ludhiana there was really no limit of age for adoption, and many instances of adoption of grown-up men are quoted.82 There are many examples when a son aged at 22 years was adopted.83 In Shahpur a married man could be adopted.84 However, in Gurdaspur he should not have attained puberty, or even, in Shakargarh tehsil, have undergone his first tonsure or been invested with the sacred thread85 In Rawalpindi only Hindu males could adopt and the adoptive father must accept the boy before he is 20.86 Nevertheless, in Amritsar the boy apparently must be unmarried.87 Thus, it clearly indicates the variations in this custom in one part from the other in the province.

As a rule nothing disqualified a man from adopting a son, unless he be spiritually dead to the world.88 Thus a bachelor, a widower or a man who is blind, lame or impotent, had a right to adopt89 –unless he be a minor.90 The right of widow to adopt a son as heir to her deceased husband was exceedingly limited. However, there were as many as 14 examples in the customary law of Ludhiana where collaterals either gave their consent or did not care to raise an objection. 91

It is interesting to note that in the Hills, the son-in-law was adopted. In Lahul the daughter must be given to the adopted son who

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81 op.cit. Vol. IX.v.
82 Ibid. Vol.V.69.
83 Customary Law of Ludhiana District 95-96
84 op.cit. Vol. XV.
86 Customary Law of the Rawalpindi District Vol. VI.1910.8-9
88 Ibid. Vol.V. 67-68
89 op.cit. VII.19; VIII.15; X.24;XII.23; XV.58 and VII.24
90 op.cit. XIV.21
91 Customary Law of Ludhiana District 94

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then becomes the heir; the adopted son succeeds, and after him his children. In Spiti, a childless man who had no younger brother or whose brother does not press his claims, adopts a man of his own got, or else he adopted a girl and sought a husband for her as his son-in-law and heir. Lastly, if he subsequently begot a son, the adopted son would receive the main portion of his land, the natural son being merely given a field for maintenance and becoming a lama just like any other younger son.92

Further, there was another limitation in the custom that the adopted son must be of the adopter’s caste or tribe, or indeed chosen from his own agnates or at the most of his own got. In Kangra proper all tribes agree that a man can adopt a boy of his own got or clan, and probably he could adopt a daughter’s son who would usually be of a different gotar. This was the principal restriction on the adopter’s freedom of choice, the others being few and confined to certain tribes and localities. There are examples adoptions even of adopting sister’s son or grandson. There are as many as 4 examples of adoption of step son. A man could adopt a son in the presence of his relatives, and bring him up in his own house, in every respect as his legitimate son.93

Adoption transferred the boy from his natural father’s family to that of his adopter; he became the latter’s son and succeeded to his estate, wholly; or if a son be subsequently born to the adopter shared equally. If more than one son be born to the adopter the rule of pagvand or chundavand would apply according to the custom of the family, the adopted boy being treated as the only son of one wife and thus, getting half the estate when the rule of chundavand applies.94

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92 H.A. Rose. *Compendium on the Punjab Customary law*, 57
93 *Customary Law of Ludhiana District*, Vol. V. 1911. 16
94 op. cit. V. 70: VII. 21; IX. 15, Amritsar; and XII. 26-27. Gurdaspur. Sialkot XIV appears to an exception, as there the adopted son takes a share according to the pagvand rule and the remaining sons inherit by chundavand.
Among the Muslims Awans of Shapur\textsuperscript{95} and among the Muslims of Sangarh tahsil. Dera Ghazi Khan, \textsuperscript{96} the adopted son inherits nothing if a natural son be born after his adoption; but the other Muslims and Hindus, who allow adoption in the latter District, say an adopted son shares with natural sons born before or after his adoption. In short, the Muslims idea of adoption is rather that of a conditional gift than of the transfer of a son.\textsuperscript{97}

However, the fiction of Hindu adoption, that the boy’s exclusive transfer to his adoptive father’s family was not, however, pushed to its logical extremes. As in Gujarat an adopted boy couldn’t adopt himself.\textsuperscript{98} An adopted son, whose tribe differed from that of his adoptive father, will only inherited the share bequeathed him by his adopter in Gurdaspur.\textsuperscript{99} If not so, among Hindu and Muslims Jats and the Sains of Shakargarh, he takes the whole.\textsuperscript{100} So, too, in Shahpur among the Awans the adopted son only inherit the share of the property gifted to him in writing by his adoptive father\textsuperscript{101} but among Hindus he inherited exactly as if he were a natural son. Again, in Amritsar, where the adopter has ‘set aside’ his adopted son’s portion, the sons begotten took the rest, and the Muslims tribes of Tarn Taran (other than Jats) had the curious rule that if no land be specified, as the adopted son’s share, he would get two-thirds, and the daughters, if any, one-third.\textsuperscript{102}

On the other hand, a boy adopted into another family generally lost his rights of inheritance in his own or natural family, but retained a kind of reversionary right there in. Thus he couldn’t inherit from his own father in the presence of collaterals, in Gujarat\textsuperscript{103} only near collaterals

\textsuperscript{95 op.cit. Vol. XV.60.}
\textsuperscript{96 op.cit. Vol.XVI.26.}
\textsuperscript{97 \textit{Customary Law of Shapur District}, Vol. XV}
\textsuperscript{98 op.cit. IX. V.}
\textsuperscript{99 op.cit. XII. 27.}
\textsuperscript{100 op.cit. XII.27.}
\textsuperscript{101 op.cit. Vol. XV. 60.}
\textsuperscript{102 op.cit. XI. 14-15.}
\textsuperscript{103 op.cit. VIII.17; XI. v; and XI.14.}
appeared to exclude a son given in adoption in Ambala.\textsuperscript{104} Most of the tribes were of the view that an adopted son lost all claim as his own father’s son, but the Hindu Jats in one or two tracts, the Lobanás and Muslims Jats of Samrala, the Arains of Ludhiana and the Gujars of Jagraon tahsil say he succeeded his natural father, if he left no lineal descendants, in preference to collaterals.\textsuperscript{105} And such a son would succeed his natural father, if the latter died without issue (i.e., without another son, and this custom is pretty general throughout that District, though a number of tribes said that such a son lost all rights in his own father’s estates in Gurdaspur tahsil.\textsuperscript{106} An only son given in adoption not only retained his rights in his natural father’s land, but could also succeed to his collaterals just as if he had not been given in adoption in Sialkot\textsuperscript{107} and this, though it was not distinctly stated, was probably a very general rule. an only son given in adoption alone retained his rights to his natural father’s land, but the Awans go further and said that any son given in adoption retained them asserted the Hindus in Shahpur.\textsuperscript{108} The son given in adoption loses all his right to his natural father’s property if the latter had other son in Multan.\textsuperscript{109}

Children had reserved rights of inheritance on the property of their father, especially the sons. Daughters and adopted sons had some limited rights; generally the girl was excluded from inheritance, of her father’s ancestral property, but she had claim over the personal acquired property of her father, while step sons and illegitimate were excluded from inheritance. However, in some instances they were given maintenance up to a certain age limit. There were few examples which were exception to the general rule of sharing equally with the legitimate sons.

\textsuperscript{104} op.cit. Vol. X.
\textsuperscript{105} op.cit. X. 25.
\textsuperscript{106} op.cit. XII. 26.
\textsuperscript{107} op.cit. XIV.
\textsuperscript{108} op.cit. Vol. XV.
\textsuperscript{109} op.cit. XVIII. Xlix.
The adopted son had a position of an heir to the property of the sonless proprietor. However, in some places religious sentiments were attached to it. His position was not that of the complete transfer of his rights by fictitious birth, or his rebirth in the adopters family, as some tribes denied his complete rights in inheritance as that of a natural born son and on the other hand, he retained his rights in his natural fathers’ property. ‘Kritrima’ adoption resembles the Punjab Customary Appointment of heir; in which tie of Kinship with natural family not dissolved and purely the personal relationship were established between adopter and adoptee. Among Hindus the conception is that an adoption is the transfer of a boy from one family to another by a kind of fictitious birth, which is as irrevocable as a physical birth. Hence, an adoption was irrevocable among Hindus, whereas among Mohammedans it was not of that character. Thus, among the Jats of Lahore an adoption could not be canceled, but the Rajput and Muslims Arains were having a custom of canceling it if the adopted son was disobedient. In Spiti an adoption once made cannot be set aside, while in Churah an adopted son must serve his adoptive father till death or forfeit his claim to his estate.

III

Guardian was a person in whose hands the rights of the person and the property of minor vests after the death of his/ her father. Customary law had some provision for the guardian of the minor after the death of the father of a minor. The rights to the Guardianship (i) of the person (ii) of the property of a minor are usually vested by custom in the same hands, but as to who that person ought to be the customary law is singularly vague. The main points of discussion in this context are who was the lawful guardian of the minor after the deaths of his/her father, what were the rights of a guardian regarding betrothal or

110 Kaikhosru J. Rustomji, Treatise on The customary law of Punjab, 287
111 The Guardian of the minor could also be appointed by the court under The Guardian and Wards Act 1890. In the case of dispute the colonial court gave decision according to the provisions of The Guardian and Wards Act 1890.
disposing of the property of a minor and what was the minors liability of paying valid debts of his father.

The first right resided in the father who could appoint a guardian before his death. In Janjua of Jhelum tehsil and the Mughals allowed a father to appoint a guardian, who may be a stranger and a solitary instance is cited among Hindus. In the absence of such an appointment the guardianship devolves on the brother, commonly, but the customs are multifarious and uncertain. In Shahpur the father has a power, of appointment of guardian. In Peshawar and Muzaffargarh, among Hindus a father might appoint a guardian, while in Sialkot the Arains in Raya alone deny the father's power to appoint a guardian by will or otherwise.

After his death near collaterals (maternal relations excluded), mother and the elder brother. In some case otherwise, In Indri one of the near collaterals becomes guardian-with the mother's consent. And in the absence of collateral the brother or other relative of the mother was appointed with her consent. On the other hand in Kaithal the mother and elder brother had first claim, and, failing them, the maternal uncle or grandfather; but the Rors in this tehsil was of the view that maternal uncle could not be a guardian. Thus, mother's relatives were excluded by the collaterals. In Ambala the Rajputs asserted that there was no fixed custom, while the Jats strongly object to the mother's brother acting when there were collaterals available. In Ludhiana the mother was entitled to the minor's guardianship on the father's death (unless, some Jat tribes asserted that and if she be unchaste; and if the father's property was separate she was also entitled to its management; but if he held it jointly, his brothers were entitled. In the absence of brothers and the mother the nearest agnate was guardian. As the mother cannot betroth a daughter without the nearest agnates' assent; indeed some Jat

112 op.cit. XIX.28-29.
113 op.cit. VIII.8.
114 op.cit. X.12.
tribes exclude her from this power and assign it to the deceased's father brother, uncle or nearest of kin within seven generations. In Ferozepur Jats accepted the mother as guardian if the brothers were separate both in domicile and estate, but she could not dispose of a girl's hand without the consent of the near kindred.

The Muslims tribes, however, preferred the brother to the mother in Gurdaspur. Guardianship of the minor's person and property devolved upon the nearest relation who could, by custom, inherit the minor's property; and, when the mother became a guardian, she acted with the assistance of some male relatives on the father's side.

In Lahore guardianship among the Jats was in the sequence of, on the elder brother, if of age, on the mother, and on the father's brother; but the mother's right does not extend to alienating property or betrothing a daughter without the consent of the father's collaterals. Among the Rajputs the position of mother was taken up by father's brother; while among the Dogras and Arains the mother stands first. Further, the guardian could dispose of a girl's hand with the consent of the near kindred. Jats follow the Lahore Jats's custom, Rajputs also give precedence to the elder brother, but after him to the uncle; while in all other tribes the guardianship devolved upon the mother. As a rule Hindus assign the guardianship to the mother, subject to good conduct, to the father's father, eldest brother, if a full brother, to the father's mother, mother's mother, and then to the sister or other maternal relative. Muslims, as a rule, assign the guardianship of the minor's person to the mother, full brother, if of age, father's mother and sister, sister,

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116 op.cit.VII.10. The mother would, it is added, take precedence of more distant kindred, except in the case of disposing of a girl.
117 op.cit.XII. 9. Such a guardian must, among the Rajputs, of both religions, Brahmans, Chahngs, Lobanas, Sainis and Gujars of Pathankot be chosen from amongst the paternal or maternal kindred.
118 Compendium on the Punjab Customary law.57
119 op.cit. XIV.11-12.
120 op.cit. XIX.28-29.
mother's mother or sister, or other female relative; but the guardianship of the property is assigned to the full brother, if of age, the mother, father's brother, or, if the latter be untrustworthy, to the mother's father's brother, or, if the latter be untrustworthy, to the mother's father or brother. Similarly, Awans, Gondals, Rahjaas and Khokhars assign the guardianships both of person and property to the adult full brother and mother, then, and other maternal relatives in preference to the agnates. The Tiwanas alone exclude the mother and all her relatives.\textsuperscript{121}

In Muzaffargarh, among Hindus sequence of the claim of guardianship was minor's grandfather, eldest adult brother, uncle, mother, mother's brother, sister's husband, uncle's son and then on the male collateral; while among Muslims it devolved on the eldest brother, if adult, and after him on the nearest male collateral, only vesting in the mother if there was no such collaterals. Hindus, however, hold that a girl's guardian must obtain her mother's consent before giving away in marriage.\textsuperscript{122} In Dera Ghazi Khan, the general rule among Muslims was that the guardianship of the property devolved on the grandfather, brother, paternal uncle or uncle's son. Thus the Jats and Sayyids followed this custom, but in all the tahsils, except Rajanpur, the mother or some other female relative becomes guardian of the person. So, too, the Baloch of Jampur tahsil made the mother guardian of the person, while those of Sangarh made her guardian of both person and property until re-marriage. Among the Hindus of Sangarh and Jampur the mother was guardian of both person and property, but on her death the brother or other male relative replaced her. Those of Dera Ghazi Tahsil, however, made the mother or some other female relative guardian of the person, while one of the male relatives managed the land and in Rajanpur the guardianship of both person and property, but on her death the brother

\textsuperscript{121} \textit{op.cit. XV.35-36}

\textsuperscript{122} \textit{op.cit. XX.24-25}
or other male relative replaced her. In Peshawar most of the Muslims tribes assign the guardianship, (i) to the paternal grandfather, (ii) the elder brother, (iii) the mother, (iv) the paternal uncle, and (v) the nearest male agnate; but among many tribes this usage was not followed. Among Hindus a father may appoint a guardian, but if he fails to do so there is no clear rule of devolution; still the mother usually comes first and after her the father’s father and brother, then the mother’s father and brother and lastly the nearest sapinda. The minor is liable to pay the valid debts of his father.

A Guardian may mortgage or sell moveable or immovable property for the payment of the deceased father’s debts, for payment of government revenue due on the land and for maintenance of the minor other tribes say the property can be mortgaged also to meet the expenses of the minors education or marriage expenses or for object directly advantageous to the ward. On proof of absence of necessity for transfer or of disadvantage to the ward the transfer becomes void. The property of the ward may be leased by the guardian for any period not extending beyond the date on which he attains his majority. On 27th November 1906 Extra Assistant Commissioner held that the mother of a minor can make a temporary alienation of her property for her benefit. However; a guardian cannot gift the property of his ward.

The minor is liable to pay the valid debts of his father or for the payment of Government revenue due on the land. There are many instances of such type in customary law, when the debt is paid to the creditor by the minor.

In general, in the eastern parts of the province mother was the guardian of minor and betrothal of a girl with the consent of near

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123 op. cit. XVI.10.
124 op. cit. XVII.10.
127 Customary Law of Gurdaspur district 13
agnates. After her the elder brother and then paternal relation were the lawful guardians. All tribes exclude the maternal relations as guardian of the minor however; there were exceptions to this general rule such as Awans, Gondals, Rahjaas and Khokhars in Lahore and some tribes of Kaithal maternal uncle was also given right of guardianship in the case of death of the mother. In the western part of the province instead of mother the brother was preferred and many times grandfather was given preference to the mother. The guardian (whether mother or any one else) had some restricted rights on the sale and mortgage of the property of the minor, in the case of payment of government revenue due on the land and for maintenance of the minor as minor himself was liable to pay the valid debts of his father.

In the colonial Punjab to solve the problem of the guardianship of the minor in case it becomes controversial on the question of custody, there were conflicts of guardianship of the property of the minor, due to the increased value of land in the late 1891. This increase in value of land was a consequence of agricultural developments, canalization, colonization, commercialization of agriculture and agrarian developments and the Guardian and Wards Act 1890 was on the convenience of it. Anglo-Muslims Law recognizes three kinds of guardianship, namely 1. Guardianship for contracting marriage on behalf of a minor or insane adult of either sex, and for controlling to some extent the matrimonial arrangements of a sane adult woman. 2. Guardianship of the person of a minor for custody and education. 3. Guardianship of the property of the minor.129 There are however, four types of guardians; natural guardian, testamentary guardian, certified guardian and a guardian under the Court of Wards Act.130

The ‘Customary Law’ of the province, which has its own social guidelines for the guardianship of the minor, especially after the death of the father of the minor, the colonial Government tried to solve this problem with prior and proper guidelines in the form of legislation. The Court took up the cause of the appointment of a lawful guardian if the circumstances so desires even if the father of the minor is alive and unfit for the guardianship of the minor.

Prior to the passing of ‘Guardian and Wards Act’ the British Government made some rules under Section 38 of the Punjab Laws Act 1872 for the care, education and the management of the properties of persons subject to the ‘Court of ward’. The guardian of a female minor shall arrange, under the orders of the Deputy Commissioner for a suitable education of the ward, when she arrives at an age for instruction, if proper instruction can be made. The guardian of a female minor shall arrange under the orders of the Deputy Commissioner; for his education unless the minor is removed by order of the Deputy Commissioner from residence with his guardian to be placed at any school or institution. When a male minor has completed his sixth year, the control of his education shall vest in the Deputy Commissioner of the district, who shall report the arrangements which he proposes for giving the minor an education suitable to his condition in life, and such as to qualify him for the position which he will occupy when he comes of age. Further, in 1890 the ‘Guardians and Wards Act’ was passed.

Thus Guardians and Wards Act, 1890 was passed in order to solve the problem of guardianship of the minor child in the case of dispute. In addition to it the purpose of this Act was to appoint a legal guardian by the court if the need so arises.

The provisions of this Act were as; the “Guardian” means a person having the care of the person of a minor or of his property, or of both his person and property: “Ward” means a minor for whose person or
property, or both, there is a guardian. Where the court is satisfied that it is for the welfare of a minor that an order should be made - A) appointing a guardian of his person or property, or both, or B) declaring a person to be such a guardian, the court may make an order accordingly.

The court may issue an order for the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the court, however in these cases court can not appoint an other guardian, until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act. The powers of the court to appoint a guardian under this Act were restrained. The court can not order except on the application of - a) the person desirous of being, or claiming to be, the guardian of the minor, or b) any relative or friend of the minor, or c) the Collector or the district or other local area within which the minor ordinarily resides or in which he has property, or d) the Collector having authority with respect to the class to which the minor belongs.

The Act made provision for a specific application form to ascertain; the name, sex, religion, date of birth and ordinary residence, where the minor is female, whether she is married, and if so, the name and age of her husband; the nature, situation and approximate value of the property, if any, of the minor; the name and residence of the person having the custody or possession of the person or property or the minor; what near relations the minor has, and where they reside etc. The application must be accompanied by a declaration of the willingness of

There was a specific application form for this purpose, so far as can be ascertained; the name, sex, religion, date of birth and ordinary residence, where the minor is female, whether she is married, and if so,

the name and age of her husband; the nature, situation and approximate value of the property, if any, of the minor; the name and residence of the person having the custody or possession of the person or property or the minor; what near relations the minor has, and where they reside etc. The application must be accompanied by a declaration of the willingness of the proposed guardian to act and the declaration must be signed by him and attested by at least two witnesses.

If the Court was satisfied that there is ground for proceeding on the application, it shall fix a day for the hearing and issue notice of the application and of the date fixed for the hearing. The court may direct that the person, having the custody of the minor\(^7\) on the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application. If the customary law to which the minor is subjected admits of his having two or more joint guardians of his person or property, or both, the Court may, appoint or declare them. Separate guardians may be appointed or declared of the person and of the property of a minor. If a minor has several properties, the Court may, if it thinks fit, appoint or declare a separate guardian for any one or more of the properties.

In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, consistently with the law to which the minor is subject, appears in the circumstances to be for the welfare of the minor. In considering what will be for the welfare of the minor, the Court in this regard will see the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property. If the minor was old enough to form an intelligent preference, the Court may consider that preference. The Court shall not appoint or declare any person to be a guardian
against his will. Collector can also be appointed or declared by the Court in virtue of his office to be guardian of the person or property, or both, of a minor, the order appointing or declaring him shall be deemed to authorize and require the person for the time being holding the office to act as guardian of the minor with respect to his person or property, or both, as the case may be.

In certain cases the court shall not appoint or declare a guardian of the property of a minor, whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or of a minor whose father is living and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.

Thus, while appointing a guardian the court foresees the welfare of the minor as for the Act was concerned. In the case, not finding suitable guardian a collector can also be appointed or declared by the court or the property of the minor was to remain under the superintendent of a ‘court of wards’.

A guardian stood in a superficial relation to his ward, he was appointed, or by this Act, he must not make any profit out of his office. It ends, immediately or soon after the ward has ceased to be a minor. A Guardian appointed or declared by the Court shall be entitled to such allowance, if any, as the Court thinks fit for his care and pains in the execution of his duties. When an officer of the Government, as such officer, is so appointed or declared to be guardian, such fees shall be paid to the Government out of the property of the ward as the State Government, by general or special order, directs. A guardian of the

Punjab Code, under Punjab Act II The Punjab Court Of Wards Act 1903.property of landholder is placed under the superintendence of the Court of Wards.
person of a ward is charged with the custody of the ward and must look to his support, health and education, and such other matters as the law to which the ward is subject requires.

In case a ward leaves or is removed from the custody of a guardian of his person, the Court, if it is of opinion that it will be for the welfare of the ward to return to the custody of his guardian. A Guardian of the property of a ward is bound to deal therewith as carefully as a man of ordinary prudence would deal with it if it were his own, and, subject to the provisions, he may do all acts which are reasonable and proper for the realization, protection or benefit of the property. Therefore, the guardian is the person who is paid for his services.

A guardian appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.

Where the person has been appointed or declared by the Court to be guardian of the property of a ward, he shall not, without the previous permission of the Court-mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of his ward, or lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.

There are variation of powers of guardian of property appointed or declared by the Court if such person is not Collector, the Court may, from time to time, by order, define, restrict or extend his powers with respect to the property of the ward in such manner and to such extent as it may consider to be for the advantage of the ward and consistent with
the law to which the ward is subject. A guardian may apply by petition to
the Court for its opinion, advice or direction on any present question
respecting the management or administration of the property of his ward.
Thus, the guardian has restricted right on the immovable property of the
minor and has to obey directions the court in this regard.

Powers of the a guardian of the person cease by his death, removal
or discharge; by the Court of Wards assuming superintendence of the
person of the ward; by the ward ceasing to be a minor; in the case of a
female ward, by her marriage to a husband who is not unfit to be
 guardian of her person or, if the guardian was appointed or declared by
the Court, by her marriage to a husband who is not, in the opinion of the
Court, so unfit; or in the case of a ward whose father was unfit to be
guardian of the person of the ward, by the father ceasing to be so or, if
the father was deemed by the Court to son unfit, by his ceasing to be so
in the opinion of the Court. And he if alive or his representative deliver
the property or accounts as required by the Court, the Court may declare
him to be discharged from his liabilities save as regards any fraud which
may subsequently be discovered.

It is a welfare measure by the colonial government to save the
person and property of the minor. The welfare of the minor was given
prime importance in the act as well as when the customary law of the
Province, had any dispute regarding the guardianship discretion and
final judgment of the court was always in favour of the minor outlawing
customary law.

Custom and legislation regarding welfare of children thus, took
care of the upbringing of children under proper care, at least in theory.
The life of a young child was governed through custom followed by
parents or guardian in different parts of the region. The fate of
illegitimate children however, was different.
Illegitimacy of children had been a social stigma, and these children were always discarded and despised by the society for no fault of theirs. In the Colonial period illegitimate children were deprived of the privileges and rights which they were supposed to enjoy in case they were legitimate. The relevant points in this connection are; who were considered illegitimate children according to the custom of society and who was responsible for their maintenance and upbringing.

Illegitimacy was generally considered where a marriage had taken place between parties whose marriage either by reason of relationship or previous marriage, or difference of caste were not socially acceptable. The offspring of such a union were to be considered illegitimate. The offsprings of a slave girl (Kanizak) were also to be considered illegitimate.

The offspring were considered illegitimate under the circumstances mentioned above by all tribes of the Nakodar and Nawanshar Tahsils, Phillaur Tahsil Pathans, Syyads and Sheikhs of Jullundur Tahsil state that (except Jat Hindus, Sainis, Labanas and Kambohs). If the wife be a Jatni who could not legally be married, she would be turned out and might go to her father's house or wherever she liked-if the fact is discovered before child's birth; but if it was not discovered till after childbirth she was retained and the child considered legitimate in the Rohtak Jats throughout asserted that. If the woman was a low-caste woman-sweeper, chumar, etc., who had been palmed off as a Jatni, she would be turned out at any time of discovery, but her child would be bathed in Ganga water and legitimized. The discovery would automatically invalidate the marriage; the woman would be turned out; and the child would be considered illegitimate by brahmans throughout and Hindu Rajputs of Jhajjar.

Children of such marriages were considered illegitimate and they didn’t take share with the other relatives of their father. The mother or her relatives had the preferential claim for the guardianship of illegitimate children. An illegitimate son of a Chambai Rajput of the Hoshiarpur district was not entitled to succeed to his father’s occupancy rights under section 59 of the Punjab Tenancy Act, 1887, as he was not a ‘male lineal descendant’ of his father within the meaning of that section.

An illegitimate son of a Chambar Rajput of the Hoshiarpur district was not entitled to succeed to his father’s occupancy rights under section 59 of the Punjab Tenancy Act, 1887, as he was not a ‘male lineal descendant’ of his father within the meaning of that section. According to Hindu Law an Illegitimate son of a Sudra by a continuous concubine was entitled to inherit the property of his putative father, but this reasoning has no application to the twice-born classes amongst whom an illegitimate son was not an heir of his natural father either under Hindu Law or under the Customary Law. The rules of succession, as laid down in section 59 of the Punjab Tenancy Act, are much more restricted in their scope than those of Hindu, Muslims, or Customary Law and This was held that an illegitimate person, who had no right of inheritance under the ordinary law of succession, was included in the category of ‘male lineal descendants’ for the purpose of succession to occupancy rights in land.

Illegitimate children had no rights to inherit the property of natural father. Even they had no claim to maintenance on the property of their fathers. Among those tribe in which the Karewa or Chadar andazi form of marriage was allowed the sons or offspring of such marriage inherit exactly as do the sons of a regular marriage. In Peshawar during the

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135 Customary Law of the Multan District. 1924.
137 Kaikhosru j. Rustomji. Treatise on The customary law of Punjab. 137
lifetime of a father, he was bound to support them, after his death it was uncertain whether their claim for maintenance would continue against his estate or not. In some areas as for Ambala district all tribes admitted that the children were entitled to maintenance up to an age limit, generally it was at 15 years.

Offspring of irregular unions were not always treated as social outcastes in 1921, Lahore. Leslie Jones J. pointed out that irregular unions were common in the hills, and the offspring of such unions were far from being treated as social outcastes. “they might not always succeed to property, but they were generally entitled to maintenances”. ⁱ³⁹

Inspite of all this, a father could make his illegitimate son, by admission to legitimacy, when upon he was given equal share along with legitimate sons. ⁱ⁴⁰ There were many instances when the illegitimate sons had equal share. There were some instances in the Multan district and for Ludhiana, where the illegitimate sons inherited along with the legitimate sons. ⁱ⁴¹ In the customary law of Gujranwala district there were some exceptions to the tradition, as sons of a maid servant took equal share along with the legitimate sons, second sons of a goli or illegitimate offspring took equal shares or no distinction of inheritance was made among such offspring.

Thus, illegitimacy of children was established and recognized by custom. Marriage either by reason of relationship or difference of caste was not socially acceptable and children of such union were considered illegitimate. Even the state itself denied the rights of illegitimate children through the Punjab Tenacy Act 1887. Mother or mother’s relative was the guardian of such children. However, there was exception to the general rule as among the low castes and hilly areas rights of such children were acceptable to their local customs. Moreover, the father of the illegitimate

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ⁱ³⁹ Kaikhosru j. Rustomii, Treatise on The customary law of Punjab. 137
ⁱ⁴⁰ Customary Law of the Gujranwala District Vol xxvi by Dalip Singh, Lahore.1914
The overall discussion on the customary law and children, points towards the children’s status in the patriarchal society in the colonial times. With the help of customs an attempt was made to regulate the life of children on the lines of prevailing practices. The concept of child in the colonial period was that, children were not specified as a specific category; rather they were treated as ‘miniature adults’ when we understand their early betrothal as well as their early marriage. The child’s future in relation to marriage age, choice of life partner and his social milieu remained in the hands of the father, mother or father’s family, as these members took decisions in keeping with custom. Impact of this custom is that as the Census records show a considerable proportion of children were married at a very young age despite restraint measures on child marriage by 1929. Varying customs also afford a striking illustration of the position enjoyed by girls or boys family in different parts of the province and amongst the different communities and tribes.

Among children, the boys had the preferential claim over the property of his father or his ancestral property. Girls were given this right, in the absence of the male lineal descendant or in the absence of the collaterals; more so, if she remained in her father’s house after her marriage, or in some cases she remained single throughout her life. However, in the self acquired property of her father she had better claims. Father could gift her with the consent of the collaterals in the ancestral property and with his own discretion in self acquired property. Step sons or illegitimate sons had no rights in the property of their father. Adopted son inherited along with natural born sons. Tribal restrictions were also imposed while at the time of adoption. However, because of tribal rules, some areas had some kinds of restrictions on inheritance of ancestral property by an adopted son. Adopted son could inherit the property of his natural father along with adoptee. Girls were never adopted as
heiress to the property. Child was placed under the guardianship of the mother, elder brother, other paternal relation according to the tribal custom. In the case of dispute the court gave decision according to the custom of the concerned tribe, but due to the passing of Guardian and wards act largely the welfare of the child was seen. Customary law had no place as such, for the illegitimate children. However, primary responsibility lay with the mother or mother's family.

In the Customary law the decision was generally given according to the provisions of the respective social group. However, by the end of the 19th century some changes were brought about by British government while imparting justice to the concerned party final decision remained in the hands of the court or more so by the concerned legislation.