CHAPTER - 2
PRE-CONSTITUTIONAL
STATUS OF WOMEN
UNDER DIFFERENT
PERSONAL LAWS
REGARDING
ADOPTION
2.1. Introduction:

The Indus Valley Civilization which spread and flourished in the northwestern part of the Indian subcontinent from 3300 to 1300 B.C. was the first major civilization in India. The next important age in the history of India after Indus Valley civilization is the Vedic age. The Vedic age in Indian history is generally regarded as the period between 1500-500 B.C. It was during this period that the states called the Mahajanapadas of northern
India took shape. It was during this period that India presented to human culture one of its invaluable contributions, the Vedic Literature.

The Vedic age is broadly classified into two categories: Early Vedic age and Later Vedic age. As the name suggests, this period got its name from the four major Vedas or the sacred scriptures that were created during that time. The four sacred Vedas are: Rig Veda, Sama Veda, Yajur Veda and Atharva Veda. These scriptures provide essential knowledge of the lifestyle and culture of the Vedic age. The Vedas are the foundations of the Hindu religion. Apart from the Vedas, we have two great epics, ‘Ramayana’ and ‘Mahabharata’ written during this age.

Hindu law as it is now generally agreed has the most ancient pedigree of any known system of jurisprudence. Law as understood by the Hindus is a branch of ‘Dharma’. Traditionally ‘Dharma’ is what is followed by those learned in the Vedas and what is approved by the conscience of the virtuous who are exempted from hatred and inordinate affection. Hindu law refers to the system of personal laws relating to marriage, adoption, inheritance etc., traditionally derived from Hindu texts and traditions that shaped the social
practice of Hindu communities. The sources of Hindu law are: The Vedas, the Smrities, the approved usages and what is agreeable to good conscience. Considered chronologically and having regard to the stage of its legal literature, Hindu law falls under three epochs:

(i) The Vedic epoch: This is also referred to as the Pre-Sutra period.

(ii) The era of the Dharmashastra. This is often sub divided into:

(a) The Sutra period;

(b) The Smriti period;

(iii) - The Post-Smriti period.

It is said that all Hindu law originated from the Vedas (also called Shrutis or what was heard), but Shrutis do not contain much that can be regarded as positive or lawyers law. The era of Dharmashastras was the golden age of Hindu law. This era was synchronous with the age of some leading Upanishads which are instinct with a spirit of inquiry and a passion for the search of truth.

In fact, the Hindu law really emanated from books called the Smritis. There are about hundred Smritis. These Smritis were not laws made by parliament or some legislature. These are the books written by Rishis or Sages of
antiquity. Smritis or Dharmashastras enouncing rules and precepts of Dharma and consists of various rules relating to religious, moral, social and legal duties. The Smritis or Dharmashastras are divisible into two classes. The first of these are the ‘Sutras’. The principal extant Dharmasutras are those of Gautama, Baudhayana, Apastamba, Harita, Vasistha and Vishnu. The Smritis, more specifically the institutes of Manu, of Yajnavalkya, Narada and the Smritis of Parashara, Brihaspati, Katyayana and others belongs to the second category of Dharmashastras and are later in age than the Dharmasutras. Manusmriti or Institutes of Manu is by common tradition entitled the place of precedence among all the Smritis. It was compiled in about 200 B.C. Manusmriti is divided into twelve Chapters. In the eighth chapter there are stated rules on eighteen subjects of laws, viz. Recovery of debt, Deposit and Pledge, Sale without ownership, Assault, Defamation, Adultery, Duties of husband and wife, Inheritance etc.

Yajnavalkya Smriti or Institutes of Yajnavalkya is more scientific, more logical and synthesized on a number of matters like status of Sudras, of women’s right of inheritance and to hold property; of criminal penalty etc. Yajnavalkya is more liberal than Manu. There is greater recognition of rights
of women and of the status of Sudras in Yajnavalkyasamriti. It would seem that it must have been compiled in about the first century after Christ. Naradasmriti also known as Nardiyadharmashastra was compiled in about 200 A.D. A great feature of this Smriti is that it deals solely with law (Vyavahara). Some topics of law dealt with by Narada are Inheritance, Ownership, Property, Gifts and Partnership; Shares of widow and unmarried sister on partition between sons; Remarriage and Separation by a woman etc.

The Smriti of Katyayana was compiled at about 4th or 5th century A.D. The topics dealt with by Katyayana have a wide range. Most striking feature is its dealing with law of Stridhan and women’s power of disposal. The Smritis of Parashara, Brihaspati are also worth illuminating. Brihaspati distinguishes civil wrongs and crimes from all titles of law. “Dvipado Vyavaharashcha Dhanahinsa Samudbhahavah.”

Brihaspati also speaks of stages of judicial proceedings.

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This list of Smritis is not exhaustive. There are about hundred Smritis which are worth mentioning in observing the ancient Indian culture and heritage. Later on, in course of time, Commentaries also called Nibandhas or Tikas were written on these Smritis. For example, the Commentary of Vijanneshwara (who wrote a Commentary called ‘Mitakshara’ on Yajnavalkya smriti), the Commentary of Jimutvahan, who wrote a book called the ‘Dayabhaga’ (which is not a Commentary on any particular Smriti, but is a digest of several Smritis); Nanda Pandit whose Commentary ‘Dattaka Mimansa’ deals specifically with the law of ‘adoption’ etc.

‘Mitakshara’ means ‘a brief compendium’ was written in the later part of the eleventh century. It is of supreme authority throughout India except in Bengal where ‘Dayabhaga’ of ‘Jimutvahana’ is given paramount importance. The Mitakshara is sub-divided into four minor Schools: Benares School, Mithila School, Maharashtra or Bombay School (western India) and Dravida or Madras School (southern India). The Benaras School covers the whole of Northern India with the exception of the Punjab where the Mitakshara law on certain points has been modified by custom. Mitakshara law is given general recognition in all four minor schools but in Gujarat, the
island of Bombay and North Konkan, the ‘Vyavahara Mayukha’ by Nilakanta Bhatta, a more modern treatise is popular and even regarded as an overruling authority on certain points. The Mithila School prevails in Tirhoot and certain districts in northern part of Bihar. A number of Commentaries were written on the Mitakshara itself, viz, ‘Subodhini’ by Visveshvara Bhatta, ‘Viramitrodaya’ of Mitramishra etc.

2.2. Status of Hindu Women during Vedic period, Dharmashastras and Post-Smriti period:

Let us see what the status of Hindu women was during Vedic period, during the Dharmashastras and post-Smriti period? There are many civilizations in the world where respect for women and their role in society are prominent and others where regard for them and their status should be improved. Among the many societies that can be found in the world, we have seen that some of the most venerating regard for women has been found in Vedic Culture. According to studies, women enjoyed equal status and rights during the early Vedic period (more than 3,000 years ago). Historical evidences illustrate the fact that women power ruled the then society. They even destroyed mighty rulers and conquered Kingdoms. The ancient Hindu
philosophical concept of ‘Shakti’, the feminine principle of energy was also a product of this age. This took the form of worship of the female Idols or Goddesses. These forms include those of Lakshmi (the Goddess of fortune and queen of Lord Vishnu), Saraswati (the Goddess of learning), Subhadra (Lord Krishna’s sister and auspiciousness personified), Durga (the Goddess of strength and power), Kali (the power of time) and other Vedic Goddesses that exemplify inner strength and divine attributes.

In ancient India women occupied a very important position. For example, Valmiki’s ‘Ramayana’ teaches us that Ravana and his entire Kingdom were wiped out because he abducted Sita. Vedavyasa’s ‘Mahabharata’ teaches us that all the Kauravas were killed because they humiliated Draupadi in public. Elango Adigal’s (a famous south Indian writer), writing ‘Sillapathigrama’ is all about the story of Madurai, the capital of the Pandyas, which was burnt because Pandyan Ruler Nedunchezhiyan mistakenly killed the innocent husband of Kannagi. In early Vedic times women also received the sacred thread and could study the Vedas. Women of the early Vedic period (5000-1200 B.C.) were epitomes of intellectual and spiritual attainment. The ‘Haritasmriti’ mentioned a class of women called
‘Brahmavadinis’ who remained unmarried and spend their lives in study and rituals. Panini’s distinction between ‘Acarya’ (a preceptor) and ‘Acaryani’ (a lady teacher or a preceptor’s wife), Upadhyaya (a preceptor) and Upadhyayani (a lady teacher or a preceptor’s wife) indicates that women at that time could not only be students but also the teachers of sacred Vedas. Education was an important feature in the upbringing of a girl child. It was considered essential for girls and was therefore customary for girls to receive education. Vedic literature praises a scholarly daughter and says that a girl also should be brought up and educated with great effort and care. Co-education seems to have existed in this period and both the sexes got equal attention from the teacher. The women also functioned as teachers. Some of the famous women of the age were Gargi, Paula, Ghosa, Maitreyi, Lopamudra, Sikta, Indrani etc. Women were allowed to recite Vedic verses and perform ‘Yagna’. It is said that there were thirty two women compilers of Rig Veda who expanded Vedic literature. Those highly intelligent and greatly learned women who chose the path of Vedic studies were called ‘Brahmavadinis’ and women who opted out of education for married life were called ‘Sadyovadhus’. During the 7th to the 9th Century A.D., we find that the general level of the culture and status of women were very high.
Women had opportunities for training in fine arts like painting, music, versification etc. Rajyashree, sister of renowned King Harshvardhana was a disciple of Lord Buddha and her advice was sought on various important matters. Avantisundari, the wife of the eminent Sanskrit poet Rajshekar, was an exceptionally learned woman and her contribution in making the career of her husband was also great.

Regarding marital lives of Rig Vedic people, there is no evidence of child marriage in the Rig Veda. The minimum age at which the girl should get married has been recommended as sixteen years or more. The Vedic ritual presupposes that the married pair was grown enough to be lovers, husband and wife and parents of children. Marriage during Vedic period was not taken as a contract but was regarded as a social and religious duty. The Veda says that an educated girl should be married to an equally educated man. The husband-wife stood on equal footing and prayed for long lasting love and friendship. At the wedding the bride addressed the assembly in which the sages too were present. The bride had the right of selecting her own partner through the well known custom of ‘Svayamvara’, that is ‘self-choice’. Marriage for girls was not mandatory. Unmarried women were called
‗Amajur‘, that is a girl who grew old at her father‘s house. A woman could marry even in her late stage. For instance ‘Ghosa‘, a well known female sage married at a late stage in her life (her husband being another well known scholar of that time, ‘Kakasivan‘) as she was suffering from some skin ailment. After marriage a girl becomes part of her husband‘s household and her gotra changes from that of her father into that of her husband. She participates in performance of ‘Yagans‘ for ‘Devtas‘ and ‘Pitras‘ of her husband‘s family. The bride takes charge of her new family. The Rig Veda indicates the rights of a woman as wife. It is addressed to the bride sitting next to the bridegroom:

“Happy be you (as wife) in future and prosper with your children here (in the house); be vigilant to rule your household in this home; closely unite in marriage with this man; so shall you, full of years, address your company (that is others in the house listen to you and obey and care about what you have to say)”.

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A girl is welcomed in many ways:

“Come, O desired of the Gods, beautiful one with tender heart, with the charming look, good towards your husband, kind towards animals, destined to bring forth heroes. May you bring happiness for both your quadrupeds and bipeds.”

The idea of equality is very much expressed in the Rig Veda:

“The home has verily its foundation in wife. The wife and husband, being the equal halves of one substance are equal in every respect; therefore both should join and take equal parts in all work, religious and secular.”

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5 The Rig Veda (Chapter 5: Hymn 61: Verse 8), ibid, p. 12.
Love marriages or Gandharva Vivaha was also widespread in Vedic period.

The following are some of the verses of Vedas who glorifies the women:

“Girls should train themselves to become complete scholars and youthful through Brahmcharya and then enter married life.”  

Another classical example from history expresses:

“Parents should gift their daughter intellectuality and power of knowledge when she leaves for husband’s home. They should give her a dowry of knowledge.”

Another Piece of example is:

“Oh wife! Give us discourse of knowledge.” The bride may please everyone at her husband’s home through her knowledge and noble qualities.

Another Piece of example is:

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6 Atharva Veda (Chapter 11: Hymn 5: Verse 18), http://agniveer.com/women-in-vedas/
7 Atharva Veda (Chapter 14: Hymn 1: Verse 6), ibid.
8 Atharva Veda (Chapter 14 : Hymn 1: Verse 20), ibid.
“Teach the husband ways of earning wealth. Protector of children, having definite knowledge, worth thousands of prayers and impressing all directions, O women, you accept prosperity. O wife of deserving husband, teach your husband to enhance wealth.”\(^9\)

Another Piece of example is:

“Oh groom! This bride will protect your entire family.”\(^10\)

Another Piece of example is:

“May this bride become the queen of the house of her husband and enlighten all.”\(^11\)

Another Piece of example is:

“Oh woman! You are the keeper of knowledge of all types of actions (Karma).”\(^12\)

These verses proved high and respected position of Vedic women. The idea of equality was most forcibly expressed in the Rig Veda. For example, the

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\(^10\) Atharva Veda (Chapter 1: Hymn 14: Verse 3), ibid.

\(^11\) Atharva Veda (Chapter 2: Hymn 36: Verse 3), ibid.

\(^12\) Atharva Veda (Chapter 7: Hymn 47: Verse 1), ibid.
Sanskrit words used by the husband for the wife were ‘Pathni’ (the one who leads the husband through life), ‘Dharmpathni’ (the one who guides husband in Dharma) and ‘Sahadharmacharini’ (one who moves with the husband on the path of ‘Dharma’, righteousness and duty). This is how ancient Vedic culture viewed the partnership of husband and wife.

The Vedic texts indicate that widow remarriage was allowed. The tradition of a widow marrying the brother-in-law of the expired husband was very common. When the dead body of the late husband was about to be cremated, the dead man’s brother took the widow in his custody and married her soon after. Although Rig Veda sanctions the marriage of the widow with the brother of the deceased husband but widow did not necessarily had to marry the brother but she could marry any other person of her choice.

“Go up O woman to the world of living; you stand by this one who is deceased; Come! to him who grasps your hand, your second spouse, you have entered into the relationship, Of wife and husband.”

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The Rig Veda blesses the widow to have a happy life with the present husband.

“O ye inviolable (The widow), tread the path of wise. In front of these and choose this man(another suitor), As thy husband joyfully receive him and may the two of you, Mount the world of happiness.”\(^{14}\)

In certain cases, if the husband went abroad for longer than a particular period of time, the woman was permitted to remarry as well. We may cite several examples of widow remarriage from ancient India. In the Harivansha Purana, Ugrayudha proposes to Satyawati, the widow of Shantanu for marriage. Emperor Chandragupta I in the 4th century married Dhruvdevi, the widow of his elder brother. Vira Hamira of Chittor married the widowed daughter of Maldeo and their son Kshetrasimha succeeded him to the throne of Udaipur.\(^ {15}\)


Kautilya in Arthashastra had also allowed widow remarriage. However, Vashishta and Prashar Smrities are far more liberal in their approach; they believe that if their husband dies, disappears, becomes a saint, is impotent or becomes penisless, the wife can remarry.

Now come to the proprietary rights of Vedic women. Women in the Vedic age appear to have enjoyed a comparatively high status than that enjoyed by their sisters in the Post-Vedic age. The Rig Vedic quotations reflect that the sons used to inherit their father’s property after his demise and used to divide it among themselves. Also, unmarried daughters got a share of their father’s property. But the brothers did not partition their paternal property with their married sisters.

In Vedic age, the sonless father lived pleasantly hoping that the daughter will give birth to a son. This shows that for a sonless person, his daughter’s son stood on the same footing as that of his sons for religious functions and also all properties of a sonless father shall be inherited by son of his daughter.
The Rig Veda commands that if parents have both son and daughter, son performs ‘Pindadan’ (after death of father, offering funeral cakes and libation of water to his soul) and daughter be enriched with gifts. With regard to the right of inheritance of a daughter who has brothers, the general opinion of Dharmashastra was that sisters should not get any share in the patrimony, if they had brothers. The Rig Veda also approved the share of a daughter in property of her father. Married women inherited and shared properties. A widow too was entitled to a share in the properties of the dead husband.

“As she in her parents house is growing old, I pray to thee as Bhaga from the seat of all.”

Regarding mother’s property, daughters and sons equally inherited it, but some scriptures insist that mother’s property belongs solely to the daughters, in order of preference, unmarried daughters; married but poor daughters; married and rich daughters. A son can claim it only if there were no daughters or if the mother in her lifetime had made it over to him. Again,

where the daughter was the only child of the family, she had the right of inheritance. Brother less maiden can perform funeral rites of the father even after she has been given in marriage. This gives her right to inherit the property. Also it shows that she is legally recognized as equal to a son.

During the Vedic period the husband and wife were joint owners of the household. The husband was required to take a solemn vow at the time of marriage that he would never transgress the rights and interest of his wife in economic matters. On the basis of this joint ownership theory of husband and wife in the household, it was concluded in the ‘Apastamba Dharmasutra’ that the wife was entitled to incur normal expenditure on the household during her husband’s absences. This theory of joint ownership of the husband and wife in the household gave wife only the right to enjoy husband’s property. It did not secure for her equality with the husband in the ownership of the property. According to the age old Smritis and all old schools of Hindu law such as Dayabhaga, Mitakshara etc, the following were ‘Stridhan’ in the hands of a woman, be she a maiden, married woman or widow:

- Gifts made to a woman before the nuptial fire.
• Gifts made to a woman at the bridal procession.
• Gifts made in token of love by father-in-law, mother-in-law.
• Gifts made by father.
• Gifts made by mother.
• Gifts made by brother.

To the above list Sage Vishnu adds any other gifts made after marriage by a woman’s husband’s relations or parent’s relations and gifts from sons and relations and also those gifts made by a husband to his wife on supersession, that is, on the occasion of his taking another wife.  

Sage Yajnavalkya defines ‘stridhana’ as:

“What was given (to a woman) by the father, the mother, the husband, or a brother, or received by her before the nuptial fire, or presented to her on her husband’s marriage to another wife, and the rest (adya) is denominated ‘stridhana’. So, that which is given by kindred, as well as her marriage fee (sulka) and anything bestowed after marriage.”  

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19 ibid, p. 227.
According to Mitakshara School, ‘stridhana’ is,

“That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented by the maternal uncles and the rest at the time of wedding before the nuptial fire; and a gift on a second marriage or gratuity on account of super session; and, as indicated by the word ‘adya’(and rest), property obtained by:
(1) Inheritance; (2) Purchase; (3) Partition; (4) Seizure, e.g., adverse possession; and (5) Finding.” 20

Jimutavahana of Dayabhaga School says that,

“That alone is ‘stridhana’ which she (a woman) has power to give, sell, or use independently of her husband’s control.” 21

Regarding rights of a Hindu woman over her ‘stridhana’, during maidenhood, she has the absolute right of disposal of every description of

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21 ibid, p. 232.
‘stridhana’ at her will. But if she is minor consent of guardian is necessary. During coverture, she can dispose only ‘saudayika’, that is property which a woman receives either before or after marriage through her parents or husband and which is held as her absolute property.

But she has no right of disposal on properties given by her husband. A widow can dispose off her ‘stridhana’ of every kind at her will including gifts of movable properties given by her husband. But such widow has no right over immovable property given her husband.

Smritis also deals with a host of subjects such as domestic rituals, customary rites, inheritance etc. Smritis like Manu, Yajnavalkya, Kapila, Lohita, Andira, Ankara, Vasistha, Narada etc., strongly discuss about the law of adoption and inheritance of adopted child.

According to Ancient Hindu law (Manusmriti) there were twelve kinds of sons, of whom five were adopted sons. They were:

1. He whom a man begets on his own wedded wife let him be known to be a legitimate son of the body (Aurasa) ,the first in rank.
2. He who was begotten according to the peculiar law (of the Niyoga) on the appointed wife of a dead man is called son begotten on a wife (Kshetraga).

3. That (boy) equal (by caste) whom his mother or father affectionately gave with liberation of water in times of distress to a man as his son, must be considered as an adopted son (Datrima).

4. But he was considered a son made (Kritrima) whom a man makes his son, he being equal by caste, acquainted with right and wrong and endowed with filial virtues.

5. If a child is born in a man’s house and his father be not known, he is a son (Gudhotpanna) and shall belong to him of whose wife he was born.

6. He whom a man receives as his son after he has been deserted by his parents or by either of them is called a son caste off (Apaviddha).

7. A son whom a damsel, secretly bears in the house of her father, one shall name the son of an unmarried damsel (Kanina) and declare such offspring of an unmarried girl (to belong) to him who weds her afterwards.
8. If one marries either knowingly or unknowingly, a pregnant bride, the child in her womb belongs to him who weds her, and is called received with the bride (Sahodha).

9. If a man buys a boy, whether equal or unequal in good qualities from his father or mother for the sake of having a son that child is called a son bought (Krita).

10. If a woman abandoned by her husband or a widow of her own accord contracts a second marriage and bears a son he is called the son of a remarried woman (Paunarbhava).

11. He who, having lost his parents or being abandoned by them without just cause, gives himself to a man is called a son self given (Svayamdatta).

12. The son whom a Brahmana begets through lust on a Sudra female is though alive, a corpse and hence called a living corpse (Parasava).\(^{22}\)

The capacity of women in matters of adoption in ancient age in the ‘Dattaka’ form has to be considered with reference to three heads, viz, the capacity to take in adoption; the capacity to be adopted and the capacity to give in

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adoption. In Vedic period, the practice of adoption was in existence, as it was evident from Rig Veda as:

“The intelligent invoked you Nasatyas who are the accomplishters of desires and the protectors of many, with a sacred hymn: her prayer was heard like the instruction of a teacher and you Aswins gave to the wife of an impotent husband Hiranyakasta her son”.23

Manu says, “by a son a man attains victory over all people: by a son’s son he enjoys immortality: and afterwards by the son of that grandson he reaches the solar abode.”24

Although Smritis generally deals with the subject ‘adoption’ but regarding the capacity of women to adopt, they were silent except ‘Vasistha Dharmasutra’ and ‘Budhyanasmrita’.

‘Vasistha’ says,

“But let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. Nor let a woman give or accept a son, unless with the assent of her lord.”

Budhyanasmriti also says,

“Let a woman neither give nor receive a son except with the permission of her husband.”

Commentators like Vachaspati Misra maintains the reason behind it in the religious belief that women are incapable to take part in the religious ceremony of adoption (as women in the Smriti period were deprived of reciting Vedic mantras and performing Yagnas) and says that women are incapable to adopt even with the consent of their husband.

There are two special works on the concept of ‘adoption’- the ‘Dattaka Mimansa’ and ‘Dattaka Chandrika’. According to Nanda Pandit, the famous

27 ibid.
author of famous book ‘Dattaka Mimansa’, women are generally incompetent to adopt. Unmarried women were unable to adopt a son.\textsuperscript{28}

But he is supporting the view of Vasistha and hold that a wife can adopt with the assent of her husband. But a widow is incapable to adopt as in her case the assent of the husband is beyond the range of possibility.

‘Dattaka Chandrika’, a famous commentary by Devana Bhatta on Capacity of woman to adopt says that “a woman is excluded from Heaven as much as a man is, if destitute of male issue, it would seem to follow that her right to adopt on failure of that issue should be co-extensive with his.”\textsuperscript{29}

The same thing ‘Dattaka Nirnaya’ by Srinath Bhatta says, “Giving or taking a son in adoption is illegal in a woman unless her husband gives his consent to it.”\textsuperscript{30}

Sage Narada declares women’s business transactions to be null and void and comes to the conclusion that a woman is not allowed to receive a son in


\textsuperscript{30} ibid.
adoption independently of her husband. Jagannatha Tarkapanchanana, the writer of ‘Vivad Bhanaranva’ says, “that the adoption of a son is the act of a man and in no code is it seen that it is the act of a woman.” He also thinks that consent of the husband is necessary for adoption by a woman.\(^\text{31}\)

Now come to the question of power of a widow to adopt a son or to give away a son in adoption. There was divergence of opinion in the different schools of Hindu law.

Although all schools of Hindu law based their conclusions on the text of ‘Vasistha’, that is,

“Nor let a woman give or accept a son unless with the assent of her lord.”

But their interpretations are different. According to Mithila School of Mitakshara law, consent of husband is essential at the time of adoption. A widow could not adopt a son to herself even if she had the express authority of her husband.

The Bengal School says that a widow may adopt a son with an express permission given by the husband in his lifetime which was capable of taking

effect after his death. But the consent of husband could not be inferred from the mere absence of a prohibition to adopt. The Benares and Madras Schools says the same thing.\textsuperscript{32} But in Madras a widow could also adopt without her husband’s authority, if the husband was separate at the time of death. But the consent of his sapindas was necessary. Again if the husband was in joint family, she must obtain the consent of his undivided coparceners. But if husband had given authority to adopt, no question of consent of sapindas could arise.\textsuperscript{33} In Bombay School, a widow could adopt without authority from her husband. But if there was an express or implied prohibition from her husband, she was unable to adopt.\textsuperscript{34} Where there are two or more widows and the authority to adopt was given to one of them only, she could adopt without consulting the other widows. A widow had no larger powers of adoption than what her husband would have if alive. An unchaste widow was incompetent to adopt a son, as she was incapable to perform the religious ceremonies, viz “Datta homam”.

\textsuperscript{33} ibid, p. 777; Vallabhalalji v. Mahalaxmi Bahuja, AIR 1962 SC 356.
\textsuperscript{34} ibid, p. 789; Gopal v. Vishnu (1899) 23 Bom 250; Malgauda v. Babaji (1913) 37 Bom 107.
But there was no such disability in the case of a sudra widow as no religious ceremonies were essential in the case of sudras. Again a minor widow could adopt provided she had the age of discretion.\textsuperscript{35}

We can summarize the actual status of widow’s power to adopt a son in ancient India in the words that in Mithila School, no consent is sufficient whereas in western India, no consent is required. In Bengal and Benares the husband’s assent was essential and in Southern India, the consent either of the husband or of the sapindas was sufficient. It appears that the theory of a widow’s incapacity to adopt a son (as daughters were not eligible to be adopted at that time) was based on her incompetence to perform religious ceremonies alone that is without joining her husband.

According to ‘Dattaka Mimansa’, a woman in adopting a son mere acts as an agent of her husband and as an agent’s authority is revoked with the death of the principal, so is the husband’s authority or consent given to his wife in adoption is revoked on his death. A widow therefore could not adopt.

On the power of a woman to give in adoption a son, Manu declares, “He is called a Datrima son whom his father or mother affectionately gives as a son, being alike, and in a time of distress confirming the gift with water.”36 The primary right to give in adoption was that of the father.37 The mother could not give her son in adoption if father is alive and capable of consenting.

But after father’s death or if father was incapable to give valid consent either due to reason of lunacy, or has renounced worldly affairs and entered a religious order other than Hinduism, she could give her son in adoption provided also that there was no express or implied prohibition from him.38 Also, ‘Vasistha Dharmasutra’ says, “Nor let a woman give or accept a son, unless with the assent of her lord.” 39

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The Mitakshara by Vijananesbwara says that the mother may give in adoption without father’s assent after his death. The Viramitrodaya of Mitramishra also maintains that the mother and the father may give in adoption either separately or jointly.

But Nanda Pandit in ‘Dattaka Mimansa’ maintains that a widowed mother has a right to give in adoption a son as the assent of the husband must be presumed. The right of adoption was not available to a maiden on the ground that adoption by a woman must be for the spiritual or religious benefit of her husband. Jagannatha Tarkapanchanana, the writer of ‘Vivada Bhangarnava’, referring to an ancient practice says, “It should not be argued that the offspring of an unmarried girl and the rest become adoptive sons through the act of the woman. Although she produced the child through lust, its filiations valid by the choice of the father or by the authority of law and not by the choice of the woman.”

Let us see what the status of women was during the period of Dharmasutras that is their Post-Vedic status? The woman at that time presents a peculiar

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picture. On the one hand she was placed on a high footing of regard and honour and on the other hand, she appears to be relegated to the position of chattel or child-producing machine, blindly obeying her husband.

Manu said that, “the mother excels a thousand fathers in point of honour.”

“Gods are stated to be pleased where women are honoured, all rites became futile where they are disregarded.”

Women are looked upon by Manu as worthy of honour, lights of houses and as Goddess Laxmi (Goddess of wealth). Women are important because on them depend the birth of issues, their upbringing ; also they are source of their husband’s and his forefather’s greatest pleasure that is attainment of heaven through the progeny born to them. Yajnavalkya declares that soma gave women purity; Gandharva sweet speech; fire all sorts of purity so that women are holy. He favoured careful protection and service of women. According to the Smriti writers, eight year was the suitable age for a girl to marry. But in the Vedic age, marriage of girls after attainment of puberty

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42 Manusmriti (Chapter 111: Verse 56), ibid, p. 89.
was the rule. Manu insists on the bridegroom being duly qualified. Also, Manu says that a girl must never be married to a man devoid of the requisite qualities (gunahina) even if her menstruation begins; rather than being married to a worthless man she would remain at her father’s house till death.⁴³

A girl was asked by Manu to wait since the start of the menses for three years. If even after that period, her guardian fails to give her away in marriage, then she was free to find out a suitable husband for her.⁴⁴

During Smriti period we find that women were ineligible to study Vedas and sacred texts or Shastra and this incapacity affected their status. It was made the basis on which the dependent condition of women was made to rest.

Regarding proprietary rights of women, according to Yajnavalkya Smriti, a woman was given share equal to that of her son provided that she had not received any ‘stridhana’ from her husband or father–in-law on partition of property. But if she had received ‘stridhana’, then her share would be half. A

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⁴⁴ Manusmriti(Chapter IX: Verse 89), ibid.
woman succeeds to the entire property of her husband dying sonless. About maintenance rights of post-Vedic women, sage Yajnavalkya says that, if a man deserted his wife and married another woman he must pay the former a reasonable amount as compensation. Again the husband could not marry another woman at his sweet will. He was allowed to do so only if the first wife was either drunkard, diseased, cunning, barren, extravagant, harsh-tongued, giving birth to female issues only and doing harm to the husband. Ordinarily adultery on the part of a woman was considered to be a grave offence; the offence was graver if she had sexual relation with a man of a lower caste. Such a woman would be devoured by dogs. Yajnavalkya provides for the divorce of the wife, if she conceives; for simple adultery she remains impure till her next period. For rape, a woman does not become an outcaste; she remains impure till delivery or the next period. Also a woman not being independent; should not be arrested of offences like adultery. The offending male should be regarded as the offender in such cases and arrested. The general attitude of Dharmashastra was that a woman was exempted from death penalty however grave the offence on her part may be. In very rare cases where the king had to punish a woman with death, he had
to undergo a penance to wash off the sinful act. But as a general rule no woman was independent during the period of Smritis.

In prescribing the duties of women Manu says, “By a girl, by a young woman or even by an aged one nothing must be done independently in her own house.”

He also said, “In childhood a female must be subject to her father, in youth to her husband, when her husband is dead to her sons, a woman must never be independent.” According to Manu, a woman had no right of her own to ‘Yajna’(sacrifice), ‘Vrata’, Upasana (fast), by serving the husband she was glorified in heaven after death. She had no independence even in religious observances. Thus, Manu says,

“ Women must particularly be guarded against evil inclinations, however trifling they may appear, for if they are not guarded they will bring sorrow on two families.”

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46 Manusmriti (Chapter V: Verse 151), ibid.
47 Manusmriti (Chapter IX: Verse 5), ibid, p. 301.
A glaring example of male domination over females is the declaration of Katyayana quoted in ‘Vyavahara Mayukha’, “Whatever spiritual acts (or acts relating to the future state), a woman performs without the permission of the father, the husband or the son, to obtain a benefit after death it shall become fruitless.” Naradasmriti, whose theories shows advancement over Manu also says that “After death of her Lord, the relations of her husband shall be the guardians of a woman who has no son. They shall have full authority to control her, to regulate the mode of life and to maintain her. When the husband’s family is extinct or contains no male or when it is reduced to poverty or when no one related to it within the degree of sapinda is left, the father’s relations shall be the guardian of a woman.”

The best way of guarding a woman as pointed out by sage Vrihaspati is, “employing a woman in the receipt and expenditure of wealth, in the preparation of food, in purification and in the care of the sacred household fire.” Vrihaspati also says,

49 ibid, p. 114, 115.
50 ibid, p. 118.
“a woman must be restrained from slight transgressions even by her relations; by night and by day she must be watched by her mother-in-law and other wives belonging to the family.”

In the eye of law also, during post Vedic period a woman was discriminated against her male counterpart. For example, generally a woman could not be a witness. Usually documents executed by women or transactions (particularly relating to gift, sale, mortgage of immovable properties) made by them were not valid. The height of discrimination is shown in the fact that according to Manu and Yajnavalkya, by murdering even a Brahmana woman one incurs a very minor type of sin. In such a case the sin is equal to that resulting from the killing of a Sudra or stealing an animal etc. In the view of Hindu sages the supreme quality of a woman was her chastity and all other qualities were secondary and to protect this chastity dependence was necessary.

2.3. Position of Women during Medieval period:

The Medieval period of Indian history starts with the eighth century A.D. and ends with the eighteenth century A.D. when the British became major

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players in Indian history. The eighth century to the thirteenth century is held to be the early medieval age and the thirteenth to the eighteenth century is held to be the later medieval period. The later medieval period was highly influenced by Islamic culture and traditions. Medieval India was not women’s age. It is supposed to be the ‘dark age’ for women. The honoured position which the woman enjoyed before the advent of Muslims in India gradually started deterioration.

Muslim invaders brought with them their own culture. For them woman was the sole property of her father, brother or husband. As polygamy was a norm for these invaders, Indian women started using ‘Purdah’ (a veil) which covers body. As Purdah prohibited the free movement of women outside the house, it proved a positive impediment in the way of their education and thereby tended to arrest their all round development. Now, Indian people began to consider a girl as misery and a burden which needs to be protected from the eyes of intruders. Protection of young and lonely girls became a great problem for their parents and this gave birth to various social evils like- Sati, Female-infanticide, Child-marriage, Jauhar and restrictions on Widow remarriage etc. ‘Sati’ means a virtuous woman. A woman who died by
burning herself on her husbands funeral fire was considered most virtuous and was also believed to directly go to heaven, redeeming all the fore fathers rotting in hell through this meritorious act. The woman who committed ‘sati’ was worshipped as a Goddess and temples were built in her memory. ‘Sati pratha’ is no where mentioned either in our Hindu scriptures or in Vedic literature. In fact, Rig Veda commands a Hindu widow to return to the world of living beings. The Rig-Veda confers on her all the properties of her deceased husband. The Rig Veda says,

“Rise; woman, (and go) to the world of living beings; Come, this man near whom you sleep is lifeless, you have enjoyed the status of being The wife of your husband, The suitor who took you by the hand.”52

We know very well that in our great epic ‘Ramayana’, after the death of king ‘Dasharatha’, his wives were never asked to step into the pyre of Dasharatha, rather they lived in family with full honour. In the

‘Mahabharata’, ‘Kunti’, mother of the Pandavas did not commit Sati. Thus, there was no such thing as ‘Sati pratha’. This very concept was a Christian Missionary invention, taking its source from the famous examples of Sati Anusuiya, Savitri, Ahilya etc and ‘Pratha’ from the practice of ‘Johar’. ‘Pratha’ is any practice that is coming from forefathers and is adopted and followed by upcoming generations. ‘Sati’ actually is a very pure word in Hinduism representing purest form of woman. To preserve their chastity, medieval women chose to adopt death as a means. They built big cauldron like pots, lit them with fire and jumped into them to die voluntarily and happily. They chose and embraced death themselves and nobody forced them to do so except the very fate created by those cruel invaders. This phenomenon was called ‘Johar’ meaning giving themselves to fire in order to be saved from disgrace. This practice was started in Rajputana but later on followed by Hindu women in every part of India. Later on, the concept of getting heaven through self-sacrifice became embedded within the minds of Indian women. At the same time the cruel fate of Indian widows inspired the women to commit Sati. Widow remarriage was not favoured. She was considered as a member of society who had unrestrained sexual vigour and thus could harm society with immoral acts. A widow was not even allowed
to turn to religious learning and hence forced to live a complete dark life aloof from the rest of the society. The pain that a Sati endures on the pyre was less painful than that experience of torture she must endure physically and emotionally as a widow. Raja Ram Mohan Roy, a great thinker and reformer from Bengal was the first person who called for a total ban on such customary rituals and for a complete prohibition of polygamy. His efforts lead the way of passing of Sati Prohibition Act of 1829 by the then British Colonial government. After independence, government of India in its efforts to put a total ban on the commission or glorification of Sati, enacted Commission of Sati (Prevention) Act, 1987.

2.4. Status of Women during Buddhism and Jainism:
The 6th century B.C. was a period of religious revolution in various parts of the world. It was an age of great religious teachers, philosophers and thinkers. Their ideas made revolutionary changes in all aspects of life. In India the School of Buddhism evolved in the eastern part in 563 B.C. More or less at the same time around 550 B.C., another School Jainism with almost similar thoughts was developing in the same part of India. The
founder of Jainism, Lord Mahavira was a contemporary of Lord Buddha, the founder of Buddhism.

After examining the position of women in ancient India, we find that their status was honourable enough in early Indian society. Women had access to the highest knowledge and could participate in all religious ceremonies. In domestic life too she was respected. Later on, when the priestly caste of Brahmins dominated society and religion became a burden, we see a downward trend in the position accorded to women. Manu deprived women of their religious rights and spiritual life. Sudras (lower caste persons), slaves and women were treated equals. A woman could not attain heaven through any merit of her own. She could not worship or perform a sacrifice by herself. She could reach heaven only through obedience to her husband. Manu said that all women were sinful and prone to evil. It is against this background that Buddhism and Jainism grew. Lord Buddha condemned the caste structure as propounded by Brahmins. He advocated for equality among male and female in matters of individual emancipation. Buddha was the first religious teacher who gave women equal and unfettered opportunities in the field of spiritual development and founded the order of Bhikkunis or Nuns, one of the earliest organization for women. In Buddhism
future happiness does not depend on funeral rites by son but on the actions or ‘karma’ of the deceased as opposed to Hindu ancient beliefs. The Buddhist funeral ceremony is very simple and can be performed by any one; widow, daughter or any one present on the spot and the presence of a son is not compulsory. There is no need of a son for any ritual or ceremony and the birth of a daughter need not be a cause for grief. This is evident from the fact that Buddha consoled king Pasendi who came to him objecting that Mallika, his queen had given birth to a daughter by saying that,

“A female offspring, O king, may prove even nobler than a male.”

It was really a great revolutionary statement of that particular time.

Marriage and family are basic institutions in any society whether it be a modern or primitive. Also, the status of women can be best judged by studying their position with regard to marriage and other family related matters, inheritance rights etc. In Buddhism unlike Hinduism, marriage is not a sacrament. It is purely a secular affair and the monks do not participate

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53 http://www.accesstoinsight.org/lib/authors/horner/wheel030.html
in it. Ideally therefore among Buddhists marriage is a contract between equals. Regarding mutual rights and duties, the Buddha has laid down in ‘Sigalovada Sutta’ as,

“In five ways should a wife as Western quarter, be ministered to by her husband: by respect, by courtesy, by faithfulness, by handing over authority to her, by providing her with ornaments.”

In these five ways does the wife ministered to by her husband as the Western quarter, love him: her duties are well-performed by faithfulness, by watching over the goods he brings and by skill and industry in discharging all business.”

According to the injunctions of the Buddha as given in the ‘Sigalovada Sutta’, which deals with domestic duties, every relationship was a reciprocal one whether it be between husband and wife, parent and child or master and servant. Among the ancient Hindus marriage was an indissoluble sacrament for a woman, while the man had the right to remarry even when the first wife was alive. Says Manu, “A barren wife may be superseded in the 8th

http://www.accesstoinsight.org/lib/authors/dewaraja/wheel280.html
year, she whose children all die in the 10\textsuperscript{th}, she who bears only daughters in the 11\textsuperscript{th}, but she who is quarrelsome without delay."\textsuperscript{55}

In addition, a man could abandon a blemished, diseased or deflowered wife.\textsuperscript{56}

Under Islamic law the marriage contract may be dissolved by husband at his will without the intervention of a court and without assigning any cause. The same right has not been given to the Muslim women.

Among Buddhists what was the position of man and woman regarding divorce is evident from a document called ‘Lakrajalosirita’ written by Buddhists monks. The document says, “A man and a woman who have been united in marriage with the knowledge of their parents and relations and according to the Sinhala custom can not become separated at their own pleasure. If a man wishes to obtain a divorce it must be by proving that his wife, failing in the reverence and respect due to a husband, has spoken to him in an unbecoming manner; or that she has lavished her affection on

\textsuperscript{55} Manusmriti (Chapter IX: Verse 80), Jayaswal, Suresh, Sadhna Publications, Delhi, Ed., 2008, p. 312.

\textsuperscript{56} Manusmriti (Chapter IX: Verse 79), ibid.
another and spends her earning on him and if her improper conduct is proved before a court of justice, he will be permitted to abandon her.”57

Again the same document says,

“If being destitute of love and affection for his wife, he withholds from her the wearing apparel and ornaments suitable to her rank; if he does not provide her with food of such a quality as she has a right to; if he neglects to acquire money by agriculture, commerce and other honourable means; if associating with other women, he squanders his property upon them; if he makes a practice of committing other improper and degrading acts such as stealing, lying or drinking intoxicating liquors, if he treats his wife as a slave and at the same time behaves respectfully to other women, on proof of his delinquency before the court of justice, the wife may obtain a divorce.”58

Regarding remarriage of widows and divorcees, unlike ancient Hindus where the question of remarriage of widows and divorcees could not arise

57 http://www.accesstoinsight.org/lib/authors/dewaraja/wheel280.html
58 http://www.accesstoinsight.org/lib/authors/dewaraja/wheel280.html
because they were considered as personal property of their husband, either alive or dead, among Buddhism, there is no any religious barrier regarding widow’s remarriage. Death is considered as a natural and inevitable event in Buddhism and that is the reason why Buddhists women suffer no moral or social stigma.

Jain religion is a religion propounded by the Tirthankars. Lord Mahavira was the 24th Tirthankar of Jainism. Right from the first Tirthankara (Shri Rishabhdev) to twenty forth Tirthankara, Shri Mahavira Swami, all the Tirthankaras have shown the right path to the entire world. Lord Mahavira was the senior contemporary of Gautama Buddha, the founder of Buddhism. Jainism has prehistoric origin dating before 3000 B.C. and before the beginning of Indo-Aryan culture.

Tirthankar Mahavira contributed a lot in uplifting the status of women. He did not make any distinction between the males and females in the observance of religion. Both the sexes were given equal opportunities in matter of religion, viz, study of sacred texts; observance of necessary duties; practice of vratas or vows; entrance into the ascetic order; practice of
penance, making spiritual progress. In his ascetic order any person whether he or she was from any royal consorts, member of the aristocracy or belonging to the common strata, could make his entry. Naturally many ladies availed themselves of this opportunity of achieving their salvation by entering into his ascetic order. That is why in Tirthankar Mahavira’s religious organization, there were two orders of ascetics, namely, ‘Sadhus’, that is male ascetic and ‘Sadhvis’ that is female ascetics. Chandana and Jydesta, the two younger sisters of Queen Trisala Devi, the mother of Mahavira and Yasasvati, the wife of their maternal uncle entered the ascetic order of Tirthankar Mahavira. In the area of education also, Jain Tirthankars advocated for equality between the two sexes. The first Tirthankar had advised his two young daughters, Brahmi and Sundari that only education could made their life fruitful. A learned lady had the same honourable position as that of a learned man. According to Jaina tradition women are expected to know sixty four arts which include dancing, painting, music, medicine, domestic sciences etc. This equal opportunities and educational freedom resulted in adoption of teaching profession by many women and to remain unmarried throughout their life in order to carry on their spiritual experiments unhampered. For example, ‘Jayanti’, daughter of king
‘Sahasranika’ of ‘Kausambi’, remained unmarried out of her love for religion and philosophy. ‘Kanti’ was a redoubtable orator and poet who completed the unfinished poems of ‘Abhivana Pampa’ in the open court of Hoyasala king Balla 1 (A. D. 1100-1106) in Karnataka. Similarly, Jain lady ‘Awaiyara’ was one of the most admired amongst the poets in Tamil language.\(^{59}\)

\(^{59}\)www.jainworld.com/jainbooks/life