INSTITUTION OF ADOPTION
HISTORICAL PERSPECTIVE

I. Prelude

Family is one of the most common and the oldest 'Human Institution' of the society. It is the social unit into which children are born and family provides protection, emotional support and sense of belonging. Most families are based on kinship i.e. the members belonging to the family through birth, marriage or adoption. The concept of adoption as a welfare measure is of recent origin. Traditionally a child was adopted for temporal and spiritual purposes and more recently to satisfy the emotional and parental instincts of the adoptives. Orphans, abandoned and destitute children were confined to the four walls of an institution.

Institution of adoption in one form or the other is prevalent in almost all the legal system of the world. The roots of this institution are traceable back into earliest historical times. Right from the beginning of the civilisation, man has aspired to have offspring. But nature may bestow one with many children while deprive the other of even a single child. In the absence of natural offspring from wedlock, people resorted to other artificial methods to fulfill their desire to have a child. Adoption which is fictitious

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creation of blood relationship was one of them. The institution of adoption came into existence as a ramification of the parental power of the father over the children under which he could transfer his dominance over them to another.\(^3\)

The Hindu and the Roman developed the institution of adoption to a great length. It would not be exaggeration to say that no other people of the world developed themselves to such minute details with regard to the institution of adoption as Hindu did it. Hindus regarded law as 'Dharma'. Dharma contains principles and rules governing the entire life of a man. The institution of adoption continued to occupy a great significance under Hindu law as the aspiration for sunship predominated the Hindu culture and civilization.\(^4\) The present chapter is being devoted to a discussion on the evolutionary process of adoption under the Hindu law and other legal system of the world. An effort would be made to trace the historical development of adoption during the ancient India, medieval India and British period. Discussion will also be focussed on its development in the post Independence era.

**II. Adoption During Ancient India**

The ancient Hindu period stretches between 1000 B.C. to 1100 A.D. On the basis of available literature one thing which clearly gets manifested during this particular period has been emotional and commotional desire of every Hindu to have a son. Different forms of marriages were recognised under old Hindu law. The main object of a marriage was the production of children. The

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3 Ibid.
desire for offsprings was natural in the society which mainly counted relationship through the father, took the form of a wish for a son to perform the necessary funeral rites for the father and to continue his line. So the desire for sonship always remained there. When it could not be fulfilled within the conceived notions of the Hindu Dharma, there emerged the institution of adoption. In fact the concept of adoption dates back to our ancient Hindu mythology.

An adoption of a son is recognised by all the Sutras, though the position of the adopted son was placed amongst the first six sons. The Dharamsutra of 'Baudhayana' generated a heated controversy regarding a secondary son by appointment and the Dharamsutra of 'Apastamba' did not recognise any secondary son. According to the Dharamsutra of 'Vasistha' the position of Duttaka

6 The ancient Hindu law recognised two kinds of son: (1) Mukhya or Principal - Son born to the husband himself to his wife. They were further divided into following kinds: (a) Auresa - Legitimate male son; (b) Panarbara - Son of a twice married woman; (c) Shudra - Son of a Brahmin husband by a shudra wife; (d) Puraya - The son born to the wife of others and they are of following kinds: (i) Keshraja - Son begotten by an appointed kinsman; (ii) Kania - Love child of a dansel taken with her when she is married; (iii) Ghudaja - Furtively produced in husband's house. (2) Secondary or Gauna - (a) Dattaka or Adoption - Given by parents voluntarily they were - (i) Krita - The son whether of one's own caste or not purchased for the price from his father and mother (ii) Kritrima - Orphan taken in adoption with his own assent; (iii) Swayamduatta - Son self given either loosing his parents or on being abandoned by them; (iv) Apabidda - The son deserted by his father or mother is apabida son of one who brings him like his own son; (b) Putri ka Putra - Son by the appointed daughter; (c) Dwayamushyayana - Son of two fathers. For more details see T.P. Gopalakrishnan, Hindu Adoption and Maintenance Act, (3rd edn.), pp. 1-2. Also see Deokinandan Aggarwal, Text Book of Hindu Law, (3rd edn.), pp. 80-81.
7 Gautam has been recognised as the earliest of the Sutra writers almost by all authorities including Kane, Dr. Jolly and Buhler. For more details see, U. C. Sarkar, Epochs in Hindu Legal History, Vol. 1, Series 8 (1st edn., 1958), p. 58 and Myne, Hindu Law and Usages, (1938), pp. 196-97.
son was a very inferior. He placed the adopted son amongst the last six sons.9

The earliest practice has been to adopt a child form one's own family. In this context the primary consideration remained the interest of the childless adoptive parents, namely, the perpetuation of the family name, lineage, protection in old age and performance of death rites by offering 'Pinda'. Hindu mythology also recognised other means of getting a child like offering prayers to the deity, e.g. Sita, Karna and Draupti, etc.10 This shows that the spiritual belief were the compelling factors for the emergence of the concept of adoption.

According to the Vedas a man blessed with a son is entitled to endless or heavenly bliss. Our shastric texts lays down that through a son, a man, conquered the world, through a grandson, he attains the immorality and through a great grandson he gains the world of sun. The other noblest aspect which had found a place in an ancient Hindu jurisprudence has been the fact that a Hindu could not adopt more than one son.11 During the 'Rigvedic period' it is also recorded that the desire to have a son born of their own body remained dominated, but in situation where there was no

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10 According to the shastric belief of Hindu's Sita was found in a carved wooden basket in a field where king Janak received Sita and took her as his daughter as a blessing from mother earth. No questions were asked about her lineage or about her inherited past and she was accepted by one and all as the princess. Similarly, Karana was found by a person who was in charge of the stable of mighty king of Hastinapur. He was loved, cared for by his adoptive parent well enough to dominate the whole epic of 'Mahabharata'. Similarly, Draupti was also found in a holy fire by king Drupad and adopted by the king. These all episodes also shows that even an abandoned child could be valued and looked up to in our ancient society. See A Project Report on National Initiative for child Adoption - Compilation of Resource Material Collaborators, (National Institute of Social Defence and of Central Adoption Resource Agencies, New Delhi, 2000)
such son, the Hindu looked to their daughter to continuance of their family.\textsuperscript{12} This means that daughter's son shall be his son and was to perform his funeral rites as well. It is further recorded that a \textit{Shudra} may adopt a daughter's son or sister's son provided the person to be adopted was not the only son or daughter.\textsuperscript{13} The above observations points to the fact that adoption seemed to be the last resort in many situations. However, it appears that consent of both the parents was an important factor for giving and taking in adoption. The physical act of giving and taking was absolutely necessary for the validity of an adoption in all cases.

D. C. Manooja traces the origin of adoption to the principle of slavery. According to the author in ancient times man like the animals could be bought and sold, given and accepted and father had unlimited rights over the children. Distress and poverty of parents was the main cause of selling the children.\textsuperscript{14} Though various reasons may be advocated for emergence of the institution of adoption, nevertheless, the basis thrust involved in an adoption was the transfer of dominion or \textit{pateria-potestra}\textsuperscript{15} from the real father to the adoptive father. Conferment of status of sonship on the boy depended entirely on the sweet will of the adoptor. Passages are found in the \textit{Smritisies} declaring the sale and gift of

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\item \textsuperscript{12} In \textit{Rigveda} III, 1(675) sonlessness is termed a virta and is placed on the same level as lack of property (amati) and agni is to be sought to be protected from it. The Aitreya Brahmana contains the old verse which says that a daughter is a misery (Kriparam) while son is light in the highest heaven as quoted in P. Chattacharya, \textit{supra} note 5, p. 57.
\item \textsuperscript{13} See P. V. Kane, \textit{supra} note 8, pp. 954-955.
\item \textsuperscript{14} See D. C. Manooja, \textit{supra} note 2, p. 8.
\item \textsuperscript{15} The \textit{pateria-postestra} of the Roman law depicts true picture of the father's unlimited power over his children in older times. But his treatment with his children was different than slaves. It was not due to any legal restraint upon his power but of natural love and affection towards his children. For details see Shashtri Sarkar Gopalachandra, \textit{Hindu Law of Adoption}, (Tagore Law Lecture, 1888), p.1.
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children amongst Hindus in ancient India. But it would be wrong to conclude that ancient sages, Manu and Yajnavalkaya prohibited the sale or gift of child for adoption. Rather both these sages recognised adoption and it was considered a meritorious act on the part of father to give away a son in adoption. In the words of D. C. Manooja, "prohibition appears to be against slavery and not against adoption."\(^{16}\)

The Hindu commentators insists upon additional formalities and rituals in order to know the intention of the adoption i.e. religious ceremonies and these additional formalities was the point of distinction between adoption and slavery.\(^{17}\) The 'Dattaka' form of adoption was considered to be the most acceptable one. In case of 'Dattaka' form of adoption a boy should be given before the 'sacrificial fire' i.e. 'Datta Homa' as a gift from the natural parents or parents to the adoptive parent or parents so that he could be complete substitute for the natural born son except shudras. However, the objective remained religious throughout.\(^{18}\)

According to text of vasishte:

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शोभितृत्रुधारणयभ, पुरुषो मातापितु निमित्तः।
तस्य प्रदानविक्रयाशयं मातापित्री प्रभवतः। (Vasistha Sutra, Ch. XV)
\end{quote}

which means that a father and a mother are competent to give, sell

\(^{16}\) See D. C. Manooja, supra note 2, p. 10.

\(^{17}\) Originally perhaps the economic motive was the more important factor in adoption, that is to get for the family as many powerful workers as possible. But later the Smriti writers all agreed on the religious duty of every Hindu which owes to his ancestors, that is to provide for the continuance of the line and solemnization of necessary rites, see P. Bhattacharyya, supra note 5, p. 58.

\(^{18}\) However, ceremonial purity was mandatory even in case of shudras for example an out caste, such as unchaste woman could not take part in adoption. See J.D.M. Derrett, Hindu Law Past and Present, (1st edn, 1957), pp.148-149.
or abandon a son. Mother alone can't give, sell or abandon her son, without her husband's consent.\textsuperscript{19}

On the question as to who could be adopted, the \textit{Dharamsastra} maintained the position that the eldest son or only son could not be given in adoption since such a child should remain in his natural family for the satisfaction of the ancestors.\textsuperscript{20} Saunaka said,

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\begin{center}
नैक्पुष्पितं कर्तव्यं पुजनां कदाचन।

वर्णसूचिकं कर्तव्यं प्रयत्नता॥
\end{center}
\end{quote}

which means - "By the father of an only son the gift of a son should never be made; but by the father of several sons should the gift of a son be anxiously made."\textsuperscript{21}

According to Manu the adoptive son must be similar to his father and mother. He used the word \textit{sadrsam} (सदर्सम). Mednatilhi a famous commentator on Manusmriti interpreted the word 'Sadrsam'

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\begin{center}
सदर्सम न भ्रातित: किं तत्तुः कुलानुपुष्पिणिः।

श्रवियदिप्रिः श्राहणाय दत्तो युवस्ये॥ मैथा on Manu IX, 68;
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\end{quote}

that is "the boy to be adopted" should be similar to the adopter in qualities and not in caste, that a \textit{brahmana} may adopt a \textit{ksatriya} boy".\textsuperscript{22}

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\textsuperscript{19} Quoted in Radhabinod Pal, \textit{supra} note 9, p. 379. The text of Vasishtha which is regarded as the foundation of the Hindu Law of adoption and which explains the reasons of the parents power over his children of transferring dominian. Quoted by Lord Hobhouse in \textit{Shri Balsu Gurulingaswami Vs. Balsu Rama Lakshmamma} (1899) 26 IA 113 p.130.

\textsuperscript{20} \textit{Id.} p. 163.

\textsuperscript{21} \textit{Ibid.}

\textsuperscript{22} Quoted in P. Bhattacharya, \textit{supra} note 5, p. 64. The Vyavahara Mayukha held that the boy should have been of the same caste as that of the adopting father. Kullaka in his commentary on Manu held the same view. Vayupurana narrates a story that Bharata, son of Dusyanta a kshatriya adopted Bharadvaja, son of Brahaspati and a brahmana. By adoption Bharadvaja become a Kshatriya.
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According to Saunka, the boy to be adopted must bear the reflection of a son. It means that the adopted son must resemble with the body of the adoptive parents. That was the reason the preference was given to adopt a child from one's own family.\textsuperscript{23} Regarding the qualification of the adoptive child, it is revealed that a child who suffered from congenital blindness, loss of limbs, chronic disease, impotence was not fit for adoption generally.\textsuperscript{24} Dattaka Mimansa prohibited the adoption of the same boy by two persons. Regarding the age of the boy to be adopted Dattaka-mimansa mentions, the best time for adoption is up to three years, then three to five is next best (gauna) and that after five no boy can be adopted.\textsuperscript{25}

Illegitimate children could not be adopted because only the legitimate parents could give the child in adoption. Though it has been stated in the foregoing discussion that both the parents could give the child in adoption but the shastra also state that the father could give without his wife's consent, but the wife could not give without the consent of her husband unless her husband was dead or living in a distant country. The leading text on this point was that of Vasistha, "न रजिपुत्र दयालु प्रतिवीणामायात्रानुजानामध्ये." A woman should neither give nor receive a son except with the permission of her husband.\textsuperscript{26}

On the effect of adoption under the shastra, law was that the adopted child was completely transplanted into the adoptive

\textsuperscript{23} Mayne, Treatise on Hindu Law and Usage, (11th edn., 1953), p. 188
\textsuperscript{24} According to Dattaka Mimansa, Dattaka Chandrika and Samaskara Kaustubha, the adoption of a boy incurable deaf and dumb is not valid. See SurendraVs. Bhola Nath (1944)1 ILR Cal.139
\textsuperscript{25} The Dattaka-chandrika held that a boy of the three higher classes could be adopted till the upanayana and a sudra boy could be adopted till his marriage. See P. Bhattacharya, supra note 5, p. 65.
\textsuperscript{26} Ibid.
family. The only restriction was that he could not marry relation of his original family whom he could not have married in the absence of adoption.

The concept of sapindaship was recognised to the extent of three degrees in both the families. The Dattaka-Mimansa, Dattaka Chandrika and Samaskara Kaustubha quote the passage of Saunaka,

\[ \text{शाश्वतानां सपिंदेषु कर्त्तव्य पुत्रसंस्थापणः।} \\
\text{तदनावेदितपिण्डो वा अन्येऽ तु न कार्ये॥ शैव।} \]

which means that a man should prefer a sapinda or sagotra to one who is not so. The adoption of a boy incurable, deaf and dumb is not valid.\(^27\) When the adopted child leave the natural family the law shall presume as if he had died.\(^28\) The man who wanted to adopted had to be without a male issue living at the time of adoption.\(^29\) One more situation related to the adoption where an only son of a person becomes an outcaste or renounces the Hindu religion, in this situation father has been permitted to adopt another child or a son. This shows that the right of a Hindu to make adoption is not taken away when his only son becomes a non-Hindu. Since such disqualified persons are also equally disqualified to perform religious ceremonies and hence the father’s right to adopt remain intact. Whether a disqualified person himself could adopt a son, it appears that there is no strict prohibition in this regard but such an adopted child shall have no right to the estate of his parental grandfather.

\(^{27}\) Surendra Vs. Bholanath, ILR (1944) 1 Cal. 139
\(^{28}\) For more details see Radha Vinod Pal, supra note 19 ; Also see U.C. Sarkar, supra note 7 and Deokinandan Aggarwal, Supra note 6.
\(^{29}\) Male issue meant three direct descendants in the male line. Accordingly, if a man has a son, grandson or great grandson, actually alive, whether natural or adopted, he is precluded form adoption.
The above discussion clearly shows that adoption has continued to be a recognised necessity during the entire ancient Hindu period. Besides, religious and spiritual consideration played a dominating role in adoption. There was nothing like secular and caste consideration played a major role.

III. Adoption During Medieval India

The medieval period starts from 1100 A.D. and stretches to 1772 A.D. This was the time when the Mughals invaded the kingdom and became the master of our destiny. During this era the various Muslim rulers ruled over this country. They built mosques and converted a vast segment of our society into Muslims. There were hardly a few of the emperors who encouraged respect for the Hindu religion. Hindu custom and traditions did not change much. Hindu law as mandated in the 'Mitakshra' and the 'Dhayabhaga' continued to have its sway in different parts of the country. The Mitakshra schools and their sub-schools as well as the Dayabhaga school had their own significance in moulding the lives of Hindus in religious as well as other secular matters. In India after Gupta empire and especially Mohammadan period, adoption became even more important particularly in the families where there was no son.

According to Mitakshra school adopted son was assigned the same position in the adopted family as natural born son. While Yajnavalkya Smriti' by Vijnanesvara assign an adopted son into seventh rank, it does not treat him as an heir to the adopted father's collaterals. The Smritichandrika gives equal rank to the

30 It was during the Muslim period that Mitakshra and Dayabhaga were written. Mitaksra is a commentary on Yagnavalaya Smriti by Vijnanesvara and Dayabhaga is a commentary by Jimutvahana.
adopted son along with the natural son (aurasa) and it prohibited the appointment of a daughter.

In the primitive races, institution of adoption was not peculiar to Hinduism but owes its origin to the social communism and in India it has become integral part of Hindu personal law. During this era the sale of son was not approved and gift was spiritually considered most mariturious form and normal mode of adoption.\textsuperscript{31} The intimation of adoption also used to be given to the chief of the town or village as well. Secular motives also found their place in adoption. The question whether an adoption as inspired by secular or religious motives have reasons in the case of adoption made by widows subject to certain restrictions and conditions after their husband's death. Every Hindu male of sound mind who had attained the age of discretion could authorise his wife (except in Mithila) to adopt a son to him after his death even if he had not attained the age of majority.\textsuperscript{32}

The authority to adopt could be given by the husband even if he was an undivided member of a Mitakshra joint family at the time of his death.\textsuperscript{33} In many of the cases it could not be said that such adoption by widow were made form religious motive. They were after made to divest the course of succession. Therefore, it is difficult to find out as to whether the motives for a particular adoption were religious or secular.

\textsuperscript{32} Two situations aim in this aspect - (i) Adoption during the life time of husband; (ii) Adoption after his death (as a widow). Here the theoretical base is the same. She can do so only or the husband and with his consent. But according to Mithila school of law - no consent possible after the death of her husband and also widow incapable of performing the attendant ceremonies, see Asha Bajpai, \textit{supra} note 1, p. 59.
\textsuperscript{33} But as regards the powers of the widow the greatest divergence of views prevailed. The basic text said that a woman should not give or take in adoption except with the assent of her husband. See, P. V. Kane, \textit{supra} note 8.
The simultaneous adoption of two or more person was not permissible. A Hindu coparcenar could validly adopt against the wishes of other coparcener. Another important aspect that came to light in subsequent years was that two persons could not adopt the same boy and such an adoption was considered illegal under Hindu law unless the custom permit the same.\(^{34}\) Similarly, there could not be an adoption of an adopted son even if the latter be the son of natural father. However, the giving and receiving were the two important aspects which had continued to be present for the validity of the adoption during this era. Though Hindu law did not prescribe any particular form for giving and taking but the factum must exist independently which means that there must be an actual gift and acceptance of the boy in adoption.\(^{35}\) When a *Mitakshara* joint family adopted a son, he became a coparcener with his adoptive father as well as with other members of the coparcenor family. Therefore, he acquired a right as though by birth in ancestral and joint family property. He could demand partition and became entitled to the benefit of survivorship. When there was a natural born son in the family subsequently to the adoption then according to the *Mitakshara* the adopted child was given a lesser share in partition in proportion to the natural born son and it differed form school to school.\(^{36}\) The same was the position in *Dayabhaga* also. However, in Madras, Bengal and

\(^{34}\) See Maney, *supra* note 31, p. 435.

\(^{35}\) The subject of the gift and acceptance is not thereby constituted a son of the acceptor. His intention to make the boy his son must be manifested by additional formalities. The Hindu commentators insist upon the observance of religious ceremonies in addition to gift and acceptance for the completion of an adoption, so that it is clearly intended that the boy is not taken as slave. See Shastri Sarkar Gopalchandra, *supra* note 15, p. 5.

\(^{36}\) In Bengal the adopted son was given 1/3 of the estate of the adoptive father, in Banaras he took 1/4 of the estate of adoptive father and in Bombay and Madras he took 1/5 of the estate of adoptive father. See Paras Diwan, *Modern Hindu Law*, (11th edn, 1997), p. 298.
other provinces except in Bombay the adopted son shared equally with the after born natural son.\textsuperscript{37} One feature which remained consistent on this aspect has been the fact that by adoption, the adopted child remained completely severed from his natural family as regards all civil rights and obligations.\textsuperscript{38} The adopted son though ceased to be member of his natural family, he could not marry any girl in the family of his birth whom he could not have married before his adoption. Nor could he adopt a boy from that family whom he could not have adopted if he had continued in that family.\textsuperscript{39} An adoption did not divest any property which had vested in the adopted son prior to his adoption.\textsuperscript{40} In the adoptive family, the adoptee will divest the property vested in another person and to the extent to which he had been entitled to it if he had been adopted prior to his adoptive father's death.\textsuperscript{41} Where a married person was adopted his wife passes with him into the adoptive family as the husband and wife forms one body as per \textit{shastra}.\textsuperscript{42} Similarly, son born after adoption of married person though conceived before, passes into adoptive family with rights of inheritance. But where the son is already in existence at the time of adoption of his father, son in existence will neither lose his \textit{gotra} and right of inheritance in his family of birth nor will he acquire any such rights in the adoptive family of his father.\textsuperscript{43}

The above discussion clearly shows that in India the Hindu law relating to adoption continued to be regulated by the \textit{Mitakshra} and \textit{Dayabhaga} schools respectively. Besides this customary laws

\textsuperscript{37} See Mayne \textit{supra} note 31, p. 451.
\textsuperscript{38} \textit{Ibid}.
\textsuperscript{39} \textit{Ibid}.
\textsuperscript{40} See D. C. Manooja, \textit{supra} note 2, p. 27.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Ibid}.
\textsuperscript{43} \textit{Ibid}.
also continued to play an important role. No other significant change is noted. The adoption conferred all the rights including the right to inherit the property of the adoptive parents. Even a bachelor or widower could adopt a child. However, the wife could neither give nor take a son in adoption without the consent of her husband. The Bengal and Banaras schools permitted the widow to adopt provided the husband has consented. The authority could be exercised after his death. The Madras school went a step further and allowed the widow to adopt a son even if the husband had not consented during his life time provided some other senior member of the family gave his consent. The Bombay school liberalized the law further and the widow was not required to obtain the consent for the validity of adoption. Thus the position differ from one sub-school to other.44

IV. Adoption During the British India

The Britishers came to India as a body of traders and merchants in the earlier part of 16th century. Nobody could have thought that a day would come when they will become the master of our destiny. Initially the British ruler i.e. the Governor General refrained from interfering in the personal laws of the native population. The Mitakshra and Dayabhaga continued to play its role in governing matters relating to personal laws of the Hindus.

44 See M. S. Pandit, supra note 4, p. 21. The Vyovaharamaynkha, Nirnayasindhu, Dharmasindhu and Samskaraustubha, which are authoritative in Bombay and Western India, held that the passage of Vashistha referred only to a wife whose husband was alive and that a widow could adopt without the husband’s authority. The presumption was that there was the authority of the husband unless the husband had prohibited the widow expressly or by necessary implication from adopting. भर्तृनुजः तु सत्यवाद। एवं दूरदृश्यात् विद्वायतु सा विनाधि विद्यूषोद्धवं राजीवानकाय नामति। अतो विधानत्वायो भर्ट्रुनुज्ञा प्रायत्ने सर्वात्रत्वं एवं सूतायवधे स्त्रियाः सप्तनृजां विनाधि किर्दिकाः। व्यूः मद्यः, p. 113, as quoted in P. Bhattacharyya, supra note 5, p. 61.
Accordingly, the matters of adoption was in practice during the British period in India. However, during this period, a person could adopt a son only with the prior permission of British rulers in India.\(^{45}\)

During this era also if a man had a son, grandson, or great grandson, whether natural or adopted, he was precluded from adoption. Similarly, simultaneous adoption of two or more persons continued to be invalid.\(^{46}\) It will be seen that the Privy Council became the highest court of appeal for India during the British era. Since the basic position relating to adoption remained unchanged during this period but some new situation came up which were settled judicially. The authoritative texts of the Hindu law relating to adoption matter also came for interpretation before the Privy Council. The High Courts in British India have referred to the mimansa rules in their judgements, in case of adoption. In Jamoona Vs. Bamasoondri, \(^{47}\) the Privy Council looked into the question of adoption by a minor. The Council noticed that a person who is a minor under the Indian Majority Act, 1875 can adopt or authorise his widow to adopt when he has attained the age of discretion. The court held that the age of fifteen or sixteen years was according to the law prevalent in Bengal to be regarded as the age of majority which is fixed by Dayabhaga school at the completion of the fifteen years. According to the Mitakshra school, it is the completion of sixteen years. The rule applied to a case of a husband empowering the widow to make an adoption. The court observed that the age of discretion cannot certainly be fixed earlier

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\(^{45}\) Britishers did not grant permission to the ruler of Jhansi, Lakshmi Bai to adopt a son after the ruler had adopted a son with proper ceremonies in 1851.

\(^{46}\) Rungamma Vs. Atchamana, (1846) 4 M.I.A. p. 1

\(^{47}\) (1876) 3 I.A 72.
than fourteen years as the law treats a girl below the age of fourteen years as a child for the purpose of marriage. This shows that Hindu law never considered a person below the age of majority as having attained the age of discretion. It would be followed that the widow herself must have attained the age of majority before she adopts a child in her own right or otherwise. This further shows that the capacity of the widow to adopt is not to be considered with reference to the Indian Majority Act, 1875. Parents only had power to give and take child in adoption. The primary right to give in and take the son in adoption was of father who could do so without the consent of the mother. A mother was incompetent to give in adoption her illegitimate son.\(^4\)\(^8\) It was held by the High Court of Bombay that a widow by remarriage lost her right to give in adoption her son by the first marriage, unless she was authorised by the first husband to do so.\(^4\)\(^9\) A Hindu father who became a convert to Mohmmedanism or non Hindu did not lose his right of giving his Hindu son in adoption but since the physical act of giving was coupled with religious ceremonies, that act had to be delegated to Hindu person.\(^5\)\(^0\) If a widow having son by her first husband remarried, but again became a widow. With a view to continue the line of her second husband, she took in adoption a son by her former husband, who she herself gave in adoption as a natural mother. The adoption was held to be invalid, because the lady forfeited her right to give away her son as soon as she remarried and also on the ground that the same person could not be both giver or taker.\(^5\)\(^1\)

\(^4\)\(^8\) Trikanganda Mallanauda Vs. Shivappa Patil, (1943) ILR Bom. 706
\(^4\)\(^9\) Punchappa Vs. Sauganbasawa, (1900) 24 ILR Bom 89.
\(^5\)\(^0\) Shamsheer Singh Vs. Santabai, (1901) 25 ILR Bom 351.
\(^5\)\(^1\) Sharad Chandra Vs. Shaniabai, (1944) ILR Nag. 544.
In an another interesting case titled **Panchappa Vs. Sanganbasawa**, the Privy Council held that apart from the **Hindu Widows Remarriage Act, 1856**, a Hindu widow on her remarriage loses her status as her husband's widow for all purposes and has no longer any spiritual ties with the family of first husband. She can't therefore, adopt a son to her first husband while she is the wife of another. What particular form of authority a widow should have to make an adoption, the Privy Council in **Surender Keshav Vs. Doorga Soondri**, held that no particular form of authority is required. Whatever authority has been given must be strictly followed. The duty of a Hindu widow is to obey such direction as her husband may have given as to the way in which she should exercise a power of adoption to him. The rules of construction of an authority to adopt have been laid down by the Privy Council in **V. A. Rao Vs. Parathasarthi Rao**, and in **Rajindera Parsad Vs. Gopala Parsad**, it was held that where an authority to adopt is given by a husband the presumption is strong that he desired to be represented by an adopted son. Where a widow is authorised by her husband to adopt a particular boy, she can't travel beyond the scope of the authority and adopt another boy. In the case of **Collector of Madura Vs. Mootooramiya**, the Privy Council held that in the absence of specific authority from the husband the widow can adopt a son to him with the assent of the *sapinda*. As has already been pointed out in Bombay the widow does not require the authority of her husband or the consent of his *sapinda* and she can adopt a son on the death of a son previously adopted.

52 (1924) ILR Bom 89, 94.
53 (1892)19 IA 108, 122.
54 (1914) 41 IA 51, 71
55 (1930) 57 IA 296.
56 (1868) 12 MIA 397
This shows that in the above situation she had the power to make successive adoption.

It is well settled that in a joint family the widow of a coparcener can adopt a son to her husband notwithstanding the vesting of his interest with another coparceners. It is also settled law that when a natural or an adopted son dies unmarried leaving his mother as his legal heir, her power of adoption can still be exercised. 57

In Partap Singh Vs. Agar Singji, 58 a village was held as maintenance grant by a junior branch of the family whose head was the holder of an impartible estate. The last male holder of the village, 'A' died childless leaving behind widow. By the custom of the family such grant reverted to the estate upon failure of male descendants of the grantee. Accordingly, the village became vested in the owner of the estate by revolt. Thereafter nearly five months later when 'A' died, his widow adopted a son to him. It was held that the adopted son was entitled to succeed to the village, which has vested in the revoler. The judicial committee observed, "The Hindu lawyers don't regard the male line to be extinct or a Hindu who have died, without male issue until the death of widow renders the continuation of the line by adoption impossible." The Right of widow to make an adoption is not dependent on the inheriting as a Hindu female owner to her husband's estate. She can exercise the power so long as it is not exhausted or extinguished, even though the property was not vested on her. These cases clearly show that the validity of an adoption is to be determined by spiritual considerations and the substitution of a son of deceased for the

57 Wellaanktvankal Vs. Venkalarama, (1916) 4 IA p. 1
58 (1918) 46 IA 97
spiritual reason is the essence of thing and the consequent
devolution of the property is a mere accessory to it.

Where a man has two wives and associate one of them in the
adoption of a son, the senior most wife was the adoptive mother,
the other being only the step-mother. In Kashishri Devia Vs.
Greesh Chander,\(^59\) where the wife so selected was the second wife
of the adopted and the adoptive mother died before the adopted
son, it was held that on his death the eldest widow was not his heir
as mother, being only a step-mother and the succession went to a
nephew of the husband.

Where a member of Mitakshra joint family adopted a son, the
later became from the moment of his adoption a coparcenor, with
his adoptive father as well as with the other members of the
coparcenary. The Bombay High Court held that he acquires a birth
right in the ancestral or joint family property. He can also demand
partition and is also entitled to the benefit of survivorship.\(^60\) Thus
the adopted son's rights in the new family are almost similar to the
rights of a natural born son, except in situations where there is a
subsequently natural born son. Whether the adopted son is
divested of the ancestral property in his natural family which
vested solely and absolutely in him prior to his adoption is a
question on which no final opinion has emerged so far.

The Madras High Court following the Calcutta High Court's
decision held that he is not so divested.\(^61\) The Orissa High Court
also took the same view. The Bombay High Court took different
view and held that the adopted boy looses all rights to property he

\(^{59}\) (1964) WR 71.
\(^{60}\) Ram Chandra Vs. Shankar, (1945) ILR Bom. 353.
pp. 437-47.
may have acquired in his natural family including the right to property which had become exclusively vested in him before the adoption. Mayne has tried to reconcile the position by holding that if a man at the time of adoption possessed property whether self acquired or inherited, the adoption should not affect his right. On the other hand, when a boy adopted is a coparcener in the joint family he is divested of his right in the coparceners property. Mayne based his conclusion on the view of the Bombay High Court which appears to be a better solution.

One of the important question which deserve a special treatment relates to adoption by a widow and its effects. There is no doubt that the widow could adopt a son after the death of her husband. It has also been a settled law that immediately after the death of her husband the widow succeeded to his estate as a legal heir. But the important question to be asked here is whether a son adopted by a widow to her deceased husband stands in the same position as if he had been born to his adoptive father. Further whether the adoptive child would divest the widow of the estate which had already vested on her. In Babu Anjoi Vs. Rantogi, it has been held that the title of the adoptive child relates back to the death of his father to the extent that he will divest the estate to any person in possession of the property to which he would have had a preferable title, if he had been in existence at his adoptive father's death. It shows that the 'Doctrine of Relation Back' was very much in operation during this era. However, after the passing of the Hindu Women Right to Property Act, 1937, the position has slightly been modified. In cases where a widow succeeded to her

62 Datta Traasukaram Vs. Govind Sambhajui, (1916) 40 ILR Bom.429
63 See Mayne supra note 31, p. 454.
64 (1897) 21 ILR Bom. 319
husband as a legal heir, the subsequent adoption by her will result in divesting of the estate to the extent the boy would have been eligible, had he been there at the time of adoptive father. Another aspect which also received judicial treatment related to the right of an adopted son to reopen the partition after his father's death. In *Shakan Lingan Pillai Vs. V. Pilla*, the Madras High Court held that the adopted son is entitled to reopen a partition made after the death of his adoptive father by the member of the family and he could claim his share in the family property. In *Ram Kishore Vs. Jai Narain*, the Judicial Committee of Privy Council observed that where a custom in derogation of Hindu law permits an orphan to be validly adopted, it would seem he has the same status as a natural born son. This shows, that wherever a custom is shown to have existed it would suppress the general Hindu law. It also continued to be recognised that an adoption could be invalidated not only for non-compliance with the requirements of Hindu law but also on the ground that it was the result of coercion, fraud or undue-influence.

Similarly, if some consideration element existed in the giving and taking of the child it could be cancelled. Though there is no particular kind of evidence required to prove the adoption but the fact of adoption should be proved like any other fact. Art. 119 of the *Limitation Act*, 1871 fixes a limit of 6 years to a suit to be obtained that an adoption is valid. The period starts running from the time when the right of the adoptive child are interfered with. This shows that the Privy Council as well as the High Courts played a major role in assigning meanings to the ancient text while deciding cases coming before it.

65 (1943) ILR Mad. 309
66 (1922) 48 IA 405
V. Adoption in the Post-Independence Era

(A) Adoption as Proposed under Hindu Code Bill

The Hindu Code Bill was the most comprehensive piece of legislation covering all the major branches of Hindu law. In 1941 Sir B. N. Rao Committee was constituted by the Government on the desirability of codifying Hindu Law. The final report of the Law Committee together with the Hindu Code Bill was placed before the Cabinet on 24th March, 1943 and on April, the Bill was introduced in the Central Legislative Assembly. The Bill passed through many ups and downs, but ultimately came for consideration of our Parliament in February 1951. However, it was decided by Parliament to split the Hindu Code Bill and passed it in piece meal. The law relating to adoption which is the focus of our present discussion is also the offshoot of the Hindu Code Bill. Here it is proposed to discuss the proposed law regarding adoption as laid down in the relevant part of the Hindu Code Bill.

The proposal contained in the Code excluded daughters from being taken in adoption, a right which was neither to be recognised under Malabar customs. The only qualification which the Code required for being adopted have been that the boy should be a Hindu, unmarried and under 15 years of age. Further he should not have been adopted before. In view of the above requirement it could be assumed that even an illegitimate child of his mother could be given in adoption. This position was further modified in the Code and parent could give a son in adoption only after reaching the age of 18 years and only if of sound mind. Further, father could give only if wife consented provided she was sane and

67 U.C. Sarkar, supra note 7, pp. 392-93.
above 18 years of age. Similarly mother may give the boy in adoption if the father is dead, has renounced the world or ceased to be a Hindu, or is not capable of giving consent.

On the question as to who may take in adoption, the Code provided that a man (or his widow) can't adopt while a son, grandson or great grandson is alive. Even a disqualified son will prevent the power of adoption coming into existence. But if the son is not a Hindu or ceased to be a Hindu the father could adopt. The adoptive father should have attained the age of majority i.e. 18 years, and must be of sound mind. However, a widow can adopt under the age of 18 years, if her husband authorised her to adopt a particular boy. If a widow remarried her power to adopt a son to her deceased husband stood terminated. Thus the Code certainly simplified the position regarding qualification and disqualification on the power to adopt including the age aspect. However, the Code did not say anything contrary to the religious adoption. The Code also did not say specifically anything about the adoption of orphans except by certain customs. So the religious aspect was left entirely intact and the state could make a law permitting orphan to be adopted.

On the prescribed manner of adoption the Code provided that the adoption must be completed by a physical act of giving and taking of child by the parents under their authority. The registration of adoption has been left to the choice of the party. The Code also lays down that the Datta Homa will no longer be a required condition which meant that religious aspect of the adoption has been relegated to the secondary position. Regarding the effects of the adoption on the adoptive child, the Code lays down that his property will remain his despite the adoption, but
subject to any obligation attached to it at the time of adoption. This meant that if he was to be the sole surviving coparcener and liable to support the widows of the deceased coparcener including his mother, his being given in adoption will not affect maintenance right of the latter and he will retain control over the corpus of the property.

Regarding the effect of the adoption on the adoptive family the Code makes no distinction between a natural and an adopted child, when a widow adopted a son after her husband's death and also inherited property, she would be divested to the extent of the share of the adopted son only. However, an impartible estate will go entire to the adopted son. The adoptive parents had absolute right over their separate property. All out adoption agreements which at one point of time received recognition are declared to be void. If a bachelor adopts, any wife subsequently married by him is to be the adoptive mother. When widows adopt, the senior most is to be the adoptive mother. But if only one of the several widows adopts, she alone is the adoptive mother. Regarding the effect of adoption on the natural family the Code provided that where the father or mother have given a son in adoption and if there is no son, grandson or great grandson in the natural family, adoption can be made. However, all relationship in the family of the birth stand severed and replaced by those created by the adoption. On the question of invalid adoption the Hindu Code Bill clearly envisioned that an adoption made in contravention of the Bill will be void and will not create any rights whatsoever. Similarly where any fraud, force or mistake is responsible in giving or taking the adoption a suit may be filed for a declaration that the adoption is invalid.
In the result one could easily comment that the Code liberalised the position regarding adoption to a great extent. If some of the suggested proposals are taken to its logical end it could complete the process of secularisation of adoption even at Hindu law.68

As has already been pointed out, the Hindu Code Bill was split up into four fragments which have now become the Acts of Indian Parliaments. The Hindu Adoption and Maintenance Act, 1956, which governs the law relating to adoption among the Hindu is also one part of this legislative exercise. However, a detailed account of the provision of the existing legislation shall be discussed and explained in the Chapter IV. The Guardian and Wards Act, 1890 is indirectly invoked by other communities to become guardian of the child during minority. The statute does not deal with adoption as such but mainly with guardianship and is to be read along with the personal laws.

The Hindu Minority and Guardianship Act, 1956 reforms and codified the Hindu law relating to guardianship of his minor. The succession and inheritance rights are governed by the Hindu Succession Act, 1956 and the Indian Succession Act, 1925. Similarly, the Juvenile Justice Act, 1986 which is replaced by the new Act of 2000 is a legislation that provides for the establishment of the children's home, for the care and protection of neglected and abandoned children. Institutional care still appears to be largest service for the care of the destitute and orphan children.

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68 For a detailed account of the proposals on adoption law which subsequently became the law in 1956, see Sir Hari Gaur, The Hindu Code, Vol. 4, (5th edn., 1978), pp.763-920
VI. Evolution of Adoption in Other Legal Systems

The nuclear family was the basic unit in primitive society and subsequently kinship groups banded together to form more complicated units such as the tribe and the State. The meaning of the blood tie was so strong that only acceptable method of initiating non-relatives was to make them artificially blood relatives by adoption. Several legal systems of world recognised the practice of adoption by which the relations of paternity and affiliation were considered as legally existing between person not so related. Adoption was really the admission of an utter stranger by birth to the status of a real born son by legally regulated forms of affiliation.69

The Egyptians and the Hebrews knew of adoption and chronicled the most famous example of all time. The daughter of the Pharaoh adopted a foundling as a son and called him Moses. And it was the young adult Moses who returned to 'his people', the Jews and led them out of their Egyptian bondage back to their home land. This was where he felt he truly belonged.70

(A) Adoption in Ancient Roman Legal System

Although adoption is referred to in almost all ancient legal systems, it was not until the Roman Empire with its highly organised institutions that we find a full account of the evolution of adoption in society.

The patriarchal family in ancient Rome rested upon ancestral worship as in ancient Greece and in ancient India.71 The tie that united the members of the family was a 'sacra'. In Roman

69 See Asha Bajpai, supra note 1, p. 14.
70 Id. p. 15.
71 See T. P. Gopalakrishnan, Supra note 6, p. 11.
law the object of which was the continuance of the family and its religious cult. In Roman legal system the *patria potesta* gave a peculiar significance to the custom of adoption and females had no power of adoption as they had no *patria protesta*. There are two kinds of adoption.

(a) Adoptio proper

(b) Adrogation

(a) **Adoptio Proper** - *Adoptio* proper was where a person under a *potestas* (parent) was given into another *potestas* (parent). Both Gaius and Justiman used the word *adoptio* proper as an adoption of a person *alieni juris*.

It, therefore, involved two acts, firstly the extinction of the agnetic tie in relation to the original family, and secondly the creation of an agnetic tie in relation to the acquired family. It was believed in the Roman legal system that if a father who sold his son as slave three times should thereby forever lose his *patria potestas* over such son and was the basis of the first part of ceremony of adoption as described by Gaius.

During Justiman’s time the adoptive father and the person to be adopted should go before the magistrate and make a declaration regarding the adoption and which was thereupon entered on the record of the court. Similarly he drew the distinction between *adoptio pleno* and *adoptio minues pleno*. In case of *adoptio pleno* the effect was under the old law, whereas in

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72 Ibid.

73 Ibid.

74 The Adoptio Pleno was only to take place when the adoption was by a natural ascendant e.g. a maternal grandfather and in evenly other case the adoption was oninus pleno and in case of minus pleno the child as a fact, passed into the physical control of the person adopting but as a matter of law remained a member of its old agnatic family. Qoted in Asha Bajpai, *supra* not 1, p. 17.
case of minus pleno the effect of adoption was that the child acquired a chance of interstate succession to the person making the adoption.

So in general the effect of adoption was that the child broke away from its old family in every respect, in particular losing all rights of intestate succession to the natural family but acquiring a new right of succession to the adoptive family exactly as if he had born into his family.\textsuperscript{75}

(b) Adrogation - According to Gaius and Justinian the adrogation of a person was sui juris and is an earlier institution than adoptio proper.\textsuperscript{76} The purpose of adrogation was to keep alive a family which was in danger failing through the lacks of heirs. Hence only the childless could resort to it, and those who through age or some similar reason were not likely to have children. Only one person could be adrogated.

The effects of adrogation was that the person adrogated broke away from its old family in every respect and acquiring a new right to the adrogating family exactly as if he had born into his family.\textsuperscript{77}

(B) Adoption in Common Law System

To the British, blood lines were so important that legal adoption was not accepted until the Adoption of Children Act,\textsuperscript{78}

\textsuperscript{75} \textit{Ibid.}
\textsuperscript{76} Adrogation took place when a person who was sui juris became alieni-juris by placing himself under the potestas of another citizen and since this involved the extinction of a Roman family; the proceedings took place originally in the cermitia colata presided over by a ponitex maxims. The consent of person making the adrogation, the person to be adrogated and the citizen present were taken into consideration and if they consented the person adrogated is passed into the fame, and the person adrogating him.
\textsuperscript{77} \textit{Id.} p. 18.
1926. The clear preference in inheritance was a blood-line successor, however, distant in relationship. Illegitimate offspring of family member could through complicated steps, be made legitimate heir. A demand for reform in the field of adoption arose and was strengthened during the period following the World War-I due to a large number of war orphans in need of homes and in response to this demand, England passed its first adoption law, the **Adoption of Children Act**, 1926. The motive for this legislation was, as in Roman law, but the idea was of conferring the privileges of parents upon the childless and the advantages of having parents upon the parent less.

The 'apprenticeship system' or 'pulling out' of child offer training to the child and often gave the child a deep and true feeling of belonging to a second family. Pulling the child out, guaranteed the best interests of the child and the society. The apprenticeship system was a useful one for dealing with dependent orphaned children. The **Adoption of Children Act**, 1926 was to some extent experimental, and was subsequently amended and replaced by the **Adoption Act**, 1958 and further led to enactment

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79 In the seventeenth century, an ancient childless knight and his wife, obtained a child born to one of the villagers. The local bishop sternly invoked the wrath of God for such adoption and threatened to excommunicate the knight and his wife if the fraud continued. After the death of knight the adopted child spent several years trying to gain her inheritance. Eventually adopted child died and the property went to the rightful heir i.e. blood relatives proving that none can tamper with the true laws of God and nature.
80 See P. M. Bromley, *supra* note 78, pp. 354-55.
81 Between 13th and 17th century this practice spread in Britain to all economic and social classes. For further details see *Ibid.*
82 It gave them secure, surrogate families. This system diminished after the 17th century. The working classes however, continued the tradition through the last century.
of 1975. At present, therefore, adoption law is contained mainly in the Adoption Act, 1958 and Part I of the Children Act, 1975 (not all its provisions are yet in force). The activities of adoption agencies are governed by regulations and the court proceedings are governed by the Adoption Court Rules. These rules were enacted in 1976 under Act 1975, and are in operation in England.

The English court make yet another adoption order named as convention adoption order, issued in favour of British subjects domiciled abroad and convention adoption orders are governed by the Adoption Act, 1975.

(C) Adoption in American Legal System

During the mid-nineteenth century, United States adoption laws used Roman law as a guide. As we have seen earlier Roman law remained basis of the American law and was a solution to protect the children who had been placed in unhealthy, uncaring homes. It was perhaps the commencement of principle of 'best interests of the child', a departure from the earlier legal forms which carried the all important rights of inheritance.

Massachusetts was the first State to enact legal adoptions in 1851. It provided for social investigations and judicial supervision to safeguard the indigent children without home. In many cases social investigations were delegated to country department o

83 Ibid.
84 Ibid.
85 Regarding convention adoption orders, the desire to produce a uniform law of jurisdiction and recognition led to the Hague Convention on the Adoption of Children Act, 1965. The terms of Convention are embodied in the Adoption Act, 1968. Nationality and residence is the governing factors in Convention Adoption Order. Unless stated otherwise the law and procedure applicable to other adoption orders also apply to Convention Adoption Order. See Children Act, 1975, sec. 24. Quoted in Bromley, supra note 81, p. 355.
86 See D. C. Manooja, supra note 2, p. 96.
charity or welfare. During investigations adoption babies were matched by the social workers to the family’s genetic, physical and intellectual make up and were to be as close as possible to the child that the adoptive couple could not bear.\footnote{87 See T. P. Gopalakrishnan, \textit{supra} note 71, p. 12.}

By 1927, all States had adoption laws. At first adoption law concentrated on a relationship and rights of 'ownership' much like property from one owner to another. Later the emphasis shifted to protection to children in the adoption proceedings and certain standards and policies were established by law. The purpose served by adoption has varied with time and by the mid 1920s in the United States, the goal was to find children or childless couples. A child having special problem was rarely considered for adoption. At present the \textbf{Adoption Assistance and Child Welfare Act, 1980} is a national law and the emphasis is on what is best for the adopted child.\footnote{88 \textit{Ibid.}}

\textbf{(D) Adoption in China}

In China as recently as the last century an ancient approach to adoption was still practices and the custom allowed a childless male to claim the first born child of any of his younger brothers because "to die without leaving a male posterity to care for his ashes and to decorate his grave thereby pacifying his wandering spirit is purgatory" and was considered "one of the greatest calamities to be apprehended" by the Chinese person.\footnote{89 See D. C. Manooja, \textit{supra} note 2, p.15.}
(E) Adoption in Greece

In ancient Greece the purposes served by adoption differed substantially from those emphasises in modern times. Continuity of the male line in a particular family was the main goal of these ancient adoptions in Greece and the importance of the male heir stemmed from political, religious and economic considerations depending on the particular society.

In Greece the power of adoption was allowed to all citizens who were of sound mind and possessed no male offspring of their own and exercised during the life time or by testament with certain formalities. The right and duties were almost identical with those of natural offsprings and could not be renounced, except when a son was subsequently born to the adoptive father and the adopted child lost all his rights of inheritance through his natural father but through the mother.90 The person adopted invariably was male and often adult whereas contemporary adoptions commonly involve infants of either sex. The welfare of the adopter in this world and the next was the primary concern and little attention was paid to the welfare of the one adopted.91

(F) Adoption in Swedish Legal System

The adoption of children is an ancient practice in Sweden.92 The adoption used to means whereby childless couples could care

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90 See T. P. Gopalakrishan, supra note 7, p. 10.
91 See D. C. Manooja, supra note 2, p. 15.
92 Most adoptions involved Swedish children, unwanted children with unmarried mothers or children from poor families, but recent decades have seen a steady improvement in the status of unmarried mothers as they are socially accepted and a generally high standard of living, there are hardly any Swedish children now-a-days for adoption. See D. C. Manooja, supra note 2, p. 98.
for a child on a permanent basis i.e. provides heirs to them. The adoption law in Sweden was enacted for the first time in 1917. Before this enactment defacto adoption existed without any legal consequences. This Act of 1917 was replaced by Parenthood and Guardianship Code of 1950, which is present law of adoption in Sweden for both in-country and inter-country adoptions.

(G) Adoption in Australian Legal System

Adoption being unknown at common law, is regulated by the statute in all Australian jurisdiction and the Adoption of Children Act was first time passed in 1876, which gradually legislated in all Australian jurisdiction. The adoption law in Australia is largely uniform from mid 1960s. Since then, however governments have sought to keep abreast of changes through legislative amendments and difference have developed between the states.

(H) Adoption in Norwegian Legal System

There were no regulations and law regarding adoption in Norwegian legal system before 1917, though the customary form of adoption was prevalent and in 1917 for the first time the adoption was recognized by the enactment of the Adoption Act. The Adoption Act of 1917 has been replaced by Norwegian Adoption

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93 Ibid.
94 This Adoption Act of 1896 was followed in the next 40 years by similar legislation in all the States and territories. Id. p. 97
95 The first State to enact a uniform Adoption of Children Act was Victoria in 1964 and the last was Tasmania in 1918. Further clarification see Nygh P.E., Conflict of Laws in Australia (4th edn., 1984) p. 382.
96 The original act of 1917 is no longer in force due to amendments in the Act number of times, especially noteworthy were the amendments of 1935, 1956 and 1980. See, D. C. Manoojka, supra note 2, p. 98.
Act, 1986 and the adoption orders are granted by the Ministry in Norway.97

(I) Adoption in Canadian Legal System

There was no law governing adoption in Canada. Though New Brunswick had an adoption statute as early as in 1873 but most provinces did not enact adoption legislation until 1920s and most provinces were originally contained in separate Adoption Acts.98 The many of these laws are included as part of a child welfare Acts or a child and family services Act. So overall adoption law of the country is a comprehensive child care programme and only for international adoptions.99

VII. Sum-up

The conclusion emerges that the institution of adoption has its roots right down to the Indian civilization. The desire to have a son always remained a prime focus of our Dharamshastra. The Hindus have continued to believe that the son conferred the spiritual benefit by offering ‘Pindas’. Therefore, it was provided that if a Hindu had no son, grand-son or great grand-son, he could adopt a male child. This continued from the ancient Vedic period down to the Mitakshra and Dayabhaga. The authority of the husband to adopt a child even without the consent of his wife dominated the Hindu social structure. Adoption by a widow was permitted provided the husband has authorized her to do so after his death. In later years widow’s authority to adopt received wider

97 Ibid.
98 In Canada adoption is a provincial matter and adoption laws come under the jurisdiction of ten provinces and two territories. The adoption laws in Canada are written under Canada’s code through each of the Provinces. Id. p. 97.
99 Id. p. 98
recognition. The adopted child was treated like a natural born child and an orphaned could not be validly adopted in the absence of the custom to contrary. An adopted child stood completely transplanted into the adoptive family for all purposes. However, in matters of property rights an adoption made by a widow resulted in divesture of the rights of the widow to the extent of his share on the basis of Relation Back theory. The Hindu Code Bill consolidated the law regarding adoption. On the basis of the Hindu Code Bill the Hindu Adoptions and Maintenance Act, 1956 was passed. The law has done away with religion consideration and lays more stress on the physical act of giving and taking. Today widows have an absolute authority to adopt.

Adoption has also received recognition in almost all ancient legal systems of the world. In Roman law its objective remained continuation of the family and its religious cult. The person adopted severed his connections from the old family and acquired new rights in the adopted family. In Britain the Adoption of Child Act, 1926 was the first legislation which accorded legal recognition to the adoption. The basic objective of this law was of conferring the privileges of parent on the childless and the benefits of having parents upon the parentless. This law was later on replaced by the Adoption Act of 1958 and further led to enactment of the Children Act, 1975. In the United States of America (USA) almost all the States have adoption laws. At present the Adoption and Child Welfare Act, 1980 is a national legislation governing the subject matter. The legislation takes into account the welfare of the child. In China adoption is primarily through the customary modes and the same continued. In Greece adoption existed right from the ancient time.
An overview of the historical setting would show that the institution of adoption remained wedded to the soil more particularly in India, Rome, Greece and the Chinese legal system. However, this should not to be taken to mean that the other legal systems of the world did not recognized it. The home truth is that the system of adoption have remained present in one form or the other in almost all recognized legal systems of the world.