I. Prelude

The jurisprudence of adoption in India has taken varied forms and dimensions from time to time. It has passed through an evolutionary process from the ancient times to the present. History is the witness to the fact that the institution of adoption has continued to play different roles under different civilisations and cultures as well.¹ The conceptualisation of adoption through different ages exhibits that continuity of the family and legal heirs to adoptive parents have remained as prominent consideration. However, the very basis of this philosophy in countries like, China,² Rome and Greece have its roots in other considerations like political, religious and economic one. A comparative prospective of ancient civilization would show that the welfare of the adopted child received little attention.³

² Even under ancient Chinese customs also, when a person dies without a male child to care for his ashes and to decorate his grave was considered as one of the greatest calamities to be apprehended by that person and hence allowed to claim the first born of any of his younger brother. For further details see Ibid.
³ As a result of impact of Roman civil law upon the legal systems of Europe, the ancient traditions have left their mark on the adoption law of a number of European and Latin American nations, and in United States, as the law
Under the ancient legal-cum-religious texts of India adoption originated under the religious belief according to which a male issue was essential to procure spiritual benefits in the life hereafter. The adoption was considered as sacramental act. Whereas in English speaking countries and European countries on the whole, contemporary laws and practices of adoption aim to promote child welfare and the interest centers more on the creation of a parent child relationship.

II. Theories of Adoption

The preceding discussion would show that the institution of adoption irrespective of the considerations have continued to exist in different legal systems with marginal differences in the motive for adoption. Nevertheless the theoretical foundation of adoption necessitates an inquiring into the different theories underlying the objectives as well as the motives for adopting the child. Therefore, a study of the ancient literature as well as the modern one would reflect the predominance of two fundamental approaches to adoption. The first approach has its basis on the religious considerations and the second approach underlies secularization of the institution of adoption.

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4 The Spiritual ceremony i.e. Datatkarma was considered as an essential one.

5 This attitude developed primarily over the period following World War-I when vast number of children were left homeless by virtue of orphanage and an increase in illegitimate births. Adoption had popular appeal as a way to provide names for these children. Its popularity was reinforced not only by the havoc of later wars but by the influence of psychiatry and allied fields, which have stressed the importance of stable family from an early age in furthering the desired development of children.
(A) Religious Theory

It is well established that through all the centuries which have seen the spread of 'Brahminical' influence and among all the classes which have came under its way, the adoption originated under the religious belief according to which a son was considered essential to procure spiritual welfare of the soul of his immediate ancestors. The substitution of a son of a deceased for spiritual reason was the essence of the thing, and the consequential devolution of the property was a mere accessory to it and all together a secondary consideration. According to Manu, "adoption is filled with instance of religious doctrine." According to which, the father by birth of a son discharges the debt of his progenitors and obtain victory over all the people; by a grandson he attains immortality, and by a great-grandson he reaches the solar abodes. A son was called a *pulia* because he saved the father from *pul* (Hell). Similarly, according to 'Vedas' also a man blessed with a son is entitled to endless heavenly bliss. As per 'Dharamshastra of Baudhayana', the formula prescribed for adoption, "I take therefore the fulfilment of any religious duties; I take thee to continue the linee of ancestors." So that it is clear that the foundation of 'Brahminical Doctrine' of adoption is the duty which every Hindu

6 Due to this religious belief an extensive class of subsidiary sons were admitted to the family, all of whom could perform the necessary ceremonies, though only some of them were allowed full right of inheritance. For more details see M. N. Srinivasan, *Principles of Hindu Law and Statutory Enactment* (4th edn., 1969), p. 155.
7 Manu's Code has always been regarded as of paramount authority on law of adoption. See *Manu Code* (Vol. V), pp. 107, 137-138, quoted in D. C. Manooja supra note 1, p. 18.
9 The father in old age subsists on the son, the son in his earlier life subsists on the father. See M. N. Srinivasan's, supra note 6, p. 155.
owes to his ancestors and provides for the continuance of the line and solemnisation of the necessary rites. It is evident that adoption of Dattak son has become important in the absence of Aurasa son (i.e. natural born son) by the time of Gautam, Baudhayana and Manu for all of them place adopted son in the first set of six sons who are both heirs and kinsman. The Privy Council and the High Courts in British India have referred to the Mimasa rules regarding the law of adoption.

In Bal Gangadhar Tilak Vs. Shrinivas Pandit, the Privy Council observed that among the Hindus the ceremony of adoption is held to be necessary not only for the continuation of the childless father but as part of the religious means whereby a son can be provided who will make those oblations and religious sacrifices which would permit of the soul of the deceased passing from 'Hades' into 'Pradise'. Similarly in Amarendra Man Singh Vs. Sanatan, the 'Privy Council' recognised the indigenous motive as dominant and secular motive as secondary and this view was also confirmed by our Apex Court in Hem Singh Vs. Harman Singh. In V. J. S. Chandrashekhera Vs. Kulandaivelu the Supreme Court of India held that the validity of an adoption has to

13 (1915) 42 IA 135-144.
15 1933 P.C. 155,158
16 AIR 1954 SC 581. In this case the Supreme Court observed that under the Hindu Law adoption is primarily a religious act intended to confer spiritual benefit on the adoption and some of the rules have therefore been held to be mandatory and compliance with them regarded as a condition of the validity of adoption.
17 AIR 1964 SC 185
be judged by spiritual rather than temporal consideration and that
devolution of the property is only of secondary importance.

The above discussion as well as the judicial pronouncement
show that religion have become the prime consideration under our
system of law throughout, the same time it can't be treated to be
sole consideration. The basis of this theory is deeply embedded in
Hindu religion and philosophy, though it may not be the same in
other legal systems. However, it is debatable whether religious or
secular considerations supplement each other or one has
dominant role over the other. One thing which can be stated with
certainty is that in Hindu cultures and traditions religious theory
has implemented adoption.

(B) Secular Theory

Under Roman and Hindu legal system the principle objective
of adoption was to provide a child to a childless person.\textsuperscript{18} Even
though the Hindu emphasized the religious aspect, adoption bore
more of secular character than of religious one.\textsuperscript{19} According to
Mayne the recognition of the institution of adoption in early times
had been due more to secular reason than to any religious
necessity and the idegious motive was only secondary. The
propriety of this motive was admitted by the Sanskrit writers
themselves.\textsuperscript{20} Vishnu, Yajnavalkaya and Narda in their texts on
adoption have assigned an adopted son very low place which speak

\textsuperscript{18} Among the ancient legal system of world only the Roman and the Hindu
Legal system provided for an organised institution of adoption, see D. C.
Manoja, \textit{supra} note 1, p.16.
\textsuperscript{19} See J. D. Mayne, \textit{Treatise on Hindu Law Usages}, (11th edn., 1953), p.188
\textsuperscript{20} In Hindu Mythology there are various instances of getting a child with
secular object and motive i.e. of Sita, Karna and Draupi etc. See A Project
Report on National Initiative for Child Adoption - A Compilation of
Resource Material Collaborators (National Institute of Social Defence and
of Central Adoption Resource Agencies, New Delhi, 2000.)
against the religious motive of adoption.\(^\text{21}\) Similarly when we are talking about the relationship of adoptee in the adoptive family, the spinda relationship is that family is extended up three degrees and the period of pollution extends only to three days.\(^\text{22}\) The adopted son offer oblation to the single ancestor in honour of the deceased adoptive father even if he perform the Sradha in the usual way, whereas the natural born son offer oblation to fourth, fifth and sixth ancestors.\(^\text{23}\)

The Kirtrima form of adoption which is still in existence in Mithila does not give right to widow to adopt a son to her deceased husband and this prohibition clearly indicates the secular character of adoption. When we talk about the rest of India except Mithila, where a widow having authority of her husband or assent of his spinda to adopt a son, a widow is not bound to do so even for the Sradha of her husband. Again the religious motive is very much weakened.\(^\text{24}\) Regarding the age of the adoptive in Bombay a person can adopt one older then himself even a married man with children. This factor also affects the religious object of adoption.\(^\text{25}\)

Among the tribes who have not come under the Brahmanical influence, we find that adoption is equally in practice but without any rules which springs from the religious fiction. Among Sudras

\(\text{\footnotesize 21}\) See D. C. Manooja, \textit{supra} note (1), p. 16.
\(\text{\footnotesize 22}\) Whereas the natural born son (i.e. Ausarason) have spinda relationship with his natural family upto 7 degrees and the period of pollution extends to 10 days. For more details see Ghose, \textit{Hindu Law}, Vol. I, p. 654.
\(\text{\footnotesize 23}\) See U. C. Sarkar, \textit{Supra} note 12, pp. 387-88
\(\text{\footnotesize 24}\) In Bombay widow may adopt a son even without the permission of her husband or the assent of his spinda, but she may decide not to adopt at all because this is her right not a religious duty.
\(\text{\footnotesize 25}\) Even Aggarwal Jains don’t believe that son whether by birth or adoption confers any spiritual belief on the father consequently an adoption is entirely secular in character, see S. V. Gupta, \textit{supra} note (14), p. 5.
and Jains religious ceremonies i.e. "Datta Hama" is not essential. Among the Jats of Punjab adoption is common by way of appointment of an heir. The appointed heir's relationship with the natural family are not broken and he continues to inherit in the natural family as well as to his appointer. Whereas in case of adoption he ceases to be the member of his natural family. Similarly in Western India amongst Talabda Koti caste and Kadwa Kumbi caste, the adoption has been recognised by the court through no religious significance is attached to it.

So the adoption law prevailing prior to 1956 was the law laid down by the Smritikaras as modified by customs and usages and as interpreted and applied by the judicial decisions. In 1956, the Hindu Adoption and Maintenance Act was passed to remove uncertainties created by judicial decta. A Uniform law of adoption for Hindu was substituted in place of varying law prevalent in different parts of India. But the present statute of 1956 is silent about the object of adoption. However, the religious motive, which was earlier so pronounces, find no place in the Act. Today the whole philosophy of adoption among the Hindus centers around the theme of having a child by a childless couple irrespective of sex. The ceremonial aspect stands liberalised in the context of secularisation of adoption. It is different matter that a Hindu while exercising his right of adoption may still adhere to old notion but that should not detract us from the essential secular nature of adoption under the present Act. The only aspect which is

26 One Sanskrit jurist has written that Sudra could not adopt, as they were incompetent to perform proper religious ceremonies. Actually they did adopt with the restrictions imposed upon the higher class.
27 See S. V. Gupta, supra note 14, p. 5.
28 See D.C. Manooja, supra note 1, p.17.
29 Hindu Adoptions and Maintenance Act, 1956, Sec. 10.
emphasized is the physical giving and taking of the child. The only requirement is that the adoption must confirm under the provision of the **Hindu Adoption and Maintenance Act, 1956**.\(^{30}\)

So from the factual point of view, the main object of philosophy of adoption continues to be the provisions of welfare of the child as paramount consideration and in modern times, adoption is certainly used for several other purposes namely, conferring status of legitimacy on illegitimate children, of providing homes for homeless children, providing a richer family life and fulfilling their fundamental needs of love and affection and sense of belonging which is psychologically and socially essential to their security. In India also, this object of adoption is steadily taking root and adoption is now considered to be one of the best forms of rehabilitation of destitute, illegitimate, orphan and institutionalised children. To put it in the metaphorical form "Somewhere a child awaits a Home Somewhere a Home awaits a Child, Adoption brings them together."

The above discussion indicates that the secularisation of the institution of adoption has acquired its acceptability and basis socially, philosophically, emotionally, economically and also religiously. In other words this theory is stretching to timeless dimensions. Though at the same time, the original character and content of adoption has not lost its relevance.

### III. Different Forms of Adoption and its Validity

Adoption in India is as old as the *Vedic* society. The *Vedic* literature contains many reference to the practice of adopting

\(^{30}\) *Id. Sec. 6.*
sons. The protection of the family depends upon the number of its male members and consequently several kinds of sons come to be recognised. Of these some were legitimate, some illegitimate and some by adoption. The forms of adoption prevalent among Hindus in early times were 'shastric' and 'customary'. Another form of adoption came to be observed during recent times called institutional adoption and legally recognised by the present Hindu Adoption and Maintenance Act, 1956 after effecting some major changes in the old law.

(A) Shastric Form of Adoption

The desire for a male offspring was natural in all human beings more so in early Hindu Society. According to 'Vedas' an Aryan is born burdened by three debts, "He owes the study of the Vedas to the Rishis, sacrifices to the Gods and a son to the same." He is free from debt who has offered sacrifices, who has begotten a son and who has lived as a student with a teacher. The importance of son can be gauged by the fact that the ancient Smriti

31 The story of 'Atri' who gave an only son in adoption to 'Aurva' who desired to have a son and the story of 'Sunahsepa' shows that 'Viswamitra' though had already one hundred and one sons adopted 'Sunasepa' under the name 'Devarate' with the consent of his fifty one sons though the elder fifty sons disobeyed their father. See Asha Bajpai, Adoption Law and Justice to Child, (1st edn., 1996 ), p. 48.


33 Hindu Adoption and Maintenance Act, 1956 does not recognise as such classification of adoptions into different forms, it recognises only one form of adoption and the institutional adoptions are in the way different from it, regarding various legal requirements.

34 See Asha Bajpai, supra note 31, p.48.
writers on Hindu law recognised twelve or thirteen kinds of sons. Many of these were not 'Aurasa sons' (natural born sons).³₅

- **Aurasa (Legitimate Son)** - Real sons i.e. sons of one's own blood through a lawfully wedded wife.
- **Paunarbara** - The son of the twice married women.
- **Shudra (Nishada or Parasava** - A son of Brahmin by a *Shudra* wife.
- **Keshtraja** - The son of the wife of others i.e. one begotten upon a man's appointed wife or widow by his near kinsman.
- **Kania** - Love child of a dansel, taken with her when she is married (i.e. maiden born)
- **Sahadha or Sahodhaja** - Son of a wife pregnant at the time of her marriage.
- **Ghudaja or Gudhotpanna** - The son born in a man's house to his wife when it is not clear to certain who is the father of that child.
- **Putri ka Putra**- The son of an appointed daughter. 'Manu Smriti' treated such a son at part with the 'Aurasa son'.
- **Dattaka or Adoption** - The son given by the parents voluntarily in adoption.
- **Krita** - The son, whether of one's own caste or not purchased for the price of from his father and mother.
- **Kritrima** - The son whom a man himself makes his son with the consent of adoptee only.
- **Swayamduita** - The son, who bereft of father or mother, either on losing them or on being abandoned by them present himself saying 'let me become thy son'.

³⁵ See M. N. Srinivasan, *supra note* 6, p. 155 and also see T. P. Gopala Krishnan *supra note* 32, pp.1 and 2 also see Deoki Nandan Agarwal, *supra note* 32, pp. 80-81.
• **Apabidda** - The son who having been discarded by his father and mother is *apabidda* son of one who brings him like his own son.\(^{36}\)

Dr. Jolly points out that the majority of the above cited twelve or thirteen kinds of sons recognised by *Smriti* writers have no blood relationship to their father and are being the offsprings of the mother's illicit connection with strangers.\(^{37}\) While five out of twelve or thirteen kinds of sons as specified above by *Smriti* writers, were formally adopted son viz., Dattaka, Kritrima, Krita, Apavidda and Swayamdata.\(^{38}\) The most of the writers' ranks last three forms of adopted sons very low in order of sons and disappeared in the course of time.\(^{39}\)

The *Dattaka* came to be clothed with all the attributes of a son and case. Quietly the importance of adopted sons increased the celebration of name and perpetuation of the lineage. Thus of these five adopted sons the Hindu law an existence just prior to the *Hindu Adoption and Maintenance Act*, 1956, recognised only two kinds\(^{40}\) of *Shastric* form of adoption.

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37 Dr. Jolly traced this partly to the doctrine of spiritual benefit found in *Smriti's* and partly to an economic motive to get as many workers as possible for the family progress. For more details see Julins Jolly, *History of Hindu Law of Partition, Inheritance and Adoption*, (Tagore Law Lecture 1883, Calcutta), p. 158.


39 The recognition of Krita, Apavidda and Swayamdata form of adopted son disappeared because in the course of time a newer morality made marriages more strict with the result that number of subsidiary sons feel leaving in the field only the legitimate Aursa sons and Dattaka son remaining existence and recognised by law.

40 See S. V. Gupta, *supra* note 14, p. 5.
(a) Dattaka Form of Adoption

The Dattaka form of adoption was prevalent all over India. Dattaka son was not in great vogue in ancient India which it has since acquired. Dattaka form of adopted son had become important by the time of Gautama, Baudhayana and Manu. All of them placed the Dattaka form of son in third place next to the Aurasa and Kshtraja sons, while other Smriti writers like Yajknavalkya, Vishnu and Narda, etc., assigned him a very low rank. A Dattaka form of adoption of a son is a son given by the parents voluntarily. A Dattaka adoption is of two kinds:

(i) Kinds of Dattaka Form of Adoption

(1) Kevala - Simple and ordinary adoption.

(2) Dvyamusyayana - (The son of two father) - When a man gives his only son in adoption to another person under an agreement that he is to be considered as the son of both the parents i.e. natural father (Janaka pitr) and of the adoptive father (Palaka), such a son inherits both in the natural and adoptive families.

(ii) Validity of Dattaka Form of Adoption

Dattaka form of adoption is not valid unless -

- The person adopting is capable of taking in adoption.
- The person to be adopted is capable of being adopted.
- The person giving in adoption is capable of giving in adoption.
- Essential procedural formalities to the validity of adoption.

41 The whole law of Dattaka form of adoption of a son is evolved from two important texts of Manyand Vasistha and from a metaphor of Saunaka.

42 The difference between Manu, Yajnavalkya and Narada, as regards the place assigned to the Dattaka form of son was probably due to the difference in local customs as suggested in 'Viramitrodaya'. For more details see Mayne, supra note 19, pp.327-28.

43 See Laxmipaliro Vs. Venkatesh, 1941 ILR Bom 315.
(1) **Capability to adopt**

A male Hindu, who is of sound mind and has attained the age of discretion[^44] may take a son in adoption provided he has no son, grand-son, great grand-son, natural or adopted even without the consent of the wife or she is at the time of adoption pregnant to his knowledge. A bachelor or widower can also take in adoption. Only son can be adopted[^45]. The existence of illatom adopted son is no bar to the Dattaka form of adoption[^46].

Similarly, a Hindu wife who has attained the age of discretion and is of sound mind may adopt a son to her husband with his express consent or authority provided the husband himself is capable of taking in adoption[^47]. The wife must carry out the wishes, directions and conditions, if any, imposed by the husband. The wife of lunatic cannot adopt to her husband during his life time[^48].

A Hindu widow who has attained the age of discretion and is of sound mind can adopt a Dattaka son to her husband in the some parts of India only if expressly authorised by the husband of the widow and without authority of the husband in the rest of

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[^44]: Age of discretion means the age of 15 years. **Indian Majority Act**, 1895 which lays down age of majority as 18 years in case of boy and 21 years in case of girl, does not apply to Hindu in the matters of adoption.

[^45]: The simultaneous adoption of two or more sons is not valid as to all. But the existence of daughter's son, illegitimate son or out caste son or a son who renounces the religion or a son who has married under the **Special Marriage Act**, 1955 was no bar to the adoption of a Dattaka form of adoption.

[^46]: The custom of affiliating a son-in-law and giving him a share is called illatam adoption prevalent in Madras and Andhra Pradesh.

[^47]: A wife cannot adopt during her husband's life time except with his express consent, see **Narayan Vs. Nana**, (1970)7 ILR Bom152.

[^48]: A wife cannot adopt for a lunatic even if the mother of that lunatic husband consented to adopt; See **Ramkrishna Vs. Laximinarayan**, 1921 ILR Bom 220.
India. She cannot adopt in the presence of sons, grandsons or great grandsons.

Law regarding the adoption of a widow is different in different schools. The basic text said that a woman should not give take in adoption except with the assent of her husband. By summarising a woman's power to adopt two situations arise in this aspect -

(i) Adopting during the life time of the husband.
(ii) Adoption after the death (as a widow).

The divergent interpretations on the requirement of adoption of a widow in various schools is as follows:

**Mithila School** - No consent possible after the death of her husband and also widow incapable of performing the attendant ceremonies, even if expressly authorised. It means the assent of the husband must be given at the time of adoption.

**Bengal and Banaras School** - The widow permitted to adopt a son only on the authority of the husband given during the life time. Such authority may be express or implied but mere absence of prohibition did not amount to implied authority.

**Bombay School** - The husband's permission is required during his life time, and so a widow may adopt without any authority.

**Dravada (Madras) School** - In the present school word husband or lord, is merely illustrative so as to include the widow's guardians.

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50 The difference of opinion between the various Schools of Hindu Law arose because of different glosses put upon a text of 'Vasista'. All the Schools except this text of Vasiatha as authentative but put different interpretation upon it.
51 See P. V. Kane, *supra* note 10, p. 105.
52 Here the theoretical base is the same. She can do so only for the husband and with his consent. See Asha Bajpai, *supra* note 31, pp. 60-61.
53 The difference between these two schools is that in Mithila School consent to the specific adoption was required, whereas in Bengal and Banaras Schools a general consent is sufficient.
The consent may be given by coparcener when husband was united with them and where the husband is separate the consent by father-in-law or other near spinda is required.

In all parts of India except in Madras and Punjab the Jain follows the custom according to which a widow is entitled to adopt to her husband without the authority. The authority to adopt a son can be given by a Hindu husband who must be of a sound mind, must have attained the age of discretion. Authority may be in writing or verbally. Where the authority is in writing, it must be registered unless the authority is given under will. Similarly, where the authority is given by a minor must be registered as the minor is incapable to make a will.

The authority to adopt must be strictly followed i.e. the way in which the power of adoption is to be exercised or any conditions as to the boy to be adopted. The conditions must be legal, e.g. an authority to adopt in the event of the natural born son dying under age and unmarried is valid.

Where the authority to adopt given to one of several widows, only she can adopt whom the authority is given even without the consent of other. Where the authority is given to all of them in that case the senior most widows in marriage has the prior right to exercise the power of adoption. The right of the junior widow comes

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54 Muna Lal Vs. Raj Kumar, (1962) SC 1493
55 If the authority given by husband is under will the formalities required for a valid will must be fulfilled as per Section 63 of the Indian Succession Act, 1925.
56 Vijayaaraatham Vs. Sudarsana, (1925) PC 196
57 In Kalawati Devi Vs. Dharam Parkash, (1993) PC 71, where the authority to the widow is to adopt within a specified period and she should adopt within that prescribed period, she cannot adopt after the expiration of that period.
58 Vellanki Vs. Vankata Rana, (1976) 4 IA 174
if the senior widow has refused to adopt.\textsuperscript{59} Once a widow has adopted a son as per authority given to her by her husband, then her co-widow cannot adopt during the life time of the adopted son.\textsuperscript{60} A widow after remarriage or unchaste widow cannot adopt to her former husband.\textsuperscript{61} An unchaste widow living in concubine age is not competent to adopt a son as she is not capable of performing religious ceremonies. But in case of \textit{Shudra}, a widow can adopt because religious ceremony is not essential.\textsuperscript{62} In \textbf{Partap Vs. Bai Suraj},\textsuperscript{63} Bombay High Court held that even amongst regenerated classes, an unchaste widow can adopt provided the performance of religious ceremony is delegated in somebody else.

A minor widow is not debarred from adopting a son provided she has attained the age of discretion and is of sound mind. A widow's power to adopt continues all her life time.\textsuperscript{64} But if a son die leaving a son or a wife, the presence, of grant son or son's widow competent to continue the tone, brings mother's power of adoption to an end.\textsuperscript{65}

A divorced woman remarrying according to custom of her caste, could validly adopt to her second husband, her own son by her first husband, the boy being given in adoption by the father.\textsuperscript{66}

Although, as a general rule an adoption by a widow is good without the consent of her husband's kinsmen, yet when such

\begin{footnotes}
\item[59] See Deokinandan Agarwal, \textit{supra} note 32 at p. 87.
\item[60] See D.C. Manooja, \textit{supra} note 31 at p. 24.
\item[61] \textit{Ibid.}
\item[62] See T. P. Gopalakrishnan, \textit{supra} note 32 pp. 46-47.
\item[63] (1946) ILR Bom 1.
\item[64] A widow may adopt several sons in succession, one after the death of the other, unless any restriction is imposed on her power. See T. P. Gopalakrishna, \textit{supra} note 32, p. 92.
\item[65] The mother's power of adoption will not be extinguished by the mere fact that her son had attained ceremonial competence. See \textit{Gurukath Vs. Kamlabai}, (1955) 1 SCR 1135.
\item[66] Mehr Abbu Jetha Vs. Merani Vekhtaj, (1953) SC 109
\end{footnotes}
adoption has the effect of divesting of the estate already vested in a third person it would appear to be necessary to give validity to such adoption. 67

An authority to adopt may be revoked either expressly or impliedly. An agreement made by a widow with the reversioners or other not to adopt a son is void agreement and not binding on her as being against the public policy. The motive of a widow in making an adoption is not material as the question of its validity. 68

An authority to adopt is given to her for her husband's benefits and not for herself. 69 Regarding the extinction of widow's authority, the decision of Privy Council in Amarendera Vs. Sanatam 70 laid down the rule, applicable to all cases alike, without distinction, that a widow's authority to adopt was extinguished, never to be revived again, by the interposition of the son's widow or the son's son, and that the continuance of the power to adopt did not depend upon any vesting or divesting of property or upon the attainment of ceremonial competence by her son, but depend rather upon the fact that her son's wife or widow could continue the lime either by begetting a natural son as a wife or by adopting a son as a widow. 71

Similarly again in Anand Vs. Shankar, 72 Privy Council observed that a Hindu family can't be brought to amend while it is possible in nature or law to add a male member to it. A widow can't adopt in the presence of a son, grandson or a great grandson. 73

67 Bayabai Vs. Bala, (1870) 7 ILR Bom. 1
68 Kankaratham Vs. Narasimha, (1941) ILR Mad. 93 (FB)
69 Jagannadda Gajapathi Vs. Kunja Bihari Deo, (1919) Mad.447
70 AIR 1933 PC 155-60.
71 Gurunath Vs. Kalabai, AIR 1955 SC 207
72 AIR 1943 PC 196
73 See T. P. Gopalakrishna, supra note 32 pp. 90-91
A custom prohibiting adoption was valid but it is very difficult to establish such a negative usage, mere absence of instance of adoption by a widow in the family being insufficient to establish it.74

(2) Capability to Give in Adoption

According to Vasistha, both parents have power to give a child (i.e. son) in adoption provided they have attained the age of discretion and are of sound mind. No other relation can give a son in adoption.75 The primary right of giving a son in adoption is that of father even without the consent of mother, though her consent is generally obtained. 76 But the mother can't give her son in adoption, while the father is still alive and capable of consent, without his express consent.77 She can give her son in adoption only if the father has become incapable of giving his consent, e.g. by reason of lunacy or he has renounced the worldly affairs and has entered the religious order or after his death provided there is no express or implied prohibition from him.78

So no other relation than the father or mother can give away a son in adoption. Even a step-mother or father can't give their step-son in adoption.79 Even mother can't give her illegitimate son in adoption.80

74 Id. 92.
75 Ibid.
76 See S. V. Gupta, supra note 14, p. 908.
77 Rangubai Vs. Bhagirathibai, (1978) 2 LIR Bom 377
78 Raja Makund Vs. Srijagannath, (1923) LIR Pat 423; Magi Vs. Sukya, (1953) ILR Meg 239
If both the parents are dead, no one else can give a son in adoption and so an orphan could not be adopted. The right of giving a son in adoption can't be delegated to anybody else except physical act of giving a son in adoption as that does not involve exercise of any discretion. If a married person is given in adoption, he thereafter, can't give his pre-adoption born natural son in adoption as it cause a charge of legal relationship. A Hindu father converted to other religion or caste otherwise can't be deprived of his right to give his Hindu son in adoption.

(3) Who may be Adopted

During the British period most of requirements laid down by Dharamshashtras regarding the qualification of the male child to be taken in adoption were considered recommendatory while a few others were mandatory rendered the adoption void. For example, prohibition against giving the eldest son in adoption was considered merely recommendatory while prohibition to adopt one’s sister’s or daughter’s son was mandatory.

The person who is given and taken in adoption:

(a) must be a male except in Madras where the adoption of a daughter was held to be valid. Although adoption of a daughter was invalid under pristine Hindu law.

81 See Deoki Nandan Agarwal, supra note 32, p. 93
82 Govindram Vs. Sheoprased, (1948) ILR Nag.398
83 Sharad Chandra Vs. Shaulabai, (1944) ILR Mag 266.
84 Sham Singh Vs. Shamlal, (1901)2 SC Bom.551 (553).
86 The Dattak Mimansa and Dharamasindu relying upon such instance as that of Shanta, the daughter of king Dasaratha who was adopted by king Lomapada and of Pritha who was the daughter of Sura and was adopted by Kuntibhoja, say that even a girl may be adopted. This view is sharply criticised by Nilakintha in the Vyavahara Mayukha. There are also implanees of customary adoption of a daughter in certain communities.
(b) must be a Hindu, though a member of one religion sect. could have adopted a person belonging to another religious sect. 87

(c) he must be of the same caste as his adoptive father and preference of the same gotra. 88 It is not necessary that he should belong to the same sub-division of the caste. 89

(d) not a deaf and dumb boy 90 or boy suffering from chronic decease, impotency etc.

(e) a person who has become a sanyasi could not be taken in adoption unless he had renamed the order. 91

(f) he must be of an age and status prescribed for the adoptee. There were a great divergence among the medieval writers regarding the age of adoptee. 92

In Bengal, Benaras, Bihar and Orissa the son can be adopted before upanayana, i.e. before the child is invested with the sacred thread. 93 Hence no age being prescribed. The boy adopted may be even older than the adopter. 94

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87 Kusum Kumari Vs. Satya Ranjan, (1903) 30 ILR Cal 999.
88 For example a Brahmin can't adopt a Kshatriya boy or a Vaishya or a Shudra boy.
89 See Shah Deo Vs. Ramprasad, (1924) 46 ILR All. 637
90 Surendra Narain Sarbhadhikari Vs. Bholanath Roy Choudhari, (1944) 1 ILR Cal 139.
91 Gulabrao Vs. Nagara, (1952) ILR Nag 591
92 In this connection certain verses of the Kalikapwana Vyavahara Mayukha and Dattaka Chandrika assume importance. The Datta Mayanka says that the best time for adoption is upto 3 years, then from three years and five is the next best and that after five no boy can be adopted. The Datta Chandrika (p. 36) holds that a boy of the three higher classes can be adopted upto upnayana and that a Sudra boy can be adopted till his marriage. See Asha Bajpai, supra note 31, p. 64.
93 Ganga Sahai Vs. Lekh Raj, (1887) 9 ILR All 253, 328
In Madras State the same rule applies but in case the adoptee is of the same gotra as the adoptive father the boy may be adopted even after upanayana but before marriage.\footnote{Viragava Vs. Ramalinga, (1886) 9 ILR Mad. 148}

Similarly, in Bombay State the child may be adopted at any age and even after marriage and the adoptee may be having his own children.\footnote{Balabai Vs. Mahadu, (1924) ILR Bom 349. In the whole of India Sudra could be adopted only before his marriage but in the Bombay residency, the adoption of manical man and of one having even a child is allowed among Sudra.}

\begin{itemize}
  \item[(g)] A stranger may be adopted through their near relatives.
  \item[(h)] Illegitimate child can’t be adopted.\footnote{Apyashellya Vs. Ramakha Apya, (1941) ILR Bom. 350.} Similarly, an orphan can’t be given in adoption.\footnote{In Hindu mythology there are various instances of getting adoption of an orphan e.g. Sita, Karana and Droupi, etc. See Sopalchariar Vs. Krishnamachariar, AIR 1955 Mad. 559.}
  \item[(i)] That he must not be a person whose mother, in her maiden state, could not have lawfully married the adopter. Thus a daughter’s son, sister’s son and mother’s son can’t be adopted.\footnote{Ram Chandra Vs. Gopal, (1908)32 ILR Bom. 619} But prohibition does not apply to Shudras.\footnote{Raj Kumar Vs. Bissesur, (1884) 10 ILR Cal 688.} The upper three classes can also adopt in violation of this rule provided it is permissible by custom.\footnote{According to Vashishta and Bandhayana, "Let no man giver accept an only son as he must remain for the obsequies of his ancestors, See Deoki Nandan Aggarwal, supra note 32, p. 95.}
  \item[(j)] The adoption of only son an elder son is prohibited in the Samrities.\footnote{For example in Punjab and Delhi among the Borah, the Brahmins of Uttar Pradesh, the Jains, the Maui Budari Brahmins of Malabar in Madras the adoption of a Disler’s son and daughter’s son were held valid on the ground of custom, (1947) Mad. 131.}
\end{itemize}
A son who has once been given in adoption after complying with the requirements can't be taken back as he stands uprooted from the natural family for all intends and purposes except those as permitted by law.

(iii) Formalities and Ceremonies of Adoption

Whether adoption for its completion in all respect requires observance of some formalities or it is just merely giving and taking of the child without much thought and conviction. A study of the ancient Hindu literature would show that in all matters of adoption ceremonies have always remained an integral part. Whether one views it from a religious prospective or a secular one, ceremonies have played a decisive role. Let us look into this aspect.

The ceremonies of adoption are:

The first and foremost formality is the physical act of giving and receiving the boy.\(^{103}\) It is the essence of adoption and law does not accept any substitute for it.\(^{104}\)

In *Vasant Vs. Dattoba*,\(^{105}\) the Bombay High Court held that mere declaration of consent or even the execution of a registered instrument not accompanied by the actual physical transfer of the boy from the dominion of his natural parents to his adoptive parents was insufficient.

The actual act of giving and receiving can however, be delegated either by the giver or the receiver of the adoption of the boy.

\(^{103}\) *Ramji Das vs. Firm Magan Lal Sen*, (1954) Pepsu 66

\(^{104}\) In Bandhayana the formalities are that one should go to the giver of the child and ask him by saying, "I give him, he receives him with these words, "I take thee for the fulfilment of my religious duties. I take thee to continue the line of my ancestors". For more details see Deoki Nandan Aggarwal *supra note* 32, pp. 95-96

\(^{105}\) AIR 1956 Bom. 49.
Another ceremony in the *Homa* called *Datta Homa* in some cases. 106 *Datta Homa* is the sacrifice of the bringing of clarified butter which is offered as a sacrifice by fire by way of oblation. There is a conflict of opinion whether in all cases *Datta Homa* is necessary. 107 It is not necessary that the *Datta Homa* must be performed immediately after the giving and taking but it may be performed later and its performance may be delegated to others. 108

(d) Legal Consequences of Adoption

The legal consequences of a valid adoption are the same whether the adoption is made by a Hindu male, his wife or widow. On adoption, the adopted son is uprooted from his natural family and transplanted into adoptive family like a natural born son. 109 He is entitled to all the rights and privileges of a legitimate son in the adoptive family except to the share on partition between him and the after born son in the adoptive family and when adopted by a disqualified heir. On adoption all his connections in the natural family are broken except that of marriage and adoption. 110

106 *Datta Homa* is not essential in case of adoption by Sudras or among the Jains. See *Indramoni Vs. Behai Lal* (1879) 7 IA 24 and *Ms Gulab Vs. Devilal*, AIR (1951) Raj 136.

107 *Valubai Vs. Govind*, (1900) 24 Bom 218.


109 The basis text on this point is that of Manu, which may be literally translated as follow, "The son given should not take the gotra (the family name) and the wealth of his natural father, the pindal (the cake of boiled rice offered to deceased ancestors in Shraddhas) and he follows the gotra and takes the wealth of the adoptive father. The Vyavahara mayukha explains Manu's verse and arrives at the conclusion that the four words gotra, rikha, pinda and sadha are not to be taken literally but they were only used to indicate all those consequences only in relation to the natural father. For more details see Asha Bajpai, *supra* note 31, pp. 66-67.

110 The adopted son though ceasing to be members of his natural family can't marry any girl in the family of his birth whom he could not have married before his adoption nor can he adopt a boy from that family when he could
An adoption does not divest any property which has vested in the adopted son previous to his adoption. In the adoptive family, the adoptee will divest the property vested in another person to the extent to which he would have been entitled to it if he had been adopted prior to his adoptive father's death.\footnote{See S. V. Gupta, supra note 14, pp. 994-95.}

An adopted son is entitled to inherit like a natural son in the adoptive family except when a son is born to the adoptive parents after adoption. The proportion of his share in the various schools is as follows.\footnote{See S. T. Desai, supra note 49, pp. 607-08.}

- **Mitakshra School in Bengal**: 1/4 share of natural son or 1/3 of the adoptive father's estate.
- **Benaras School**: 1/4 of the share of the natural son.
- **Sudras in Madras and Bengal**: Equal to that of natural son.
- **Dayabhaga School**: 1/3 of the whole estate.

Where a married person is adopted, his wife passes with him into the adoptive family and his son born after adoption though conceived before adoption also passes into the adoptive family. But when the son is in existence at the time of adoption will not pass with him into the adoptive family.\footnote{Son in existence will neither lose his gotra and right of inheritance in his family of birth nor he will acquire any such rights in the adoptive family, see S. T. Desai, supra note 49, pp. 605-606.}

Adoption once made can't be cancelled by the parties thereto.\footnote{Even the adopted son can't renounce his status as such and return to his natural family.} Registration of adoption is not compulsory.\footnote{Registration of adoption deed is only a piece of evidence but not an exclusive proof.}

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\end{footnotes}
(b) Kritrima Form of Adoption

An exception to the general law of adoption is the Kritrima form of adoption.\textsuperscript{116} According to Dattak Mimansa, Kritrima son is recognised as a son given. This form of adoption does not exist any more except in Mathila and certain west coast states.

Either man of woman can adopt in this form of adoption. It means that a wife can adopt a Kritrima son to herself even if her husband has already adopted a son to himself. She does not require the consent of anyone, not even consent of her husband.\textsuperscript{117}

In Mithila a widow could not adopt to her husband but she was at liberty to do so and she could adopt a son to herself in addition to the one adopted by her husband.\textsuperscript{118}

Age and relationship of adoptee is immaterial but the consent of the major adoptee and adopter is essential and should be given at the life time of the adoptive parents.\textsuperscript{119} The adoptee must be of the same caste as adoptive father. A Kritrima son does not lose his claim of inheritance in the natural family nor assume the gotra (surname) of his adoptive father.\textsuperscript{120} The Kritrima son can take only the inheritance of adoptive parents and to no other relation. The son of Kritrima son or other heirs does not take any interest in the property of adoptive parents. The relationship between the Kritrima son and adoptive parents being limited to the parties themselves without extending it any further on either side as per contract. This form was practised by the Namboodris in

\begin{itemize}
\item \textsuperscript{116} Kamla Prasad Vs. Murlil Manohar, (1934) 13 ILR Pat 550.
\item \textsuperscript{117} See D. C. Manooja, supra note 1, pp. 28-29
\item \textsuperscript{118} It means that the authority of husband to adopt is not required and widow can't adopt a Kritrima son to her husband.
\item \textsuperscript{119} The adoptee may be major, minor or a married person. A minor son may be adopted with the consent of his parents.
\item \textsuperscript{120} Lakshmi Reddy Vs. Lakshmi Reddy, AIR (1957) SC 314.
\end{itemize}
Kerala. This form of adoption is superseded by recent state which permits adoption by Hindu families.121

(c) Difference between Dattaka and Kritrima Forms of Adoption

Generally speaking, Kritrima form is considerably taken in its rules than the Dattaka. The fiction of the new birth in the adoptive family does not exist, consequently, the boy of the rules flowing from the maxim of Saunaka that the boy to be adopted must be 'the reflection of son' is eliminated, giving to this form its almost unfettered choice of boys and freedom.122 The comparison between the Dattaka and the Kritrima form of adoption is as follows:

(i) Under Dattaka form of adoption parents alone have the right to give a boy in adoption whereas under Kritrima form of adoption the boy may give himself in adoption because the consent of the boy is absolutely essential.

(ii) Regarding the capacity to take in adoption under Dattaka form of adoption only male may adopt and widows with the authority of their husband i.e. they adopt to their husband not to themselves whereas in the Kritrima form of adoption a male can adopt and female can adopt on in the Mithila school to herself and can't indeed adopt to her husband even though expressly authorised.

(iii) The fundamental condition that a person may adopt only in the absence of 'main issue' is common to both.123

(iv) Regarding the status of the person adopted in Dattaka form of adoption the choice of the boy is greatly restricted whereas

122 See S. V. Gupta, supra note 14, p. 126.
123 Ibid.
in *Kritrima* form of adoption no restriction of choice of the boy.

(v) The identity of caste of the boy in both cases the boy must be of the same caste.

(vi) Regarding the ceremonies the physical giving and taking of the boy is essential in *Dattaka* form of adoption and *Datta Hama* is also essential in some cases whereas no ceremonies are necessary and the validity of *Kritrima* form of adoption.

(vii) In *Dattaka* form of adoption the adoption establishes full relationship in the family of adoption and is not confined to the contracting parties. The boy acquire full status of son in the adopted family as of a son actually born in such family, whereas in *Kritrima* form of adoption the boy does not lose his right of inheritance in the natural family, however he can only inherit to the person actually adopting him and no one else.\(^\text{124}\)

**B) Customary Form of Adoption**

The customary form of adoption is not universal throughout India. But there are certain customary adoptions prevalent in some communities in the various parts of India. Out of these customary forms of adoption some were local and others were followed by different communities.

**(a) Dwamushayama Adoption**

*Dwayamushayayama* is a system of adoption in which the adopted son retains the fictial relationship to his natural father and is called a son of two fathers. This type of adoption is prevalent

\(^{124}\) *Id.* p. 127.
among Nambudiris in Kerala. The Dwayamshyayayama son inherited from both the families. If he himself died his relations in both the families would be entitled to succeed to his property. The recent statute has not approved this special form of adoption.\(^{125}\)

**\(\text{(b) Illatam Adoption} \)**

This type of adoption is a custom of Sath (Reddist of Kammas of Tamil Nadu and Andhra Pradesh), affiliation of a son-in-law in consideration of assistance in the management of the family estate.\(^ {126}\) It was purely a creature of custom to which judicial recognition has been given.\(^ {127}\) It is having basically a secular object i.e. a specific agreement of giving a daughter in marriage and son-in-law is customarily recognised as the heir in the absence of natural son.\(^ {128}\) But this does not treat him as the copartner there. He will not loose his connection with his natural family.\(^ {129}\)

In *G. Narayanappa Vs. Govt. of A. P.*,\(^ {130}\) it was held by the Supreme Court that institution of Illatom adoption, that although an Illatom son-in-law has some rights similar to those of a natural born son after the adoption if Illatom son-in-law, but this rights are not identical to those conferred by law on a son or an adopted son. He does not succeed to the properties of his father-in-law by

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127 In *G. Narayanappa and another Vs. Govt. of Andhra Pradesh*, (1992) 1 SCC 196. The Supreme court examined the nature of illatom adoption and its special features.
130 (1992) 1 SCC 196, 197.
survivorship but only on account of custom or an agreement giving him a share in the property of his father-in-law. He is entitled to a share in the property of father-in-law only after the death of father-in-law, it being well settled in law that there can be no heir to a living person. This custom is not specifically protected by a new statute.\textsuperscript{131}

\textbf{(c) Goda-Datta Adoption}

\textit{Goda-Datta} form of adoption was prevalent among the followers of Vallabhacharya in Gujrat, Rajasthan and other places. No ceremony of \textit{Datta Homa} and giving and taking of boy is necessary by this type of custom. Even an orphan can be adopted as son. Only ceremony is required are; \textit{Marjan} i.e. pouring of sacred water on the person to be adopted; \textit{Punejavacan} i.e. reading of holy literature at the time of adoption, \textit{tilak} on the forehead of the adoptee in front of idol and smelling of the head of the adoptee, and putting on an \textit{uparna} or scarf on the head of the adoptee. This type of adoption once made could be cancelled.\textsuperscript{132} This type of customary adoption is no more available after the commencement of the \textbf{Hindu Adoption and Maintenance Act, 1956}.\textsuperscript{133}

\textsuperscript{131} It may be noted that customary adoptions like \textit{llattam} adoption are no longer possible. Section 4 of the \textbf{Hindu Adoption and Maintenance Act, 1956}, seeks to repeal all existing laws, customary, statutory or of any other kind which are inconsistent with the Act, the only exception being those contained in Sec. 10. Section 10 serves only prevailing customs and usages in conflict with the stipulation therein that the person taken in adoption shall be unmarried and not completed 15 years of age. For more details see M. Krishnan Nair, \textit{supra} note 121, p. 117.

\textsuperscript{132} For more details see M. Krishna Nair, \textit{supra} note 121, pp. 117-118

\textsuperscript{133} In \textit{Danrai ji Vrijlal Vs. Chadra Prada}, AIR 1975 SC 784. It was held by majority views that the revocability of Goda form of customary adoption even after the commencement of the \textbf{Hindu Adoptions and Maintenance Act, 1956}.
(d) Adoption Amongst Jain

In Jain community adoption carries no religious significance and is purely contract. The Jain law of adoption developed through custom and usage in the Jaipur State.\(^{134}\)

In the absence of such law the ordinary Hindu law governs the matter relating to inheritance, succession, adoption and marriage amongst them. In the beginning the court allowed a Jain widow to inherit and to exclude the adopted son on the basis of Jain customs, but later in a series of cases the courts disallowed such a right to the widow in the absence of proof of custom and applied the ordinary Hindu law.\(^{135}\)

A Jain widow had a power to take a boy in adoption without the authority of her husband. Jain adoption carries no religious significance and is purely a contract, which is liable to be cancelled on the breach of conditions by either of the parties.\(^{136}\)

(e) Customary Adoption in Punjab

In Punjab there is a customary appointment of an heir creating a personal relationship between the adoptive father and the appointed heir only.\(^{137}\) There is no tie of the kinship between the appointed heir and the collaterals of the adoptive father. The appointed heir does not acquire the right to succeed collaterally in

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135 See *Kesar and another Vs. Gopi Chand*, (1948) JLR 323. The court also observed that among the Agarwals Banias of Saraogi sect the practice has been at the time of adoption to tie a turban round the head of the boy who is being adopted in the presence of principal men of the community and give them a feast.
137 See S. V. Gupta, *supra* note 14, p. 5.
the adoptive family.\textsuperscript{138} The status of appointed heir is materially
offered the form that of the son adopted under the Hindu law. The
custom among the Brahmins and Khatris of Punjab, a son given
away in adoption can accordingly succeed to the property of his
natural father only if there is no other son of the natural father, if
there is another son of natural father, he cannot succeed. \textsuperscript{139}
Where the parties are Hinds, the Hindus' law would apply in the
first instance and whossoever asserts a custom at variance with the
Hindu law shall have to prove.\textsuperscript{140} A Hindu governed by customary
law in Punjab is not disentitled to make a formal adoption
according to Hindu rites and ceremonies or a formal customary
adoption.

Under Hindu law, the objective of adoption is religious while
under the Punjab Customary law the objective of the adoption is
secular.\textsuperscript{141}

All the tribes of Punjab authorise only males to adopt and
negates the right of woman to adopt.\textsuperscript{142} Only a male can be
adopted. The adoption of female is not recognised by the Punjab
customary law. Even an only son can be adopted under customary
law in Punjab.\textsuperscript{143} The formal ties necessary for adoption are:
(i) a formal declaration of adoption before the brotherhood.

\begin{itemize}
  \item \textsuperscript{138} Kehar Singh Vs. Diwan Singh, AIR (1968) SC 1555. The incident of an
informal adoption of appointed heir as well as those of a formal customary
adoptions were examined by the Supreme Court.
  \item \textsuperscript{139} Salig Ram Vs. Munshi Ram, AIR (1961) SC 1374.
  \item \textsuperscript{140} Ibid.
  \item \textsuperscript{141} Under the Punjab customary law of adoption, object of appointing heir is to
provide for the adoptive father someone to live with him, to look after him
and to help him manage the land.
  \item \textsuperscript{142} The woman can adopt only if authorized by their husband since dead or
husband's collaterals through males. As centric males can't adopt, they
merely have chelas or religious pupils. For further details see J. L. Kapoor,
Law of Adoption in India and Burma, (1933), suppl., (1936), pp. 41-42.
  \item \textsuperscript{143} For more details see D. C. Manooja, supra note 1, p. 31.
\end{itemize}
(ii) general treatment of the appointed heir as a son. 144

An appointment of an heir once lawfully made can't be revoked by the adoptive father.145 The property inherited by the appointed heir from his adoptive father itself acquired. The customary appointment of an heir in Punjab resembles in many respects with Kritrima form of adoption of Hindu law. 146 The customary law of adoption in Punjab has stand arrogated after the present Act by the present Statute.147

It is custom among the case of 'Naikins' or dancing girls to adopt daughters. The burden of proving a custom of adopting a daughter is very heavy on the person alleging.148

The other communities like Muslim, Christians and Parsis do not legally recognise adoption but there were some customary forms of adoption among them.

(g) Customary Adoption Among Communities other Than Hindus

(i) Customary Adoption Amongst Christians

The laws applicable to Christians of India are, the Indian Christians Marriage Act 1872, the Indian Divorce Act, 1869 and the Indian Succession Act, 1925. These are silent about the fiction of adoption.149 However, there is no express prohibition of

144 ld. p. 32.
145 An adoptive father can't disinherit his appointed heir for misconduct, disobedience a neglect to support his adoptive father.
146 But unlike Kritrima son, however, customary adopted son in Punjab is excluded by his natural brothers in succession to the estate of his natural father.
147 Kartar Singh Vs. Sajan Singh, AIR (1974) 2 SCC 59
148 See S.V. Gupta, supra note 14, p. 1024.
149 The present law applicable to Christians in India is the common law in England. In common law the rights, liabilities and duties of parents are inalienable and therefore, adoption does not have the sanction of common law. This, adoption to be legal and valid should have the sanction of either
adoption in religious law of Christians. It will be thus custom (of
their own) which governs adoption in their case. Many enlightened
Christians opined that the Church looks upon adoption as a
natural phenomena and that the prevailing laws of inheritance and
intestacy have no religious foundation. The Christian philosophy of
'faith, hope and charity' has also led many to invoke the machinery
under the Guardian and Wards Act, 1890 for the purpose of
adoption. A child to be adopted is converted to the Christian faith,
which he or she may renounce on attaining majority.\(^\text{150}\)

(ii) Customary Adoption Amongst Parsis Communities

No provision relating to adoption is found in the personal law
of Parsis.\(^\text{151}\) The Parsis do not recognise legal adoption as such,
but recognise customary form of adoption called 'Paluka, Putra and
Dharamaptra'\(^\text{152}\) by which the widow of a Parsi dying issueless can
adopt on the 4th day of the death of the husband for the adhoc
purpose of performing certain religious ceremonies for the
deceased annually. The adoptee does not confer any proprietary
rights.\(^\text{153}\)

(iii) Customary Adoption Amongst Muslims

There are very few Muslim families in India who have a
legally recognizable custom of adoption. Among them are some
families in the Kashmir valley who have a legally recongizable
custom of adopting a son called 'Pisarpawada'. When a sonless

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personal law or statutory law. See Halsbury's Laws of England, Vol. 21,
p. 226.

150 See Guardian and Wards Act, 1890, sec. 8

151 The Parsi personal law is now found in the Parsi Marriage and Divorce
Act, 1936 (Act No. 3 of 1936) and Part III of the Indian Succession Act
1925 (Act No. 39 of 1925).

152 See Paras Diwan, Law of Adoption, Minority, Guardianship and Custody,

153 The Palakptra boy the temporary adoption is believed by Parsis that person
not born a Parsi can never become a full Parsi.
proprietor appoints one of his male kinsmen or tribesmen to succeed him as his heir the appointed heir is called 'Pisarpawada'.

According to the notion prevailing amongst agriculturists in Kashmir, adoption is in no sense connected with religion and it is more or less a public institution by a sonless owner of a land of a person to succeed him as is heir. Agreeing with Ralligam it is, therefore, more correct to speak of the personal relation of an heir rather than as adoption.

In Mod. Akbar Bhat Vs. Mohd Akoon, the Full Bench of Jammu and Kashmir High Court held that the Muslims of Kashmir valley generally recognise the custom of adoption but this custom of adoption of a son who is called pisarparwada is entirely different from adoption amongst Hindus. The customary adoptee is not transplanted in the family of the adopter. He has no right of collateral succession so on and so forth. He can inherit only to his adopting father. The ceremonies also connected with this customary adoption are entirely different form those of Hindu law.

154 In Sultan Wani Vs. Mohammad Wani, the High Court of judicature on 10 Bahadoon, 1993 B. (unreported) observed that Kashmir Muslims appoint sons even in presence of their natural sons. It is also not necessary that Pisarpawada must be one's male kinsmen or tribesman. Strangers are also appointed.
155 Jiwa Sigh Vs. Chandli, (1920) Kah. 39, p. 43.
156 See W.H. Rattigan, A Digest of Customary Law, (14th edn., 1966) 212.
157 In Code, Sant Ram Dogra writes that adoption is of the Hindu origin and has been maintained among the Mohammedans in spite of all the bigoted attacks against this institution for last hundred years. The zamindars of the valley still thinks an adopted son as good as real son. For more details see Sant Ram Dogra, Code of Tribal Custom in Kashmir, (1930), p.9.
158 AIR 1972 J&K 105.
159 id. 110,111.
In the absence of a legally recognisable custom of adoption amongst Muslim in India, the courts will, thus, apply Muslim law on the basis of justice, equity and good conscience.

There also exists a customary institution, like Hinds in Jammu and Kashmir and some other parts of India, known as 'khanadamad' whereby a sonless man associate with him in his life time is son-in-law who resides with him, cultivates for him, and acts as a means of transmitting the estate of Original proprietor's daughter. In absence of kanandamad's sons and Khananishin daughter's from his kahanishin wife, the khanadamad takes a life interest.  

So the Hindu law is always applied subject to any custom to the contrary. Section 3 of the Hindu Adoption and Maintenance Act, 1956 provides that the custom or usage must be a rule which having been continuously and uniformly observed for a long time and obtained the force of law among the Hindus in any locality, community, group or family and which is certain and not unreasonable and not opposed to the public policy.

The discussion shows that a custom which fulfill all other requirements, its validity has been given a specific statutory recognition under the Act. Section 3, Clause (a) of the Act has accorded an overriding effect to the custom and usage governing adoption in the are of its observances. The customs have also continued to receive recognition from time to time in different

160 Thus khanadamad merely acts as a can candeit He should not be compared to a son, though he is though as a son in the house and has to respect his parents-in-law like a son. For more details see Moti Lal Mittal, Uniform Adoptions Problems and Perspectives, the dissertation work of LL.M. (D. 7693) submitted to Delhi University, See Ellis, Punjab Custom, (1921) 90.

161 Hindu Adoption and Maintenance Act, 1956, Sec. 3.

162 For further comments see S. V. Gupta, supra note 14, pp. 249-54.

163 Hindu Adoption and Maintenance Act, 1956, Sec. 3.
judicial decisions as well. The only overriding factor has been the fact that the custom or usage in question should not be opposed to public policy. The burden of proving a particular custom governing adoption shall be on the person who asserts it.

(C) Institutional Adoption

The old Hindu law of adoption was parent based and not child based, the welfare of the child was not its concern. It was only protecting the rights of the parents while the adoption of orphans, illegitimate children and girls was prohibited. Even prior to the Independence, child welfare services were in the nature of providing institutional service to orphans, destitute, disabled and delinquent children.

Now it is universally accepted that institutions are not the right places for the proper development of the children. The child develops to his or her fullest potential in a secure and loving family environment but where a child is denied this basic right and is given up permanently by the biological family, alternative care has to be ensured. The institutions are unable to meet their fundamental need of love and above all recognition of them as normal and ordinary children which is psychologically and socially essential to their security. The options for these children are

164 Balkrishna Vs. Sadasiv, AIR 1977 Bom 412; Laxman Vs. Anusuyabai, AIR 1976 Bom 262. In Bombay a person who has completed the age of 15 years has been adopted under custom of adoption recognised and allowed to prevail over section 10(S) of the Hindu Adoption and Maintenance Act, 1956 by the court.

165 The idea prevalent at the time was that orphanhood destitution and disability were the curse of God and that can be looked after away from the community confined in the institution run with the contribution of richer section of the society.

166 I.C.C.W News Bulletin; The Changing Face of Adoption, (1986) p. 2., more than the physical needs, the child has socio-psychological and socio-emotional needs that can't be met by any institution but by the family.
institutionalization, foster care or adoption. Of these adoptions is the best alternative as it provides the equivalent to the biological family giving the child individual loving care, security and an identity on a permanent basis.

The **Hindu Adoption and Maintenance Act, 1956** provides for the adoption of orphans, foundling and abandoned children.\(^{167}\) The present statute authorized the guardian to give his ward in adoption with the prior permission of the court.\(^{168}\) Before 1962, the guardian means only *dejure*\(^{169}\) guardian. But in 1962 keeping in view the interest of the abandoned children the **Hindu Adoption and Maintenance Act, 1956** was amended so as to include the *de facto* and *dejure* guardians.\(^{170}\) The power or right if the guardian is limited because they can't give the child in adoption without the prior permission of the court. The 'court' means the city court or a district court within the local limits of whose jurisdiction the child to be adopted ordinarily resides. The court would grant permission only if it is satisfied that the applicant seeking permission has not received nor agreed to receive and that no person has made or given, or agreed to make or give to the applicant any payment or reward in consideration of the adoption except such as the court

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\(^{167}\) Whereas under the Mitakshara law, an orphan, a founding or an abandoned child could not be adopted because child could be given in adoption by parents only and not by the guardian. For more details see Paras Diwan, *Supra* note 85, p. 209.

\(^{168}\) **Hindu Adoption and Maintenance Act, 1956**, sec. 9.

\(^{169}\) *Dejure* guardian means testamentary guardian or guardian appointed by the court.

\(^{170}\) The *de facto* guardian means that guardians who are having the actual possession and custody of the child. It means, a manager, secretary or any person incharge of any orphanage or institution could give the child or ward of that orphanage or institution in adoption. Section 9(4) of the Act was amended by the Amendment Act, 1962 so as to facilitate the adoption of orphan.
may sanction a payment or reward in its discretion. The consideration which weigh with the court in deciding the welfare of the child are the interest, well being, health, education, social status and happiness of the minor. The welfare of the child means moral or material welfare, which is not to be measured by money or by physical well being. The ties of affection must not be disregarded. The moral and religious welfare also must be considered.

Section 9(4) of the Hindu Adoption and Maintenance Act was amended in 1962 so as to facilitate the adoption of orphans. Another aspect of the provision is that the guardian can himself adopt the ward. The giver and taker of the child will be the same person. Regarding the adoption of orphans by foreigners it was observed as early as in 1982 they Gujrat High Court in Rasiklal Vs. Changanial Mehta, case pointed out that the Hindu Adoption and Maintenance Act, 1956 was silent regarding the adoption of Hindu orphans by the foreign parents. The court observed, "In order that court can satisfactorily decide an inter-country adoption case, the court should issue notice to the Indian Council of Social Welfare and seek its assistance. If the Indian Council of Social Welfare does not appear, or if it is able for some reason to render assistance, the court should issue notice to an independent reputed and officially recognised social welfare agency

171 Hindu Adoption and Maintenance Act, 1956, sec. 17. The obvious object is to prevent the institution of adoption from being made an instrument for bartering children. The Act in this Section seeks to prohibit trafficking in children. Because the institution of adoption developed by our ancestors was wrapped with the best and the noblest of motives which stemmed from religious and secular instincts and it will be dangerous and against the sentiments of the people, if it is made profit making machine.
172 See M. Krishna Nair, Supra note 121, p. 98
173 AIR 1982 (Guj) 193.
working in the field and in that area and request it to render assistance in the matter."

The Supreme Court of India in *Lakshmi Kant Pandey's case*\(^{174}\) took note of these observations and observed that such a procedure will save the child from maltreatment and exploitation by the adoptive parents. The Supreme Court noted that once such child is adopted by foreign parents he or she would henceforth be governed by the law of his or her country as if he or she was a national born child.\(^{175}\) Supreme Court has pointed out that the welfare of the child must be primary object for the institution while giving the child in adoption.

As already pointed out, the modern concept of institutional adoption owes much to the aftermath of the Second World War. Adoption began to be seen as a way of providing unwanted illegitimate, neglected, incared and unclaimed children in hospitals with a family. By adoption an infant is permanently incorporated into a family with all the rights of a normal child even though he was not born as a natural child there.\(^{176}\)

Institutional placement according to need, age and sex should be made available for children and young person upto age of 18 years specially who are orphaned and foundling.

Since the institutional adoption of children is in its formative stage in India, steps need to be taken to set it on right lines before

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174 *L. K. Pandey Vs. Union of India*, AIR 1984 SC 469
175 The more classifications on the above cited subject was issued by the Supreme court on 3.12.1980 in Writ Petition No. 1171 of 1982 title *L. K. Pandey Vs. Union of India* and consequently Govt. of India issued certain guidelines through Ministry of Welfare on 14th July 1989, 1993, to regulate matters relating to adoption of Indian children by foreigner and also see Revised Guidelines for Adoption of Indian Children, issued by Ministry of Welfare Govt. of India, 1995.
the role of interest in due to unregulated procedure and infirmities of human nature, greed and vested interest. \(^{177}\)

**IV. A Comparative Overview**

The adoption law prevailing prior to 1956 was the law laid down by the 'smritkars' as modified by the customs and usages and as interpreted and applied by judicial decisions. However, the law was varied and uncertain according to the different schools exercising their influence in different parts of the country. \(^{178}\)

About ancient law of adoption in India, it has been observed by the critics -

"The Hindu law of adoption was primarily anxious and protected the rights of parents - natural and adoptive, and was not concerned with the protection of the adopted child. In fact when we consider that the law prohibited adoption of orphans, illegitimate children and girls, while permitting adoption of even grown up married men, it is clear that the idea of protecting destitute children or giving them a house and family was totally absent in the legal philosophy behind this law."\(^{179}\)

The religious overtones which were earlier so pronounced no longer find a place in the **Hindu Adoption and Maintenance Act**, 1956, which was enacted to remove the uncertainties and to resolve the conflict of judicial decisions in the pre-1956 law of adoption in India.\(^{180}\) However, secularisation of adoption does not mean that the Act of 1956 makes a total departure from the old

\(^{177}\) See D. C. Manooja, *supra* note 1 p. 36.
\(^{180}\) Even a religious ceremony like Datta Hama is not essential.
religion concept of law of adoption in India. Some aspects of the old law which should have rejected are still retained. For example, adoption continues to be a private act without any supervision by the State except when guardian gives the child in adoption, etc.

The social concept of adoption has now undergone a momentous change. Adoption is no longer considered a crutch to aid childless couples or a means to relieve a person form the torments of the hell. Now adoptions are guided by the principles of social reform, equity, justice and welfare. It is now realised that a child deprived of a family environment is always fatally hampered physically and mentally and such child develops an attitude of melancholy and indifference. Therefore, it is just and human to give shelter to such a child by facilitating adoption. In modern times adoption is looked upon as the most satisfactory method of providing a home and family to the helpless, the unwanted, the destitute or the orphan child and to rehabilitate him in society. Along with this growing realisation, a new social phenomenon having long term repercussion has emerged. Significantly, a child adopted is often a destitute, diseased and discarded. Thus, a feeling of paternally which binds the child to a home is the strong motive force behind the institutionalisation of adoption. Today, an adoption of a child through institutions has come and assure a more significant economic content by across international barriers of religion, caste, society, race and nationality.182

Though before the commencement of the Act of 1956 certain forms of customary adoptions were prevalent in some parts of

182 There has been remarkable increase in the number of inter-country adoptions since the Second World War. See D. C. Manooja, supra note 1.
India, all these have, however, been now abolished by the present legislation. No such adoption can be made after the Act came into force. In respect of an adoption which has taken place prior to this Act, the old law that should be applied even though it may be inconsistent with the provisions of this enactment.

Though the Act abrogates the customary law of adoption yet it recognises certain customs and usages. The custom of adoption of person who have completed the age of fifteen years has been recognised and allowed to prevail over, Sec. 10(5) of the Act by the court in certain cases. It has been held by the Supreme Court in Dhanraj Vs. Suraj Bai that where an adult is adopted under custom that can prevail over Section 10(4) of the Act, adoptee’s own consent must be taken for adoption, the Act does not abrogate this rule.

V. Sum-up

The above discussion shows that, the supremacy of male during ancient time in all matters affecting adoption. The

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183 These *inter-alia* were Kritrima, Illatam, Dvyamshyaama, etc. for more details see S. R. Bansali, *supra* note 125, p. 128
184 Hindu Adoption and Maintenance Act, 1956, sec. 4(9)
187 Hindu Adoption and Maintenance Act, 1956, clause (3) and (4) of sec. 10. As a general rule, a married person can’t be taken in adoption as exception is engrafted in this rule to recognise the adoption and married person in Bombay.
188 Balkrishna Vs. Sadashiv, AIR 1977 Bom 412.
189 AIR 1975 SC 1103
190 In Bombay there had been a long practice of the adoption of an older person than the adoptee and exception engrafted in this clause is designed merely to recognise this practice in Bombay.
patriarchal values appear deeply embedded in the concept of adoption, especially after the vedic period. It is evident that during the vedic times, sons were adopted only for secular motives.\textsuperscript{191} A study of codes and commentaries in the historical order shows more clearly that the institution started as merely secular and later on with the progress and development of religion and religious philosophy it began to be associated with religion itself. Finally the institution became more secular than religion. This character is never lost and is retained to the present day.

In view of the key role played by a son in the socio-religious life of a man, it was but natural for the shastric law to make some provisions whereby one who did not have a natural son could acquire an 'artificial' one. But many of various Smriti writers gave adopted son a low rank compared to the aurasa son. Similarly Supreme Court of India in \textbf{V. J. S. Chandra Shekar Vs. Kulandaivalu},\textsuperscript{192} confirmed the view of Privy Council\textsuperscript{193} and it was held that the object was principally religious. Whatever be the motive of adoption one thing is certain that different people adopt with motives. Sometimes the motive may be to despise a prospective heir who could take the property in the absence of a son, whatever be the motives the court need not enquire into them.\textsuperscript{194}

Before the commencement of the \textbf{Hindu Adoption and Maintenance Act}, 1956 the prevalent law had its basis in the \textit{samriti} literature molded by custom and usages and interpreted

\begin{itemize}
\item[\textsuperscript{191}] Instances can be cited of Vishwamitra and Kuntibhoja. Vishwamitra had an aurasa son (i.e. natural born son) of his own and Kuntibhoja adopted a daughter.
\item[\textsuperscript{192}] AIR 1963 SC 185
\item[\textsuperscript{193}] \textbf{Amarendra Vs. Man Singh}, (1933) 60 IA 242
\item[\textsuperscript{194}] \textbf{Shripat Vs. Dattaram}, AIR 1974 SC 878
\end{itemize}
and applied by the judicial decisions. The Act of 1956 provided for a uniform law of adoption for Hindus. The whole philosophy of the adoption among the Hindus centres around the theme of having a child by a childless couple irrespective of sex. The ceremonial prospective stand liberalized in the context of secularization of adoption. Welfare of the child seems to be the paramount consideration. Today the status of an adopted child is fully protected and safeguarded by the law in all respect. Customary form of adoption have also received legal recognition. However, in Punjab which provide for a customary appointment of heirs, the appointed heir does not acquire the right to succeed collaterally in the adoptive family. In Punjab adopted child only can succeed to the property if there is no other son of the natural father. The adoption of female is not recognized by the Punjab customary law of adoption. The Christians and Parsis have no law governing adoptions though customary mode of adoption is recognized with some variations in terms of rights of the adopted child. In the State of Jammu and Kashmir customary mode of adoption is very much prevalent. Customary mode of adoptions also continued to receive judicial approval from time to time. The Hindu Adoptions and Maintenance act, 1956 also provides for the adoption of orphans/destitutes/abandoned children. The guardian is permitted to give his ward in adoption with the prior approval of the court. Similarly the guardian himself can also adopt a child. Regarding adoption of abandoned/destitute/neglected children by the foreigners, the Act is silent. Therefore, for regulating inter-country adoption matters, the guidelines framed by the Supreme Court in L. K. Pandey Vs. Union of India need to be observed.

195 AIR 9184 SC 469
in letters and spirit. Therefore, adoption in the present day context has a momentous change. Hence, we may safely say that conceptualization of the certainty of the family and legal heir to adoptive parents have remained as prominent consideration in the philosophy of adoption and the paramount consideration is the welfare of the child.