

SON: THE SOULFUL GOAL

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Abstract

This paper is based on the smṛiti literature mainly focusing on the time frame from 2nd century BCE to 3rd century CE. It will draw attention to the need of son in a patriarchal family system. Is the need based on economic, social or religious need? In the absence of a son what are the ways to ensure the family is able to acquire a son for the family? Is having a daughter enough for the family? What will be the rules of inheritance for different kinds of son? Is there parity between sons within the family? These are some of the questions that I will try to focus in this paper.

Keywords: son, daughter, adoption, niyoga, primogeniture, inheritance, piṇḍa, property, literature



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Introduction

The pillar of society was the family, and because of the patriarchal family structure that prevails in society, sons are needed and valued. The desire for a son was based not only on secular but also on religious grounds. The cardinal purpose served by the birth of a son was that the son enabled the father to pay off his debts to his ancestors and to secure immortality (*amṛtatva*). According to the Manu-*smṛiti*, (Buhler:1886, vol.25) 'a son delivers (*trāvate*) his father from hell called 'put' therefore he was called *putra* (a deliverer from *put*, v.138). The yearning for a son was partly motivated by the knowledge that the son would preserve and perpetuate the family line.

The son's strong relationship with the benefit of offering *piṇḍa* was emphasized in the *sūtras*, *smṛiti* thereby elevating and making him prominent. However, it should not be assumed that secular benefits derived from a son were not considered; rather, the vast gap between the two, namely, religious and secular, caused the secular benefits to be buried under the deluge of extravagant notions about spiritual benefits derived from sons. As a result, the rule of inheritance was founded on the son's primary obligation, which was to provide a funeral oblation. Thus, one can say that offering of funeral oblation, which was also the son's primary

obligation, formed the basis for the law of inheritance. According to *Viṣṇu-smṛiti*, 'he who inherits the wealth, presents the funeral oblation to the deceased' (Muller:1900, p.64).

Primogeniture: A Legitimate, Acceptable Principle?

In patriarchal joint family system religious efficacy supported the concept of primogeniture in which the eldest son would succeed his father. Another theory for the origin of primogeniture is that if the father passed away without dividing the family estate, the eldest son, who was recognized as heir would care for his siblings and other relatives, like a father. *Manu-smṛiti* states that the eldest son by the mere fact of his birth enables the father to free himself from the debt of his ancestors, therefore, he deserves to get the entire estate or an additional share. *Manu-smṛiti* (Buhler:1886, p.348) not only gives the eldest son an extra share in excess but the brother born after him also gets one share and a half. The reason for this kind of division could be that the eldest and the second brother were considered more eminent than the rest. The second brother was given half a share in excess because in the absence of the elder brother he would perform the religious rites.

A gradual change toward the practice of equal property sharing occurred as a result of public scrutiny and criticism of the first-born son's exclusive proprietary rights. Even though Kauṭilya agrees to the special allotment given to the eldest son called *uddhāra*, he attaches the caste factor in the allotment of this special share. He specifies that amidst sons born of the same mother, goat shall be the special share of the eldest among brahmins, horse among *kṣatriyas*, cows among *vaiśyas*, and sheep among *śudras*. Kauṭilya is the only author who makes the division of primogeniture on the basis of caste. He also says that inheritance would go to the most capable son and the rest of the sons will depend on him (Shamasastri:1920, p.185). *Manu-smṛiti* recommends that the entire property should go to the eldest son. *Nārada-smṛiti* and *Bṛhaspati-smṛiti* agree with the view that an extra share should be given to the eldest son but *Bṛhaspati-smṛiti* adds a clause to this rule. According to him when the sons divide the heritage of the father, they should all share equally though a greater share should be given to the son who has distinguished himself by virtue of sacred knowledge. *Yajñavalkya-smṛiti*, is of the opinion that the father while portioning the ancestral property could not indulge in unequal distribution. He could exercise the right of giving an extra share to his eldest son while portioning his self-acquired property. During the Gupta period kingship was seen to be hereditary but royal power was limited by the absence of a firm practice of primogeniture (Sharma:2015, p.299). Primogeniture may have lost some of its significance in the Gupta era, and by the post-Gupta era, the foundation had crumbled. Therefore, *Kātyāyana-smṛiti* finds

partition just only when there is equal division of the property and by the time of Vijñāneśvara it is evident that the law of absolute power of father giving special share to the eldest was not in force.

Family's options for ensuring a son

Like primogeniture *niyoga* was another practice that was disliked and succumbed to societal pressure as a result of the hostility it received from society. *Niyoga* came into existence because women could not own *dāya* independently but only in conjunction with a son which she could do by cohabiting with a brother of her husband. The need for *niyoga* also arose due to the great importance attached to a son as daughter was considered to be unfit to release her father from *pitr-ṛṇa* (Parri:1975-6, p.85). The widow submitted to *niyoga* not to raise a child for herself but for her dead husband whose salvation was contingent on the birth of a son. It was mostly seen that the younger brother of the dead husband cohabited with the widow to raise a son. The choice of the brother could be due to two reasons. One could be from the genetical point of view, that is, the issue resulting from *niyoga* would get much more family blood if the appointed person was brother of the deceased instead of a stranger. Secondly, from the economic point of view, no stranger would come and occupy the property of the deceased member.

Manu-*smṛiti* (1886, verse 146) asks the brother of the deceased to raise a son and hand over his property to the son, but in case a son is begotten through greed or desire then that son is incapable of inheriting the property. By the early medieval period the practice of *niyoga* became more or less obsolete (Chattopadhyaya:1966) as is evident from the later *smṛitis* and its commentaries which were not in favor of *niyoga*. The void created by the absence of a son procured by *niyoga* was filled in by the legislation of an adopted son.

Reasons for Adoption

In the absence of a *kṣetraja*, adopting a son seemed the only possibility therefore extensive class of subsidiary sons came into existence. The desire to have a son could emerge from the concern of needing a protector in old age. It also made economic sense to have additional helping hands on the field. Earlier an adopted son would not be recognized because of the notion that an adoptee would not have the same attachment and concern for the adoptive family. However, on account of the brahmānical influence a peculiar religious importance got attached to the son. Therefore, a *dattakaḥpuṭra* was recognized and slowly he acquired importance in Hindu law. Thus, the main objective of adopting a son was to fulfill the duty which every Hindu owes to his ancestors, that is, the solemnization of the necessary rites and to provide for the

continuance of the family line. Consequently, it was the first duty of the man to become the possessor of male offspring. It was the only but natural in a society where a son was so indispensable for the spiritual as well as the material welfare of man that subsidiary sons should be admitted to the family. Though these sons were not of the same body yet they were competent to perform the necessary ceremonies in the absence of heirs of the body.

Besides the *aurasa* son, twelve kinds of sons were mentioned by Manu-*smṛiti*, Yajñavalkya-*smṛiti*, *Bṛhaspati-smṛiti*, *Viṣṇu-smṛiti* and other *smṛitikāras*. There are a few like Apastamba Dharmasūtra which does not recognize any other kind of son except *aurasa*. Through his writings one comes to know that he possessed the knowledge that *kṣetraja* sons were raised but he forbids the practice of raising sons in this manner. Apastamba is the first to condemn the practice of *niyoga*. Despite the formidable list of twelve sons heed must be paid to the fact that the spiritual benefit derived from all the secondary sons were not at par with each other. The reason being that all the sons were not equally competent. Secondly, at one and the same time a man could not have all or most of them as sons.

Types and importance

Amidst the *smṛitis* there is a great amount of confusion and contradiction about the place that should be accorded to the different kinds of sons and also the rights that should be assigned to them. Among the *smṛitis* highest position was given to the *putrikāpuṭra* unlike the *sūtras*. The responsibility of raising the position of *putrikāpuṭra* to the second-place rests with Manu-*smṛiti*, Kauṭilya, *Bṛhaspati-smṛiti* and Yajñavalkya-*smṛiti* unlike Gautam who had ascribed the tenth position for the appointed daughter's son. As time went by the position of the *dattakaḥ* also rose to a higher position. Its position was so high-lighted that the other types of sons faded in the background by the later Gupta period and *dattakaḥ-putra* got firmly entrenched in the soil.

The twelve kinds of sons are put in two groups by the *smṛitikāras*. The first six according to the Manu-*smṛiti* and Nārada-*smṛiti* are the *bandhudāyāda* because they not only took the *gotra* of the father but also the wealth of the father and of his kinsmen in case they do not have any heirs. The members of the second group are called *bāndhavas* because they only take the *gotra* of the father but not the wealth of the father nor of his near kinsmen. Kauṭilya is of the view that only the *asurasa* succeeds as heir to the kinsmen of his father but the sons who are not procreated by him succeed only to his wealth and not to his kinsmen. Yajñavalkya-*smṛiti* recommends the son to take the wealth of the father and offer *piṇḍa* to him in default of the preceding son but this is possible only if the sons belong to the same caste as that of the father.

Thus, one can see that there is conflict regarding the place and share of the sons. The reason for this could be that the several kinds of sons were not very popular or they were confined to certain localities. If the case had been vice-versa then the rules for the different kinds of sons would have been properly formulated and the law would have crystallized in the long span of time that it had got.

The inability to adopt or be adopted

According to Yajñavalkya-*smṛiti*, the boy who is to be adopted should be of the same caste as the adopting father. Manu-*smṛiti* (Kane:1973, p.675) employs the word ‘*sadṛśam*’ which was interpreted as meaning the same caste though in post-Gupta period the implication was of being similar in quality rather than in caste. The eldest son should not be given up for adoption, according to the Mitākṣarā, a commentary on the Yajñavalkya-*smṛiti*. This is because only the eldest son is most important for fulfilling a son's obligations to his biological father. Manu-*smṛiti* concurs with this viewpoint since he claims that the father is released from his obligation to the *pitṛs* by the sheer occurrence of the birth of a son. The adoption of an only son was forbidden (Dhar:1986, p.256). Even a boy who was ineligible to conduct the *śrāddha* ritual could not be adopted since the primary goal of adoption would not be achieved.

There is not even a single instance of a daughter being adopted as there was no reason or foundation for her adoption. The very purpose for adoption could never be fulfilled by daughters since girls could not perform *pitṛdāna*.

Time and Adoption Preference

The importance of early adoption was underlined since, with the right environment and instruction, the adopted son would be able to have the same sentiments for his parents as an *aurasa* son. However, a twice-born child should not be adopted until after the *upanayāna* ceremony. Amongst the *śūdras* the *upanyāna* ceremony does not take place so they could be adopted till their marriage takes place. Amidst twice-born even after the *upanyāna* ceremony adopting could take place if the *gotra* of the taker was same as the giver (Derett:1963, p. 112). Originally there was a marked preference for adopting a near agnatic relation, especially a brother's son. The reason being that a person belonging to the same *gotra* or family could be admitted easily as kinship was purely based on agnatic terms. The adopter being of the same family or *gotra* would take interest in family matters. Secondly, the boy being of the same *gotra* would not be faced with difficulty in fulfilling of religious duties for the *gotra* of the adopter and ancestors were the same as that of the adoptee.

Who can adopt?

Any male with a sound mind who hasn't had a son in three generations could adopt. A woman, however, was unable to adopt a son in the absence her husband. In Bengal, a widow who had the prior permission of her husband could adopt but only the son who was authorised by her husband and not any other boy. The reason for a widow not being allowed to adopt was that she could not perform any *homa*, including *dattahoma* without her husband. Under certain circumstances where there are two or more widows and the authority to adopt is given to one of them only, then only the appointed one could adopt without consulting the other widows. But where the authority to adopt is given severally, then the senior widow has a prior right to exercise the power of adoption. The junior widow has no right to adopt unless the senior widow refuses or relinquishes her right and authorises the junior widow to adopt.

Adoption and Gotra

An only son could not be adopted nor could a disqualified heir adopt a son. Adoption of a boy outside of the *gotra*, in S.V. Gupta's (1970, p. 22) opinion was invalid, even if the husband's request for a son could not be found within that *gotra*. This view is contradictory to the view of Manu-*smṛiti* (Anjagar:1958, p.105) according to whom a boy endowed with good qualities would inherit the property of the adopted father even if he comes from a different *gotra*. The reason being that the adopted son takes the *gotra* of the adopted father as the *piṇḍa* follows the *gotra*.

The father's power to give his son in adoption was absolute. He could give the son without his wife's permission though her consent was generally sought and obtained. As far as the mother of the son to be given was concerned she could not give her son in adoption without her husband's consent. In case her husband was incapable of giving the son in adoption then he should have given his wife prior permission to adopt or give a son in adoption because the wife is not competent to give her son in adoption against the will of her husband. The reason being that within the patriarchal family system a wife was supposedly under the protection of the husband. By bringing the wife in the ambit of adoption an agency even if it is subtle seems to be given to the wife. Adoption directly cut at the very root of obtaining a son by *niyoga*.

Inclusion of Mother in Adoption

The right to give a son in adoption belonged only to the natural father and mother. No other relative, such as a stepmother, brother, or the mother of an adopted child, had the authority to place a boy for adoption. This may have been influenced by the fact that the son belonged equally to the mother and father.

Limitation on adopted Son

There were a few limitations imposed on the *dattakaḥ*. He was unable to marry a girl of his old *gotra* and also of the *gotra* of his adopted father (Aiyangar:1958, p.107). The adopted son could also not marry an adopted daughter because they became brother and sister through adoption. Moreover, after adoption they belonged to the same *gotra*.

Laws of Inheritance

The adopted son (*dattakaḥ*), after the adoption became valid, was entitled to the same rights and liabilities which an *aurasa* son (born of *anuloma* marriage) would possess. Therefore, a *dattakaḥ* could inherit the property not only of his adoptive family but also of his father's brother or cousin if the latter had no son or no other heir. In case a son is born after the adoption then the adoptee would get only one-third or one-fourth of the entire property and the rest shall go to the *asrasa* son. If there is an instance that two brothers form a joint family in which one of them has an *aurasa* son and the other adopts a son, then on partition of the family estate the adopted son gets an equal share to the natural born son. According to Vaṣistha giving of one-fourth share to the adopted son applies only when there is an *aurasa* and a *dattakaḥ* son are of the same man.

Types of Adoption and their rights

When a ceremony is performed for adopting a child, the adoptee is transferred from the family of birth to the family which adopts. Due to this transference the adopted son cannot perform *śrādhā* and similar rites in the natural family, nor can he claim the property of his biological father. This is only in case of *dattakaḥ* form of adoption where the adopted boy is transferred completely from the family of his birth to the adoptive family unlike the '*dvyamushyayana*' form of adoption where the son belongs to the adoptive and the biological family. In this form the son offers *piṇḍa* to both the fathers and in turn inherits their property. Another kind of adoption is the *kriṭṛima* where the boy alone, it seems may give himself in adoption because his consent is absolute. In the *kriṭṛima* form of adoption the adoptee does not lose his right of inheritance in his biological family, however, in the adoptive family he can only inherit the property of the person who actually adopts him and of no one else, unlike the *dattakaḥ* form of adoption.

If a son was born after partition of the property was made then he would inherit the father's share. The self-acquired property of the father which was taken by him on division with his sons would now go to the son born after the partition only after the demise of the father. If there was a reunion of the father with some of his sons then the shares would remerge and the son born after partition would get the same share as any other son would get in the remerged

group. If the son was in the womb but was not known when partition took place then he must get a share of the property from his brothers which would be equal to theirs after a redivision took place.

Reasons for Division and Seniority: Things to Take into Account

The driving force or reason for partition was that property must have been guided by religious motive. After partition of the property the brothers performed religious duties separately unlike the unseparated brothers where the religious duties were performed by the eldest son of the family. The other reason could be from social point of view, that is, break-up of the joint family system. There were other factors as well which could influence division of property or inheritance rules like caste, form of marriage, seniority of the mother etc. If one considers caste then it is clearly laid out that devolution of property would be done on the basis of caste hierarchy. For example, a son of the brahman wife would get four parts of the property, son of a *kṣatriya* wife three parts and so on. Equal share of the property to a son could only be given if he belonged to the same caste as his father but landed property would never be shared with a son born of *śūdra* wife. However, Bṛhaspati-*smṛiti* was of the opinion that a son endowed with superior qualities irrespective whether mother was *kṣatriya* or *vaiśya* the son would get equal share as the son born of a brahman wife.

If a man married a woman of his own *varṇa*, according to *anuloma* form of marriage, then there would be equal division of property. In case he was married according to *pratiloma* form of marriage then the son born of this union would get the least part of the property. However, if a woman belonged to a higher caste than the man she married, the son of this union would not receive any piece of the family property but would instead be supported by being provided with food and clothing until death. In case the father dies without any kinsmen then the son inherited the property of the father.

If sons were born of different mothers but the wives belonged to the same *varṇa* wherein the junior wife (*kaniṣṭhā*) begot a son before the senior most (*jyeṣṭhā*) wife, then the question arose which son would be senior—the one born first or the one born to the senior-most wife who was termed *pūrvaja*. According to Manu-*smṛiti* (verse 123-4) the son of a senior wife would be considered the senior most son and he would get a preferential share. The reason being that seniority amidst sons are based not by their age but by the seniority of their mother. however, in the next verse (verse 125) Manu-*smṛiti* also states that among sons born of mothers of same *varṇa* seniority was not according to the mother but according to birth. Thus, there is an apparent contradiction found in Manu-*smṛiti*. It could be possible that Manu-*smṛiti* gave two

versions so that people choose either verse according to their need. When sons born of mothers different *varṇa*, then the son born of the same *varṇa* as the father will always be the senior most. In case of twins the later-born was considered senior on the basis that he was conceived earlier but this cannot be determined so an ambiguity remains as far as seniority amidst twins are concerned.

Seniority of the eldest son can be lost if he ill-treated his younger brother or indulged in any kind of fraud etc. According to *Bṛhaspati-smṛiti* seniority did not rest on birth or mother but on the superior qualities and learning. By the time of *Yajñavalkya-smṛiti*, the advantages enjoyed by the senior most son had disappeared and all the sons enjoyed equal benefits. Thus, the advantage of being a senior son lost its meaning over passage of time. Sons who were special or had any physical ailments were disqualified from inheriting ancestral property but they were entitled to be maintained out of the said property. In case the defect suffered by the son gets cured owing to medical treatment, in that case the disqualified son could reopen the partition and was entitled to get a share of the property. In another instance if a son develops a disease after partition, then he does not have to return the property but could enjoy the property. If a daughter was born to a disqualified son without any physical defect, then she was entitled to maintenance but could not ask for a part of the ancestral property.

Thus, in a nutshell only the *aurasa*, the *puṭrīkāpuṭra* and the adopted son free from all defects had their first claim on the legacy of the father and subsequently on his inheritance.

Note:

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