CHAPTER IV
LAWS ON ADOPTION

Adoption can be characterised as an almost worldwide institution, with historical roots into antiquity. Adoption is the act of establishing a person as parent to one who is not in fact or in law his child. Thus, adoption signifies the means, by which a status or legal relationship of parent and child who are not so related by nature, is created. It is a process by which people take a child who was not born to them and raise him or her as a member of their family. As a result of a decree of adoption the child becomes the child of the adoptive parents to all intents and purposes.1

Earlier, every Hindu considered himself to be bound to perpetuate his name. The etymology of the Sanskrit term *putra* for the English equivalent ‘son’ clearly indicates the necessity of him. According to Manu the son is called *putra* by Brahmā himself as he delivers his father from the hell called *pūtṛś.* Brhaspati also reiterates the view.3(i) So, it is found that the very word *putra* was coined on the basis of the purpose of the birth of a male child. So,

2. ꞌpunnamnonarakādyasmāttrāyate pitaram sutah.
   tasmātputra iti proktaḥ svayameva svayambhūvā:’
   *Manusmṛti*,IX.138
3(i). ꞌpunnamno narakātputraḥ pitaram trāyate….’
   *Brhaspatismṛti*, XXVI.81
the birth of a son was quite necessary. It is already discussed in the third chapter about the necessity of the son. However, in the context of adoption also it requires special mention. A father could attain immortality by throwing off his debts on the son. It was also regarded as the great fortune of a person if he could have a son’s son and a son’s grandson. According to Manu through a son one conquers worlds, through a son’s son one attains endlessness and through the son’s son of a son one attains the world of the Sun. In this regard Baudhāyana states that through a son one conquers the world, through a grandson one obtains the immortality and through a great grandson one attains the highest heaven.

3(ii). 'ṛṇamasminsāmānayaṁ atītaṁ ca gacchati. pitā putrasya jātasya pasyeccejjivato mukham:'
Vasisthadharmasūtra, XVII.1

4. 'putreṇa lokānyāyatī paraḥ putreṇānanyamaśnute.

atha putrasya pautreṇa bradhnasyāpnoti viṣṭapam:'
Manusmṛti, IX.137

5(i). 'putreṇa lokānyāyatī paraḥ pautreṇām maśnute.

atha putrasya pautreṇa nākamevādhirohati: '
Baudhāyana-dharmasūtra, II.9.16.6
Vasistha\textsuperscript{5(ii)} and Yajnavalkya\textsuperscript{6(i)} also are of the same above view.

The Smritiwriters have mentioned eleven or twelve kinds of subsidiary sons besides the \textit{aurasa}. The list as given by them are not altogether the same. Some kinds of sons mentioned by some \textit{Smrtikāras} are omitted by others who included other kinds of sons.

The different kinds of sons as enumerated by different Smritiwriters\textsuperscript{6(ii)} are shown in the list below. The list reflects the number of sons and their ranks recognised by a particular Smritiwriter.

\begin{itemize}
\item \textit{putreṇa lokaṁjayati pautreṇānāntyamaśnute.}
\item \textit{atha putrasya pautreṇa bradhnasyāpnoti viṣṭapam:}
\item \textit{Vasisthadharmasūtra, XVII.5}
\item \textit{lokaṁāntyām divaḥ prāptih putrapautraprapaurakaiḥ.}
\item \textit{Yajnavalkyasmṛti, I.78}
\item \textit{Manuṣmṛti, IX.166-178}
\item \textit{Gautamadharmasūtra, III.10.30-31}
\item \textit{Baudhāyanadharmaśūtra, II.2.3.14-30}
\item \textit{Vasisthadharmasūtra, XVII, 12-35 Yajñavalkyasmṛti, I.128-132}
\item \textit{Nāradasmṛti, IV.13.45-46 Brhaspatismṛti, XXVI.70-74}
\end{itemize}
### Kinds of sons

<table>
<thead>
<tr>
<th>Kinds of Sons</th>
<th>Manu</th>
<th>Gautama</th>
<th>Baudhāyana</th>
<th>Viśistha</th>
<th>Yajñavalkya</th>
<th>Nārada</th>
<th>Bṛhaspati</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Aurasa</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2. Putrikā-putra</td>
<td>10</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>3. Kṣetra</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>3</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>4. Dattaka</td>
<td>3</td>
<td>3</td>
<td>4</td>
<td>8</td>
<td>7</td>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>5. Kṛtrīma</td>
<td>4</td>
<td>4</td>
<td>5</td>
<td>_</td>
<td>9</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>6. Gādhotpanna</td>
<td>5</td>
<td>5</td>
<td>6</td>
<td>6</td>
<td>4</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>7. Apavid-dha</td>
<td>6</td>
<td>6</td>
<td>7</td>
<td>11</td>
<td>12</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>8. Kāṇīna</td>
<td>7</td>
<td>7</td>
<td>8</td>
<td>5</td>
<td>5</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>9. Sahodha</td>
<td>8</td>
<td>8</td>
<td>9</td>
<td>7</td>
<td>11</td>
<td>5</td>
<td>11</td>
</tr>
<tr>
<td>10. Kṛta</td>
<td>9</td>
<td>12</td>
<td>10</td>
<td>9</td>
<td>8</td>
<td>10</td>
<td>6</td>
</tr>
<tr>
<td>11. Pauna-rbhava</td>
<td>10</td>
<td>9</td>
<td>11</td>
<td>4</td>
<td>6</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>12. Svayaḥ-datta</td>
<td>11</td>
<td>11</td>
<td>12</td>
<td>10</td>
<td>10</td>
<td>12</td>
<td>_</td>
</tr>
<tr>
<td>13. Saudra</td>
<td>12</td>
<td>_</td>
<td>13</td>
<td>12</td>
<td>_</td>
<td>_</td>
<td>8</td>
</tr>
</tbody>
</table>

These different kinds of sons are defined below:
1. *Aurasa*: An *aurasa* or legitimate son is one whom a man begets on his own wedded wife. 7

2. *Putrikaputra*: The son of an appointed daughter is called *putrikaputra*. 8(i)

The *Vyavahāramayukha* interpreting the text of Vasistha opines that *putrikaputra* is of two kinds. 8(ii) Sometimes a girl is given to a person in marriage by her sonless father with the stipulation-I give you in marriage this brotherless girl, the son born of her will be my son. In this case the son born of the daughter so given becomes the son of his maternal grandfather. This is the first kind of *putrikaputra*. When a sonless man appoints his daughter as his son she is then *putrika* and treated as son. This is the other kind of *putrikaputra*.

3. *Kṣetraja*: Sometimes a wife of a dead man or an impotent person or a person suffering from an incurable disease is appointed according to the law

---

7. ‘svaṅkṣetre saṁskṛtyāntu svayamutpadayaddhi yam.
   Tamāurasaiṁ viṇāṇyāt putram prathamakalpitam.’
   *Manuḥśṛtī, IX.166*

8(i). *Manuḥśṛtī, IX.127*

8(ii). ‘putrikāsuto dvedhā. tatṛādyamāha Vasisthaḥ,
   abhrāṭkām pradāsyāmi tubhyaṁ kanyāmalaṁkṛtām.
   asyāṁ yo jāyate putraḥ sa me putro bhavedīti.
   antyamāha sa eva- tritīyāḥ putrikāiva-iti. asminpakṣe
of family. The son begotten on her by the brother or other sapinda of her husband authorised by the family in that behalf is called as kṣetraja or the son of the wife. 

4. **Dattaka**: When the father or the mother gives their son to another affectionately in a time of distress with water then he is called a dattaka or an adopted son.

5. **Krtrima**: If a man makes a boy his son who resembles with him, can distinguish good and evil and of good nature then he is called a krtrima son.

6. **Gūdhotpanna**: A gūdhotpanna or gūdhaja is he who is secretly born in a man’s house and it is not known, to whom he belongs. Then He would belong to him who is the husband of the mother of the child.

---

9. ‘yastalpajah pramītasya klīvasya vyādhitasya vā. 
svadharmena niyuktāyāṁ sa putraḥ kṣetrajah smṛtaḥ:
deverādvā sapindādvā striyā samyaṇīnyuktāyā. 
prajepsitādhigantavā sanīnasya parikṣaye.’

Manusmṛti, IX.167, 59

10. ‘matā pita vā dadyālaṁ yamadbhiḥ putramāpadi .
sadrśam prītiśānyuktam sa jñeyo datrimah sutah.’

Manusmṛti, IX.168

11. Manusmṛti, IX.169

12. Ibid.170
7. Apaviddha: If one adopts a son deserted by both father and mother or by either of the two, then that son is called the son rejected or apaviddha.  

8. Kāṇīna: If an unmarried girl secretly bears a son in her father's house then that son is called a Kāṇīna or a maiden's son.

9. Sahodha: Sahodha is the son who is in the womb of his mother at the time of her marriage. The person whom she marries may or may not know about the unborn child. This son belongs to the husband.

10. Krīta: If a man for the sake of having offspring buy a son openly from the mother and father, then this son is called krīta or a son-bought. It is immaterial whether he likes or dislikes it.

11. Paunarbhava: The paunarbhava or the son of a remarried woman is one who is begotten by a man on a twice married woman when she is deserted by her former husband or is separated from him by her own desire.

12. Svayamādatta: If a boy having lost his parents or being abandoned by them, attaches himself to a man then this boy is called svayamādatta or a son self given.

13. Ibid. 171
14. Ibid. 172
15. Ibid. 173
16. Ibid. 174
17. Ibid. 175
18. Ibid. 177
13. **Saudra or parāśava:** The son whom a brāhmaṇa begets through lust from a śūdra wife is called saudra. This son though is living is like a corpse.¹⁹

As adoption is, to bring up someone else’s child as one’s own, in this sense the five sons namely, the son given (dattaka) the son bought (kṛśa), the son made (kṛtrima), the deserted son (apaviddha) and the son self given (svayamādatta) are all adopted sons. Different names are given to them only to mark the differences in the modes or circumstances of their actual adoption.²⁰ However, the forms other than dattaka did not get much importance in course of time. Except the dattaka, in the other cases there is a breach of some moral principles²¹ and the gift is spiritually the most meritorious form of transferring dominion and so the dattaka is regarded as the normal mode of adoption.²²

The modern Hindu lawmakers recognise only two kinds of sons. They are the aurasa or the legitimate and the dattaka or the adopted sons.

Since the times of Rgveda, people prayed for the birth of a son. They

---

19. Ibid. 178
22. Supra, Note 20, p. 348
did not like to adopt the son of some one else. Adoption was directly and specifically prohibited. A Rgvedic poet exclaims that as the wealth of another, the adopted son should be avoided. Again, it is stated that the child of another cannot be one’s offspring. It happens only in the case of a fool. Then in another stanza the adopted son is mentioned as a stranger and it is prohibited to think about him also in one’s mind. Then he wants to have a vigorous, victorious newly born son.

However, the concept of adopted son was not completely unknown even in the Vedic times. The legend of Sunahsepa in the Aitareya Brāhmaṇa refers to his father having sold him in adoption to king Hariscandra. Another Vedic story tells of ṛṣi Atri who gave his only son in adoption to Aurva.

The adopted or dattaka son got some importance by the time of Gautama, Baudhāyana and Manu. All of them placed him in the first set of six sons. It is found that some Śāstras divided the twelve kinds of sons into two categories. According to them the first six kinds were regarded as both

---

24. ‘na seso Agne anyajatamastyacetanasya…….’ *Rgveda*, VII.4.7
25. *Rgveda*, VII. 4.8
26. Supra, Note 20, p. 346
kinsmen and heirs, while the remaining six are regarded only as kinsmen. However, only a fractional share, in the absence of the first six kinds might be given to those who were regarded only as kinsmen. Gautama, Baudhāyana and Manu regarded the dattaka as both kinsmen and heirs. However, no one of them has kept the dattaka in the position next to aurasa. Vasistha placed him in eighth. Narada placed him in ninth and Yājñavalkya placed him in the seventh. However, Yājñavalkya did not classify the sons in the above way. According to him, each succeeding son inherits in absence of the preceding one.

Thus, it may be observed that the adopted son was assigned low rank by the Smṛtiwriters. Āpastamba considers it sinful to make a gift or sale of a son. An indication of this idea is found in the definition, given by Manu also which has already been stated. There it is found that when a father or mother gives a son in distress then he is called an adopted son. The term ‘distress’ generally means the absence of issue of the receiver of the son. But supporting the view of Āpastamba, that can also be interpreted as the distress of the giver

27. Manusmṛti, IX.159, Baudhāyanadharmaśūtra, II.2.3.31-32
   Varisthaharmasūtra, XVII.27,36, Gautamadharmaśūtra, III.10.30-31
   Nāradasmrī, XII.47
28. ‘caturthāṁśina aurāsādyabhāve.’ Gautamadharmaśūtra, III.10.32
29. ‘pindadarmāśahasraścaisūm pūrvābhāve parah parah.’
   Yājñavalkyasmrī, II.132
30. Āpastambadharmaśūtra, II.6.13.11
and not the spiritual distress of the taker for the want of male issue. This view is given by the commentator Sarvajña. Some writers like Bālamabhata and Kātyāyana also take the word ‘āpad’ to mean distress of the natural father such as famine. So, the expression ‘āpadi’ found in Manusmṛti should be taken to mean the need or poverty of the original parents and not of the adoptive parents owing to their lack of a son. So, under normal circumstances the gift of a son was not welcomed. Only when the person was in distress he was allowed to give a child in adoption. So, the low position of the adopted son was due to the growth of the sentiment against the gift of a son.

OBJECTIVES OF ADOPTION

A person adopts a child with certain objects. Though there are different objects of adoption they can be broadly divided into two. They are religious and secular.

Earlier only the adoption of a male child was in vogue. Such adoptions were made because of the religious benefit. According to traditional Hindu

31. ‘āpadi svastasya rakṣanāsaktau,’

commentary of Sarvajña on Manusmṛti, IX.168

32. Kane P.V. and S.G.Patwardhan (ed.), Vyavahāramayukha, Motilal Banarasidass, Delhi, 1933, p.105
principles, adoption takes place in order to provide a male Hindu with an heir who can perform his śrāddha ceremony after his death.\(^3\) In this regard Atri declares that that man alone who has no son should always secure a substitute for a son with all possible efforts. It is for the sake of securing the offering of pīnḍas and water.\(^4\) Thus, predominantly adoption was considered as a sacramental act. The religious motive for adoption never altogether excluded the secular motive. To continue the line of the family was another important object of adoption. In the ceremonial for adoption given by Baudhāyana the adopter received the child with the words: “I take thee for the fulfillment of the religious duties. I take thee to continue the line of my ancestors.”\(^5\) Vasiṣṭha views that as the son is to continue the line of their ancestors, so an only son should never be given or taken.\(^6\) So the purpose of adoption in the days of Śuṅga was to secure spiritual benefit from the pīnḍas and water offered by the adopted son. With the help of this son the name and family of the adopter could also be perpetuated.

---


34. "apuṛṣenaiva kartavyah putrapratinidhiḥ sadā.
pīnḍodakakṛtyāhetoryasmāttasmāiprayatnatah:"
Atrisamhitā, 52

35. Supra Note 20, p.349

36. "na tvekam putram dadyat pratigrhṇiyādvā: sa hi santānāya pūrveṣām:"
Vasiṣṭhadharmasūtra, XV.3.4
The motifs for which an adoption is made in the modern times are varied. A person may take a son in adoption for the kindness to his friends or relatives who have many sons but small assets. Sometimes a particular branch of extended family is desired to keep alive and then it becomes essential to take a boy in adoption. Again, the desire of a widow to have someone to support her in her old age may be cited as another important cause of adoption. Sometimes taking the chance of her sonlessness certain family members can deprive her of the property and capture it. For this reason, it is necessary for the lady to adopt. Apart from these there are some other purposes also. One of those is to provide consolation and relief to a childless person. In modern law, its purpose is also to rescue the helpless, the unwanted, the destitute or the orphan child and provide it with parents and a home. Its purpose may also be to provide a richer family life. For instance, a person who has only a son can adopt a daughter and vice versa.

In the present circumstances, the Hindu Adoptions and Maintenance Act, 1956 has made adoption a secular institution and secular act.

But though at present, the purpose of adoption is a secular one yet it is not completely devoid of religious benefit. Even today some people take a child in adoption to secure performance of one’s funeral rites and to preserve

37. Supra, Note 33.
38 Supra, Note21, p.220
the continuance of one’s lineage.\textsuperscript{39} Thus, though there are different reasons behind the adoption in modern era, yet the purposes of adoption found in ancient days still exist.

**REQUISITES FOR A VALID ADOPTION**

The person who takes and gives a child in adoption and also the person who is to be adopted have to fulfil certain requisites. Those requisites for a valid adoption are discussed below.

**Conditions for taking a child in adoption**

Adoption is generally done by a childless person who is willing to have a child. A person is in need of a child to fulfil different purposes both religious and secular. In the days of Smṛtis, the main purposes of adoption, as already stated, were that for offering oblation to ancestors and also for the continuation of the direct line. So, a person who wanted to adopt must not have anyone who could offer his oblation after his death. The opinion of Atri, already stated above, can be mentioned in this regard. According to him, a person who does not have a male issue has the capacity to take a son’s representative. Baudhāyana declares that an adopted son is received in the place of a son.\textsuperscript{40} So, a sonless one had the right to take an adoption.

\textsuperscript{39} Inder Sing vs Kartar Sing, AIR 1966 Punjab 258

\textsuperscript{40} ‘...........\textit{vo \textit{patyārthe parigṛhyate sa dattah}}’

\textit{Baudhāyanadharmasūtra}, II.2.3.20
The word male issue (putra) in the verse of Atri means three direct descendants of the male line. According to different Smrtikaras, by three direct descendants a person is benefited after his death. So, a person who was not having a son, grandson and great grandson could adopt in the days of Smrtis. Two or more persons could not adopt the same boy. Such an adoption was invalid. By the term aputrena found in Atrismrti in singular, only one adopter is indicated.

Section 7 of the Hindu Adoptions and Maintenance Act, 1956 lays down the capacity of a male Hindu to take a child in adoption. According to this section, a person who is going to adopt a child must be of sound mind. He should not be a minor one. If such a person has a wife then he has to take consent of her. However, such a wife also should have to fulfil certain conditions to give the consent properly. For this she should not renounce the world or cease to be a Hindu. Moreover, she should not be declared by a court of competent jurisdiction to be of unsound mind.

Another important condition to be fulfilled by an adopter, declared by section 11 of the Hindu Adoptions and Maintenance Act, 1956 is that if the adoption is of a son, then he must not have a Hindu son, son’s son or son’s son’s son living at the time of adoption. It is immaterial whether he is

42. Supra, Note 4, 5(1), 5(2), 6(i)
legitimate or adopted at the time of adoption. If a person wants to take a daughter in adoption, then he must not have his own daughter or son's daughter, whether legitimate or adopted, living at the time of adoption. Moreover, if the person to be adopted is a female then the adoptive father should be at least 21 years older than the adopted daughter. It is also found in this section that two or more persons cannot adopt the same child simultaneously.

The sonlessness was the main condition to be fulfilled by a person in the ancient days who was going to take a boy in adoption. The meaning of sonlessness found in ancient days is kept same in the modern Act. Earlier, an adoption could be done without the assent of wife. As an adoption was made solely to the husband and for his benefit he was competent to do it without his wife's assent. Moreover, the lower position of the women also forced the lawgivers to think it as not necessary to take her consent at the time of adoption. The provision that two persons could not adopt the same boy is applicable in modern law on adoption also. However, modern lawmakers have systematised all the conditions to be fulfilled. The need of consent of women under the modern law, at an adoption by a male, shows the importance of women. So, keeping the principal condition intact, the modern lawmakers have made further development.

At the time of Smritis, the adoption was for the benefit of the husband. It was an act of him. So, the wife was not entitled to the equal right as the man
had. Vāśiṣṭha states that a woman should neither give nor accept a son except with the permission of her husband.\textsuperscript{43} The meaning of this portion of the \textit{Vāśiṣṭhasmṛti} given in the \textit{Viramitrodāya} is that while the husband is alive, a son should not be adopted by the wife acting independently in the absence of the husband’s permission.\textsuperscript{44} According to \textit{Dattakāmīṃśā} the wife can adopt to no one but to her husband, not even to herself. She can never adopt to her husband during his life time except with his assent.\textsuperscript{45} So, at the lifetime of the husband, only with the assent of him a wife could adopt. She could adopt only to her husband. He could delegate the act to her and in that case she would only be an agent on his behalf.\textsuperscript{46}

After a man’s death the widow is the only person who can adopt to her husband. The wife and the husband being treated as a single entity for many purposes, the widow as surviving half of her husband, was thought to be capable of continuing her husband’s line on his behalf.\textsuperscript{47} There is no clear

\textsuperscript{43} ‘na strīputram dadyātpratigṛhiṇīyādvā nyatānujñānādbhartuh.’
\textit{Vāśiṣṭhadharmasūtra}, XV.5


\textsuperscript{45} Supra, Note 20, p.358

\textsuperscript{46} ibid

mention in the *Smrtis* as to the capacity of a widow to take in adoption. In this regard also the basic text is that of Vasistha. Four interpretations are placed on this point in different schools. In Bombay school, the view taken was that the text applies only when a female adopted during the lifetime of her husband and therefore, a widow also could adopt which the general law prescribes as beneficial to her husband’s soul. The Mithila School took the view that since consent of the husband was necessary at the time of adoption, a widow could not adopt. The Benaras School took the view that consent was necessary though it could be effective even after the death of the husband.48 According to Dravida School, the assent of the kinsmen may take the place of that of the husband according to the decision of the Judicial Committee in the Ramnad case.49

From the above, it has been seen that a woman had ordinarily no power to take a son in adoption. The authority given to her by her husband entitled her to act on his behalf. So, where there was the want of that authority, the power to adopt did not arise. So, without the permission of the husband an adoption was invalid.50

It is already mentioned that the purpose of adoption was to ensure spiritual benefit for a man after his death by offering of oblations and rice and

48. Supra; Note 20, p. 358-359
49. Collector of Madura vs Mootoo Ramalinga, 1868, 12 M.I.A.440
libations of water to the manes periodically. So, it is obvious that an unmarried woman could not adopt. Woman having no spiritual needs to be satisfied was not allowed to adopt for herself. So, the right of an unmarried woman to take a child in adoption was not recognised by the Smrtis.

The Hindu Adoptions and Maintenance Act, 1956 provides that a woman, married or unmarried, who is of sound mind and not a minor has the capacity to adopt a child. However, a married woman does not have such capacity unless her marriage has been dissolved, her husband is dead or has completely renounced the world or if he has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.51

So, under modern laws on adoption, in the normal circumstances, a married woman during the lifetime of her husband does not have the right of adoption which an unmarried one can enjoy.

With the study of both ancient and modern laws regarding adoption by a woman, it is observed that in the days of the Smrtis, a woman while her husband was living could adopt with the consent of him. But the married woman of modern days, under normal circumstance when her husband is alive, is completely prohibited from taking a child in adoption. This is a matter of modification of law by giving equal right to a woman to adopt a child as a man has. However, the modern law has given complete freedom to an unmarried woman and also to a widow to adopt a child. Adoption by an

51. The Hindu Adoptions and Maintenance Act, 1956, Section 8
unmarried woman is quite a new thing which the Smṛti writers did not feel as necessary, as adoption basically was for the benefit of male one. However, the widow with previous permission of her husband or with the permission of her husband’s kinsmen could adopt a child. But she could not do it independently which she can under the modern law.

**Conditions for giving a child in adoption**

The act of adoption has the effect of removing the adopted son from his natural family into the adoptive family. It affects his prospects in life most materially and irrevocably. So, only those who have dominion over the child have the power of giving him in adoption.

In regard to the power of giving someone in adoption Manu is of the opinion that both parents can give him to another in distress. It is found in the definition of adopted son which is already stated. Vasiṣṭha is also of the view that both parents have got this right. But the woman needs the assent of her husband. According to *Dālīkṣamīnasā* the wife cannot give away her son without the consent of her husband while he is alive and capable of consenting. So, at the lifetime of the husband it is clear that only with the assent of the husband a woman could give a son in adoption. But it is not clear

---

52. "tasya pradānavikrayatāgeṣu maṭāpitarau prabhavataḥ.

*Vasiṣṭhadhamasūtra*, XV.2

53. Supra, Note 43
whether a widow could give without assent. According to Dātaka-mīmāṃsā she may do so after his death or when he is permanently absent by entering in a religious order or if he loses his reason. But the Mitākṣarā on the Yājñāvalkyasmṛti opines that she needs the permission. It has been held by the court that a widow was free to give her son in adoption unless she was distinctly prohibited by her husband to do so.

So, no other relation but the father or mother could give away a boy. A father had absolute authority to dispose of his son in adoption even without the consent of his wife. However, a woman did not have the capacity to give a son in adoption without the assent of her husband. Regarding a widow though different interpretations are found, considering the dependence of a woman in those days, it can be stated that a widow also needed previous permission of her husband in giving her son in adoption.

Section 9 of the Hindu Adoptions and Maintenance Act, 1956 declares about the person capable of giving a child in adoption. It lays down that the father, the mother and the guardian are the persons who have the capacity to give a child in adoption.

The father has a preferential right in this regard. However, it is subject to the consent of the mother, if alive, unless she has renounced the world or

54(i). Supra, Note 20, p.385
54(ii). bhartranujñāyā prōṣite prete vā bhartari.... Mitākṣarā on Yājñāvalkyasmṛti, 11.130
has ceased to be a Hindu or has been adjudged lunatic. In the normal circumstances a mother may exercise this power only when she is a widow. However, if her husband has renounced the world or has been an adjudged lunatic then also she can give a child in adoption. If both the parents of the child are dead or have renounced the world or have abandoned the child or have been adjudged lunatic or where the parentage of the child is not known then the guardian has the capacity to give a child in adoption. The guardian of the child may exercise the right with the previous sanction of the Court.

The Smrti writers have given the father absolute authority to give a child in adoption. Under modern law, he needs the consent of his wife. Earlier the intelligence of the wife was thought to be quite less than her male counterpart. That is why, the need of her consent was completely ignored. But, in the modern circumstances, the women have got their actual status to some extent and so the law is also made keeping it in view.

The mother, with the permission of her husband could give a child in adoption in the time of Smritis. The mother while her husband is alive and capable of giving in adoption does not have the capacity to give a child in adoption under modern law. In this regard, there is a need of amendment of the Act. However, a widow has the capacity to give a child in adoption in the modern times independently.
Conditions to be fulfilled by the child to be adopted

A person to be adopted must have certain qualities. At the time of adoption the adopter must see whether the required qualifications are present or not. In the days of Smṛtis only the male child was allowed to adopt. The statement of Manu mentioned above, which uses the term *sah*, to indicate the adopted one, reveals that the adoption of only the boy was allowed. In ancient days the main purpose of adoption was to offer oblation to the ancestors and to continue the lineal. This purpose could be fulfilled with the help of only by adopting a son. The adoption of girls could serve no purpose in this regard.

Regarding the caste of the adopter and the adopted, no unanimous opinion is got. Most of the Smṛtkāras and the commentators preferred sameness of the caste. Yājñavalkya holds that the twelve kinds of the sons should be of the same caste as the father.¹ So, the person to be adopted must be of the same caste as the adopting father. Manu emphasised that the adopter and the adopted one should be same and he uses the term *sadrṣam* in this regard.² But he is not clear whether the word *sadrṣam* implies the sameness of qualities or sameness of caste. According to Kullukabhaṭṭa *sadrṣam* means equal by caste.³ Medhātithi however, expressly states that a *brāhmaṇa*

---

¹ Yajñavalkya, Smṛti, II.13.3
² Manu, Smṛti, IX.168
³ Kulluka on Manu, Smṛti, IX.168
may adopt a *ksatriya* boy.\(^{58}\) The *Vāyupurāṇa* narrates that Bharata the son of Duṣyanta adopted Bharadvāja, son of Brhaspati. He was a *brāhmaṇa* and afterwards became a *ksatriya*. But Saunaka and Vṛddha Yājñāvalkya provide that such a son does not take the wealth.\(^{59}\) Thus, the general consensus was regarding the opinion that only the same caste should be resorted to.

There was the prohibition of adopting an only son during the days of the *Śṛṅgis*. In this context Vasiṣṭha states that no man should give or accept an only son, as he must remain for the obsequies of his ancestors.\(^{60}\) The *Mitākṣarā* on *Yājñavalkyasūtra* also supports the view of Vasiṣṭha.\(^{61}\) As the only son had got the whole responsibility to protect his ancestors by performing religious rites, so the only son was prohibited to adopt. Moreover, the only son of the original parents could in no way be given away because he was indispensable for the continuation of the family.

It is a matter of discussion whether the eldest son was allowed to take

---

58. ‘......*ksatriyādirapi brāhmaṇasya dattako yujyate...*’ *Medhātithi* on *Manusmṛti*, IX.168
59. Supra, Note 23, p.675
60. *na tvekaṁ putraṁ dadyāpratigrhnīyādvā: Sa hi santanāya pūrveśāṁ:* *Vasiṣṭhadharmasūtra*, XV.3.4
61. *tathā ekaputro na deyah.*
*Mitākṣarā* on *Yājñavalkyasūtra*, II.130
or give in adoption in the days of Smṛtis. The Mitāksara is of the opinion that if there remain many sons then also the eldest should not be given. According to this, it is the eldest son alone who is the foremost in serving the purposes of a son as regards his genitive father. It is opined on the basis of the view of Manu who states that a man becomes a father by the birth of his first son and becomes free from the debt owed to the pīṭras. The Vyavahāramayukha on the other hand views that prohibition should not be understood by the opinion of Manu. According to this, Manu only provides that by the birth of the eldest son a man becomes free from debt. So, there is no prohibition to give or take the eldest son in adoption.

It is seen that there is not any express prohibition of adoption of an eldest son in the Smṛtis. A father is declared to be benifitted by his eldest son. So, naturally he will keep himself away from giving his eldest son in adoption. So, the importance of the eldest son as shown by the Smṛti-writers may be taken as indicative of prohibition of adopting him.

Regarding the age of the boy to be adopted the Smṛtikāras have not mentioned anything. Divergence of opinions is found among the

---

62. 'tathā 'nekaputrasadbhāve 'pi jyeṣṭho na deyāḥ.'

Mitāksara on Yājñavalkyaśmṛti, II.130

63. 'jyeṣṭhena jātāmātreṇa putrībhavati mānavaḥ.'

Manusmṛti, IX.106

64. Supra, Note 32, p.108
mediaval writers regarding the age of adopted boy. It is found in the
Datatakamīmāṃsā that the best time for adoption is up to 3 years. The next best
time is from 3 years to 5 years. After 5 no boy can be adopted. The
Datatakacandrika holds a boy of the three classes can be adopted up to
upanayana. But a śūdra boy can be adopted till his marriage.65 The
Vyavahāramayukha holds that even a boy not of the same gotra may be taken
in adoption after upanayana or after marriage. It might be even when the
person to be adopted has himself had a son.66

From the above discussion it is found that no clear rules are mentioned
regarding the qualities of an adopted son. Yet the following things can be
gathered. The child to be adopted should be of the same caste with the
adoptive family. Moreover, there was restriction in adopting an eldest son.
Regarding the age of adoption the Smṛti texts are quite silent. However, some
Digests preferred adoption of a boy up to upanayana.

In Section 10 of Hindu Adoption and Maintenance Act, 1956, it is
found that a person of either sex may be adopted. In this regard certain
conditions are enumerated which are to be fulfilled. They are:

(i) The adoptee must be a Hindu.

65. Supra, Note 23, p. 680
66. Ibid, pp. 680-681
(ii) He or she must not have been adopted before.

(iii) He or she must be unmarried, unless custom permits.

(iv) The age of adoptee must be below 15 years unless custom permits to adopt one above 15 years.

So, unlike the days of Smrtis, the caste of the adoptee which was earlier a requirement to be followed, is completely ignored by modern law. It is because earlier the superiority and inferiority of the castes were valued much, but to remove such an evil practice from the society, modern law has not given importance upon it at all. There is not any prohibition directly or indirectly in adopting either an only son or an eldest son in modern law. The age which is fixed for the adoptee under modern law is below 15 years. The Smrtis have not given any particular age. They are quite silent in this regard. However, from the Digests it is clear that adoption was preferred up to upanayana. Earlier only a male issue was adopted. Nowadays the adoption of both a boy and a girl is valid.

RESULT OF ADOPTION

Adoption has the effect of transferring the adopted person from his natural family into the adoptive family. The adoption confers upon the adopted person the same rights and privileges in the family of adoption as the son of the body. He leaves behind all his rights which he enjoyed in the family of his birth after his adoption in the new family. As Manu says, the son given
should not take the *gotra* and the wealth of his natural father. He does not perform the obsequial and *śrāddha* rites for his natural father. However, the son given away is not dead to the family of birth or ceases to have any connection. It only restricts the cessation of relation to the offering of *pīndā* and the taking of the estate after he is adopted.68

It is not clearly mentioned by the Smṛtiwriters regarding the persistence of *gotra* in a marriage with a girl of the natural family. However, it is made clear by the Digests. The *Samāskāra-kustubha* says that every *dattaka*, when entering on marriage, must avoid the *gotra* of his natural as also of his adoptive father. The *Dharma-sindhu* says the same.69

The adoptive family acquires in the *dattaka* son a full substitute for the *aurasa* whom it never had or died. Sometimes an *aurasa* son is born after a boy is adopted. According to Vasistha in such a case the *dattaka* son takes a fourth share.70

---

67. 'gotrarikthe janayiturna haredattṛimaḥ kvacit.

   gotrarikṭhānuṣṭvāḥ pīndō vyapaiti dadataḥ svadāḥ:'

   *Manusmṛti*, IX.142

68.Supra, Note 23, p.691

69.Ibid, p.695

70. 'tasmiścetpratigṛhīta aurasaḥ putra upaṇdyeta, caturthaḥgabhāghāt

   syāddattakaḥ.' *Vāsiṣṭhadharmasūtra*, XV.9
From the above discussion it follows that under normal circumstances the adopted boy loses the gotra of his natural family. However, in some matters person adopted retains the tie of blood with his natural family. For this reason, he cannot marry a girl within the prohibited degrees from that family. The adopted child loses the property also of his natural family. The adopted son is entitled to inherit in the adoptive family as fully as if he were a natural born son.

Section 12 of the Hindu Adoptions and Maintenance Act, 1956 deals with the effects of a valid adoption. This section declares that an adopted child shall be deemed to be the child of his or her adoptive father or mother. It is with effect from the date of the adoption. From such date, all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family. In this regard, the following things are provided that

(a) The child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth.

(b) Any property which was vested in the adopted child before the adoption, shall continue to vest in such person subject to the obligation, if any, attaching to the ownership of such property including the obligation to maintain the relatives of the family of his or her birth.

(c) The adopted child shall not divest any person of any estate vested in him or her before the adoption.
From the above, it is observed that in both the laws the adopted child loses the tie of his natural family except in regard to marriage. He cannot inherit the property of that family after adoption. The effect of adoption seen in the days of Smṛtis have not been changed much in the modern law. However, the modern law is much clear in this regard.

CEREMONIES NECESSARY IN ADOPTION

It is the most essential ingredient in adoption that the natural father is giving the boy and the adopter is taking him. The intention of it is to transfer the boy to the family of the adopter.

The Śāstra prescribes certain ceremonies which ought to be followed for a valid adoption. At first there must be the ceremony of giving and taking. Baudhāyana very clearly mentions about that which is to be told by both the parties to each other at the time of adoption. One should go to the giver of the child and ask him saying, ‘give me thy son’. The other answers, ‘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’.71

Another requisite is the homa called dattahoma. The text of Vasiṣṭha72 mentions this. According to Dattakāmaṇīmaṁśā and the Dattvakandrika the

71. Supra, Note 20, p.395
72. '........vyāhṛtyabhīḥḥutvā....pratigrhūyāt.' 
   Vasiṣṭhadharmasūtra, XV.6
dattahomam or oblation to fire is the most important rite in the case of three higher classes. It is necessary to establish the filial relation.\textsuperscript{73} It is not necessary that the dattahoma must be performed immediately after the giving and taking. But it may be performed latter.\textsuperscript{74}

The fundamental notion is that the homa is required to cause the secular act of giving and accepting, which has an obvious worldly function to take upon itself a spiritual significance. Without homa the ancestors cannot believe that the boy has really changed families and become a sagotra.\textsuperscript{75}

Clause VI of section 11 of the Hindu Adoptions and Maintenance Act, 1956, prescribes the only formality that the child to be adopted must be actually given and taken in adoption by the parents or the guardians concerned or under their authority. It should be with intent to transfer child from the family of its birth to the family of adoption. The physical act of giving and taking of the adoptee is the essential formality of adoption.

The performance of dattahoma not being essential does not have any place in modern law.

Thus, earlier a boy was transferred from one family to another by the spiritual performance called dattahoma. Apart from that there must be giving and taking of the boy from one party to another. Under modern law the

\textsuperscript{73}Supra, Note 20, p.396
\textsuperscript{74}Supra, Note 23, p.687
\textsuperscript{75}Supra, Note 47, p.64
performance of *homa* is not necessary. As the object of adoption is completely secular, the spiritual ceremony is not required. The only requirement is the giving and taking of the child.

So, it is established that in both ancient and modern laws formality is required in adopting a child. However, the modern law has changed the ancient law by making the spiritual ceremony non-essential.

The concept of adoption was not so much popular during the days of *Smṛtis* as it is found in the modern time. The purpose of adoption has been broadened in the present circumstances. Moreover, different aspects to be considered during adoption in the ancient days have been changed by the modern Act. The provisions regarding adoption are now much more clear than they were in the days of the *Smṛtis*.