Chapter 6

ILLETTITIMACY UNDER CODIFIED HINDU LAW

SUMMARY OF THE CHAPTER

0.0 Introduction

1.1. Part (A)

1.1.1. Hindu Succession Act 1956

1.1.1.1. Parallel Assessment

1.1.1.1.1. Section 8, 9, 10, 11, 12, 13

1.1.1.1.2. 2(57) G. Clause Act 1897

1.1.1.1.3. 3(3) A.P. General Clause Act 1891

1.1.1.1.4. 2(45) A.P. (Telauyana) G. Clause Act

1.1.1.1.5. 3 (I) (T)

1.1.1.1.6. Section 4

1.1.1.2. Legislative Pronouncements


1.2.1. Section 16

1.2.1.1. Judicial Pronouncements

1.2.2. Section 3(f)

1.2.2.1. Judicial Interpretation

1.2.3. Section 11 & 12

1.2.3.1. Judicial Interpretation

1.2.4. Section 5

1.2.4.1. Parallel Assessment of Section 5 with Ancient Test

1.2.4.1.1. Apsthanbla

1.2.4.1.2. Manu

1.2.5. Principle of Monogamy

1.2.5.1. Judicial Interpretation

1.2.6. Prohibited Relationship

1.2.6.1. Ancient Hindu Text

1.2.6.2. Judicial Interpretation

1.2.7. Section 12 Voidable Marriage

1.2.8 Critical Evaluation

1.2.8.1. Child marriage Restraint Amendment Act 1938

1.2.8.1.1. Judicial Pronouncement

1.2.8.2. Child Conception

1.2.8.2.1. Judicial Pronouncement

1.2.8.3. Secular Aspect of Marriage [Ceremonies of Hindu Marriage

1.2.8.3.1. Judicial Pronouncement

1.2.8.4. Dissolution of Marriage

1.2.8.4.1. Judicial Pronouncement

1.3. Hindu Adoption and Maintenance Act 1956

1.3.1. Section 20, 21, 22;
1.3.1.1. Judicial Interpretation

**1.3.2**  
Section 125 Cr. P.C.

1.3.2.1. Judicial Interpretation

1.3.2.2. Summing up

**2.0.**  
Part (B)

2.1. Constitutional Provision

**2.1.1.**  
Article -13

2.1.2. Preamble

**2.1.3.**  
Article -14

2.1.3.1. Judicial Interpretation

2.1.4. Article 15(3)

2.1.4.1. Judicial Interpretation

**2.1.5.**  
Critical Evaluation of Article 15

2.1.5.1. The children Act 1960

2.1.5.1.1. Section 2(e), 2(j), 2(i)

2.1.5.1.2. Section 17

2.1.5.1.3. Section 50(3)

2.1.5.1.4. Section 50(4)

2.1.5.2. Juvenile Justice Act 1986

2.1.5.3. The Juvenile Justice [Care and Protection of children] Act 2000

2.1.5.3.1. Section 2(k)

2.1.5.3.2. Section 23

2.1.5.3.3. Section 39(i)

2.1.5.3.4. Section 60

**2.1.6.**  
Article 16

2.1.6.1. Parallel Assessment

2.1.6.2. Judicial Interpretation

2.1.6.2.1. Hindu Adoption & Maintenance Act 1956 [Sec 21]

2.1.6.2.2. Workman Corporation Act Sec 2(1)(d)

**2.1.7.**  
Article 21 & 22

2.1.7.1. Judicial Interpretation

2.1.8. Article 23(1)

2.1.8.1. Judicial Interpretation

2.1.8.1.1. The children (Pledging of Labour) Act 1933

2.1.8.1.2. Bonded Labour System (abolition) Act 1976

**2.1.9.**  
Article 24

2.1.9.1. Parallel Provision

2.1.9.1.1. Judicial interpretation

2.1.9.2. Protection of Human Right Act 1993

2.1.9.2.1. Judicial Interpretation

2.1.9.3. Hindu Minority and Guardianship Act 1956

2.1.9.3.1. Judicial Interpretation


Hindu cultural heritage has a versatile vastness and universality. It has its civilized traditions. Its social ethos are based on Dharma and reflected in sastrik law propounded by the sages. Whenever social requirements demanded law moved accordingly due to its inherit dynamism. However, our social reformers mingled with politicians adorned with the overtones of western culture, thought of amending and codifying Hindu Law thinking that it is not in pace with the modern social out look. Their efforts ultimately bore fruit and Hindu law was amended and codified. Dharma almost synonymous with Hindu religion was neigh given a go-by. So-called secular oriented provisions were brought in to that extent that Hindu law neither remained religious nor secular and created a turbulent legal chaos. The law was amended in such a way that it was not only distorted but brought in ambiguities and legal infirmities, particularly in the field of matrimonial law governing illegitimacy.

1.0 PART-A

The question whether a child is legitimate or illegitimate arises in various kinds of actions and proceedings. It most frequently becomes material in suits brought to determine its rights to property or in proceedings to compel a person to support an illegitimate child of which he is alleged to be the father, but it may arise in various other kinds of actions as, for examples, in a divorce action or nullification of marriage on the ground that the birth of the child is not from his loins. In general the policy of law is to declare the child legitimate when it can be firmly done.

So to have a look on the position of an illegitimate child in the Codified Hindu Law regarding succession to property a scanning glance is needed on the Hindu Succession Act 1956 which has amended and Codified Hindu Law.
1.1. The Hindu Succession Act 1956

1.1.1. Section 8

Section 8 of the said Act speaks of general rules of succession in the case of males and stipulates:-

The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter¹

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;
(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;
(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased;
(d) and lastly, if there is no agnate, then upon the cognates of the deceased.

1.1.1.1. Parallel Assessment with other Legislation

1.1.1.1.1. Section 8,9,10,11,12,13

Section 8 is to be read along with Section 9 to 13. Section 9 speaks of, “Order of Succession among heirs in the Schedule”; Section 10 is, “Distribution of property among heirs in class I of the Schedule²,” Section 11 is, “Distribution of property among heirs in class II of the Schedule;” Section 12 is, “Order of Succession among agnates and cognates³,” and the Section 13 is, “Computation⁴ of degrees”

Here it would suffice to deal with Section 8 of the Act and the said Section speaks of Schedule I which give the list of relatives specified therein.

The Schedule(class I) son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a

¹ Chapter II Hindu Succession Act 1956.
² There are four rules governing distribution of property.
³ There are thee rules governing order of succession.
⁴ There are three clauses for determination of degree among agnates and cognates.
predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; window of a predeceased son of a predeceased son. The tree of this Schedule (class I) is given below:-

1.1.1.1.2. General Clauses Act, 1897

Section 8 (class I) heirs speaks of “son”, which is not defined in the said Act and resort had to be taken to the General Clauses Act, 1897, wherein “son” has been defined:-

Section 3(57) “Son” in the case of any whose personal law “permits adoption shall include an adopted son”.

1.1.1.1.3. Section 3(3) of the A.P. General Clauses Act, 1891

Section 3(3) of the A.P. General Clauses Act, 1891 "Son" and "father" in the case of anyone whose personal law permits adoption "son" shall include an adopted son and "Father," adopted father.

1.1.1.1.4. Section 2(45) of the A.P. (Telangana) General Clauses Act

Section 2(45) of the A.P. (Telangana) General Clauses Act "The word "son" shall include every such person in whose personal law adoption is permitted and who has been adopted."

Section 8 is to be further read with Section 3(1)(j) of the said Act.
1.1.1.5. Section 3(1)(j)

Section 3(1)(j) "related" means related by legitimate kinship.

The word "related" is specifically restricted to legitimate kinship. The illegitimate sons or daughters are there nor to be reckoned as sons and daughters under the Act and they are excluded from the line of succession by virtue of this definition.

Section 8 is further to be read with Section 4 of the said Act which is as follows:-

1.1.1.1.6. Section 4. Overriding effect of Act

(1) Save as otherwise expressly provided in this Act,-
   (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
   (b) any other law in force immediately before the Commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

(2) For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holding or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings.

Thus reading together all the provisions mentioned above the effect is:-

That "son" includes both a natural son and a son adopted in accordance with the law relating to adoption among Hindus in force at the time of adoption. The illegitimate son of a male Hindu dying intestate is not included in the definition of "son" "step son" also does not fall within the ambit of "son".
However, the Madhya Pradesh High Court\textsuperscript{5} in Anasuya Bai v Jagadish Prasad held that the illegitimate son is entitled to "inherit" and this decision was commented upon by the jurists that it is not a correct decision.

\textbf{1.1.1.2. Legislation Pronouncement}

Again section 8(a) was agitated before the Bombay High Court in Daddo Atmaram Patil v Raghunath Atmaram Patil\textsuperscript{6}. In this case Section 8(a), Sec. 4, Schedule I and Sec 3(i)(j) were discussed. The learned judge went through the various decision of the High courts and the apex court and held that considering the scheme reflected by Section 3(I)(j), 4 and 8 of the Act, it is not possible to include illegitimate children within the meaning of the words, "son", "daughter" and daughter of a predeceased daughter in class I of the Schedule to the Act. If so, illegitimate children cannot invoke in their favour the general rules of Succession embodied in section 8 in respect of property of a male Hindu dying intestate; conclusion consequently follows that even a sudra illegitimate son or daughter is not entitled to secede to the estate of his or her putative father by way of intestate succession opening after the coming into force of the Hindu succession act, 1956.

However, the learned judge lamented and said that "it is indeed unfortunate that an otherwise dynamic legislation should have extinguished the intestate succession rights of illegitimate sons of sudra heretofore enjoyed by them unperturbed over the centuries. One hopes for the time when the resultant injustice stands remedied. Till then, however, the law as in force has to prevail and must be given effect to.

The conclusion is obvious that the illegitimate child is not the child of the father. So we have to see that how far it is the child of the mother because maternity is a well established fact and law has recognized this fact. So we have to switch on to Section 15 of the said Act.

\textsuperscript{5} 1977 M.P.L.J.\textsuperscript{7}.
\textsuperscript{6} AIR 1979 Bom. 176.
1.1.2. Section 15

Section 15 of Hindu Succession Act, 1956

The property of a female Hindu dying intestate shall devolve according to the rules set out in Section 16, -

(a) Firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband;
(b) Secondly, upon the heirs of the husband;
(c) Thirdly, upon the mother and father;
(d) Fourthly, upon the heirs of the father; and
(e) Lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in Sub-Section (1),-

(a) Any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in Sub Section (1) in the order specified therein but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-Section (1) in the order specified therein, but upon the heirs of the husband.

Section 15 speaks of three types of property :-

(1) property inherited by a female from her father or mother;
(2) property inherited by a female from her husband or father-in-law, and;
(3) property which she herself acquired in any other manner from any other source as her absolute property.

Regarding the first two categories separate set of rules are prescribed under Section 15(2)(a) and 15(2)(b). Regarding category (3), it is governed by sub-Section (1) of
Section 15 and the main rule of Succession is that the sons and daughters\(^7\) of a Hindu female shall succeed to the property held by her absolutely at the time of her death.

Section 15(1)(a) is significant wherein three expressions are used i.e. sons and daughters\(^7\) and the husband. But in Section 15(2)(a) and 15(2)(b) the expression used is "in the absence of any son or daughter of the deceased."

### 1.1.2.1. Parallel Assessment with other Legislations

#### 1.1.2.1.1. Section 3(1)(j)

There appears to be apparently a conflict and that can be resolved if we read this complete Section 15 with Section 3(1)(j) Proviso:-

"Provided that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another, and any word expressing relationship or denoting a relative shall be construed accordingly."

**Section 3(1)(j) Proviso** if read with Section 3(1)(j) the whole stress is on the expression "related". The word "related" is specifically restricted to legitimate kinship. The illegitimate sons or daughters are therefore not to be reckoned as sons and daughters under the Act and as such do not fall within the parameter of Section 8. They are excluded from the Succession by virtue of Section 3(1)(j). However, the Proviso to the section lays down that illegitimate children shall be deemed to be related to the mother, and to one another, and their descendants who are only legitimate descendants shall be deemed to be related to one another. Thus under the Act, illegitimate child is the child of the mother.

The right of an illegitimate child to a succession to the property of the Female Hindu dying intestate has been agitated repeatedly wherein firstly the stress was as to the meaning of “son” or daughter.

\(^7\) Son or daughter includes the children of any predeceased son or daughter.
1.1.2.2. Judicial Interpretation

In Mallappa Fakirappa v Shivappa⁸, the point agitated was as to whether “son” includes “step son”. The court referred to the 12th Edition of Mulla’s “Principles of Hindu Law”, at page 984 it is stated as follows:

“a ‘step son’ is not entitled as ‘son’ to inherit to his step mother as one of the heirs under this entry (a). But he can succeed to her property as an heir of the husband under Entry (b).

The High Court held that the expression “son” in Section 15(I)(a) cannot be properly understood to include a step son of the deceased. In the absence of any definition or explanation to the effect that the word “son” would also include a step son; that word should be given its natural meaning; if so, a son of a deceased female would mean a male issue of the body of that deceased female.

In Ramkothari v Prakashwati⁹ the discussion centered round the word "deceased" used in sub Section 2(a) and 2(b) of Section 15 but not in Section 15(I)(a). In Section 15(I)(a) the words "son and daughter" are not followed by the word "deceased" and whereas it is there in sub-Section 2(a) and 2(b) and that it must be taken that the sons and daughters of the husband (step sons and step daughters of the deceased female) are included in the words "sons and daughters."

In R.A. Patil v A.B. Redaker¹⁰, Section 15(2)(b) and Section 3(I)(j) Proviso were discussed and the court held that the words “son or daughter” of the deceased in Section 15(2)(b) of the Act can only mean a son or daughter of the female dying intestate without regard as to from which husband they were born to her. This interpretation is reinforced by the definition of the word “related” in section 3(I)(j) of the Act. Under the Proviso to this definition even illegitimate children are to be deemed to be related to their mother and to one another for the purpose of the Act. Effect of this definition is that the phraseology "son or daughter of the deceased" is to

⁸ AIR 1962 Mysore 140(para )
⁹ 1968 ALL L.J. 484.
¹⁰ AIR 1969 Bom. 205
be construed to mean not only the sons or daughters of the female Hindu from any of her husbands, but even sons or daughters born to her in an illegitimate manner. If, therefore, by virtue of this definition, illegitimate son or illegitimate daughter is to be included in the phraseology of "son or daughter of the deceased" in section 15(2)(b), there is no warrant to assume that the legislature intended to exclude the son or daughter of the deceased female Hindu, from inheritance, born to her from any other husband than the husband from whom the female Hindu had inherited the property. Moreover having regard to the plain language of the phraseology and having regard to the set up in which this phraseology is employed by the legislature in Section 15(1)(a) and Section 15(2)(a), it cannot be even suggested that the words "sons or daughter" can be construed to mean her son or daughter by any particular husband. It will only be reasonable to presume that the legislature intended to give the same meaning to the same expression or phraseology not only in every part of the same Section but in fact in every part of the same Act.

Thus in this case the court held that a son by the first husband of a female Hindu is entitled to succeed on the death to the property inherited by her as sale heir of her second husband in preference to the nephews and grand nephews of her second husband under Section 15 of the said Act.

In K.p. Lodhi v Harparsad11, Section 15(1) and 15(2) were discussed and it is held that from the language of sub-Section (1) and (2) it is clear that the intention of the legislature was to allow the succession of the property of the Hindu female to her sons and daughters and only in the absence of such heirs the property would go to the husband's heirs. Consequently, the female's property would devolve on her sons and daughters even where the sons and daughters are born of the first husband and property left by the female was inherited by her from the second husband. The court further held that it is true that the words "Notwithstanding any thing contained in sub-Section (1)" exclude the provision in sub-Section (1) in so far as the succession of the property inherited by a Hindu female from her husband is concerned. However, the special mode of succession provided in sub-section (2) itself restricts the application of clause (b) of sub-Section (2) to cases where a son or daughter exists, the heirs of

11 AIR 1971 M.P. 129.
the husband cannot succeed according to clause (b) of sub-section (2) and the property must go to the son or daughter.

**Gurbachan Singh v Khichar Singh**\(^{12}\) In this case the honourable High Court discussed Section 15(1)(a) of the Act and distinguished Mallapp's case AIR 1962 Mysore 140\(^{13}\) and held that the expression "son" as used in Section 15(1)(a) includes both natural and adopted sons. If a female remarries after the death of her first husband or after divorce her son from the other husband would be her natural son. A son may even be illegitimate when the female from whose body he is born is not the lawfully wedded wife of the person from whose loins such a son is born but he will still be natural son of his mother when the question of succession on her dying intestate arises. In the matter of succession as regulated by clause firstly of Section 15(1)(a) the expression "son" thus includes the child born from body of the deceased no matter what be the legal relationship between her and the person from whose loins he is born.

**Triloku v Wazir Chand**\(^{14}\) This case was under Jammu and Kashmir Hindu Succession Act (38 of 1956), Section 13-Succession in case of Hindu females. The honourable court followed AIR 1969 Bom\(^{15}\) 205 and held that a son of the first husband of a female Hindu is entitled to succeed on her death to the property inherited by her as heir of her second husband in preference to the relations of her second husband. The fact that she had no son from her second husband cannot confer right to inheritance on the relations of her second husband.

Though the case was under J&K Succession Act, 1956, Section 13, but the honourable court took legal inspiration from Section 15 of the Hindu Succession Act 1956 and thoroughly examined Sec. 15 and drew a conclusion of "Doctrine of Nearness" and held that the principle behind this mode of succession also can be defended on very solid and reasonable grounds that they are the nearness of relationship with the offsprings of the female Hindu from whatsoever source the children have been begotten.

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12 AIR 1971 P&H 240.
13 Gurbachan Singh v/s Khicher Singh AIR 1962, Mysore 140.
14 AIR 1971 J&K 136 F.B.
This case pertains to succession to stridhana and this is a second appeal decided by Full Bench on order of reference made by Ramanujam J. This reference became necessary in view of conflicting decisions of the same High Court in *Meenakshi v Muniandi Panikkam AIR 1915 Mad. 63* and *Venkanna v Narayanamma AIR 1954 Mad. 136*.

Their lordship held that term "daughter" includes an illegitimate daughter and legitimate son cannot exclude an illegitimate daughter in matter of Succession to stridhana. Now the concept of stridhana is amalgamated in Section 14 of the Hindu Succession Act.

Their Lordship referred to Hindu Succession Act 1956 and the old Mitakshara Rule of Succession to stridhana and held that where there is no inhibition expressly or impliedly to be found in the original text, courts cannot lose sight of the progressively changing views of social outlook and insist upon only applying the old notions. The change in the social outlook in respect of succession is reflected in the recent legislations, particularly the Hindu Succession Act, 1956 which has done away with the distinction between legitimacy and illegitimacy within certain limits in the matter of Succession either to property of a male or a female, dying intestate. It is also to be noted that Section 3(1)(0), which defines the word "related," has a proviso according to which illegitimate children shall be deemed to be related to their mother and to one another. It seems that having regard to this trend of legislation reflecting the changing social approach to succession, interpretation of the word "daughter" as including an illegitimate daughter would be justified. When such an illegitimate daughter is available for succession of stridhana property of the mother, the son who is not in the nearer line of stridhana heirs cannot have preference and exclude an illegitimate daughter and thus overruled the decision cited as AIR 1915 Mad. 63.

Basically speaking, their Lordships relied upon Section 15 read with Section 3(1)(0) Proviso and the decision overtly appears to be progressive and speaks of Judicial Activism.

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16 *AIR 1975 Mad. 275(F.B).*
Gurnam Singh v Ass Kaur\textsuperscript{17} In this case again the discussion centered round the word "deceased" omitted in sub-Section (1) of Section 15. The honourable High Court held that the exclusion of the words "of the deceased" from sub-section (1)(a) was only a matter of convenience and to avoid repeated use of this phraseology in all the sub-clauses of the sub-section that is, (a) to (e). The omission of the words "of the deceased," in subsection (1) is, therefore, hardly of any significance. On the other hand, if these words had been used in sub-section (2), there could be a likelihood of confusion which has been avoided. The court further held that the plain and natural implication of the words "son or daughter of the deceased" in sub-section (2) of Section 15 is that the son or the daughter should be hers, even though she might have married once or more than once and may have, thus, given birth to children from these marriages, the reason being that these offsprings are capable of establishing their blood relation to the female Hindu as a son or a daughter.

The honourable High Court followed AIR 1962 Mys. 140 and AIR 1969 Bombay 205 and dissented ILR (1968) 1 All 697.

Kishori Bala v Tribhanga\textsuperscript{18} In this case the honourable High Court while discussing Section 15(1)(a) held that the expression "sons and daughters" appearing in Section 15(1)(a) can only mean sons and daughters of the female Hindu dying intestate and it cannot by any stretch of imagination include sons and daughters of the husband of that female Hindu. The words "of her husband" shall have to be read after the words "sons and daughters" appearing in clause (a) of Section 15(1) before Section 15(1)(a) may be said to include sons and daughters of the husband not by that female Hindu but by any other wife of the husband. This was not permissible.

In this case the honourable High Court followed AIR 1969 Bombay 205 and AIR 1977 P&H 103 and dissented 1968 All L.J. 484 ; ILR (1968) 1 All 697. So in conclusion the honourable High Court held that son of deceased female would mean male issue of the body of that deceased female and that the word "son" does not include stepson.

\textsuperscript{17} AIR 1977 P&H 103.
\textsuperscript{18} AIR 1980 Cal. 334.
In this case Section 15(I)(a) and 16 have been discussed. The facts of the case being that a female Hindu by name Pari had an undivided share in the suit property and that on account of operation of law her limited interest, if any, had collaterals as to who shall succeed to her property. It was held that inheritance is governed by Section 15 of the Act. Under Section 15(I)(a) read with Section 16 the property would devolved upon the respondent the son of Pari, to the exclusion of all other heirs mentioned in sub-section (1) of the Section 15. For the purposes of succession to here estate under Sction 15(I)(a) it is immaterial whether the respondent was the off-spring of the marriage of Pari with Kithu or her illicit relationship with Punnu. In other words, it is immaterial whether he was the legitimate of illegitimate son of Pari. The honourable court followed Rama Anand v Appa Bhima AIR 1969 Bom. 205 and Gurbachan singh v Khichar Singh AIR 1971 P&H 240.

However, the matter is finally set au rest by the supreme Court in Lacman singh v Kirpa Singh. Though here the question was whether the word “son” includes “step son”. The Apex Court held that ordinary laws of succession to property follow the natural inclinations of men and women. The list of heirs in Sec. 15(1) of the Act is enumerated having regard to the current notions about propinquity or nearness of relationship. In the case of a woman it is natural tat a step son, that is, the son of her husband by his another wife is a step away from the son who has come out of her own womb. The word “sons” in CL.(a) of Section 15(I) includes first by sons born out of the womb of a female by the same husband or b different husbands including illegitimate sons too in view of Section 3(j) and secondly adopted sons who are deemed to be sons for purposes of inheritance.

If Parliament had felt that the word "sons" should include "step sons" also it would have said so in express term. It is worth noticeable that under the Hindu law as it stood prior to the coming into force of the Hindu Succession Act, a step son, Leo, a son of the husband of a female by another wife did not simultaneously succeed to the

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20 Rama Andnd V/s Appa Bhima AIR (1969) Bom. 205
22 AIR 1987 S.C. 1616.
stridhana of the female on her dying intestate. In that case the son born out of her womb had precedence over a step son.

The Apex Court further held that no distinction can be made between clause (a) of Section 15(1) and clauses (a) and (b) of Section 15(2) on the ground that whereas in Section 15(1)(a) the word "sons or daughters" are unqualified, the words "sons or daughters" in clauses (a) and (b) of Section 15(2) are qualified by the words "of deceased," to support the conclusion that the unqualified words "sons or daughters" in Section 15(1)(a) indicate that they included also the children of her husband by another wife. The words "sons and daughters ....... and the husband" in clause (a) of Section 15(1) only mean "sons and daughters .......... and the husband" of the deceased. They cannot be "sons and daughters .......... and the husband" of any body else. Thus the Supreme Court overruled 1968 All L.J. 484.

Now reading Section 8, 15 and 3(I)(j) together, the inference is obvious.

(i) so far Section 8 is concerned, ‘sons and daughters’ mentioned in Schedule I indicate “sons and daughters” born out of the loins of male Hindu dying intestate.

(ii) Marriage is a condition precedent.

(iii) Regarding section 15, “sons and daughters” means “sons and daughters” born out of the womb of a female Hindu dying intestate.

(iv) Marriage or no marriage. Maternity is the basis and nearness of relationship is the doctrine.

(v) “son or daughter” includes adopted son or daughter.”

From these inference we enter into another field that this codified law instead of blurring the distinction between illegitimate and legitimate child, has made it more glaring. Now legitimate child is governed by section 8 read with section 3(I)(j) in matter of inheritance to property of the male Hindu dying intestate.

In the case of female Hindu dying intestate, it is governed by section 15 read with section 3(I)(j) and 3(I)(j) proviso. So in this case both legitimate and illegitimate children are included. Here the child is connected with the womb of the female dying
intestate. Thus legitimate child can reap the fruit both under section 8 and section 15 and whereas illegitimate child can have recourse only under section 15 of the Act.

In fact the Higher Courts speak of the doctrine of "Nearness relationship." It is to be seen in the light of Section 18 read with Section 3(1)(e)(i) and 3(1)(e)(ii). **Section 18** speaks of "**Full blood preferred to Half blood.**" "Heirs related to an intestate by full blood shall be preferred to heirs related by half blood, if the nature of the relationship is the same in every other respect."

**Basically speaking Section 18 is connected with schedule II of the Act but we are in fact concerned with schedule I of the Act. Thus if the intestate leaves one of his heirs related by full blood and another related by half blood, then the heir related by full blood shall be preferred subject, however, to the condition of "nature of relationship is the same in every other respect." In so far as class I heirs are concerned of a male dying intestate, the question of half blood relationship does not arise because except the mother all others are descendants of the deceased dying intestate. If the intestate is female, the child born to her husband by another woman cannot be considered to be related to her by half blood as there is no blood relationship at all in such a case. So Section 8 is to be read with Section 10 to 13 and Section 15 is to be read with Section 16.**

Such eventuality shall arise in case of schedule II and Agnates and Cognates where "the nature of relationship is same in every other respects." This phrase indicates the "degree of ascent and decent" being the same in case of Agnates or Cognates.

But this phrase needs judicial reinforcement. In *Sarwan Singh v Dhan Kaur*\(^{23}\) it was held that the nature of relationship between a brother and sister is the same as both are children of the father of the intestate. It was observed that the nature of relationship is to be reckoned in terms of degrees of ascent or descent or both. It was therefore held that full blood sister excludes half blood brothers. But in *Purushotam v Sripad*\(^{24}\) it was held that a sister of full blood will not exclude a brother of half blood.

\(^{23}\) (1971) P&H 323; ILR (1971) 1 Punj. 158.
\(^{24}\) AIR 1976 Bom. 375.
However, both the above cases were discussed in *Waman Govind v Gopal Babu Rao*\(^{25}\) wherein their Lordships relied on *ILR (1971) 1 Punj. 158*\(^{26}\) and overruled *AIR 1976 Born.375*\(^{27}\). This decision of Bombay High Court was made in the light of the decision of the Supreme Court in *Satyanaran v Urmila*\(^{28}\) delivered while considering the case of heirs in class II that there can be no distinction on the ground of their being males or females.

Thus in conclusion it can be inferred that legitimate child is connected with the loins and illegitimate child is connected with the womb. Connection with loins is given supremacy over the connection with womb. Thus there is discrimination. It is a matter apart as to whether it stands the test of reasonable classification. However, our study of Section 8 and 15 of the Hindu Succession Act is incomplete without reference to Section 16 of the Hindu Marriage Act, 1955.

### 1.2. Hindu Marriage Act, 1955

#### 1.2.1. Section 16

**Section 16 of the Hindu Marriage Act, 1955** "Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

Provided that nothing contained in this Section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

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25 AIR 1984 Bom. 208 (EB).
27 AIR (1976) Bom. 375.
Section 16 of the Hindu Marriage Act, 1955 is an adaptation but with a variation, of Section 9 of the English Matrimonial Causes Act, 1950 which is in the following terms:

"Where a decree of nullity is granted in respect of a voidable marriage, any child of the parties to the marriage at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment."

This Section 9 of the English Act purported to be a substitution for Section 7(2) of the earlier English Act of 1947 which is as follows:

"Any child born of a marriage avoided pursuant to paragraph (b) or (c) of the last foregoing sub-section shall be legitimate of the parties thereto notwithstanding that the marriage is so avoided."

1.2.1.1. Judicial Pronouncement

This original Section 16 was clothed with unsatisfactory language and it was inter alia pointed out that a child born of a void marriage would not get the protection of section unless a decree of nullity had been passed by the court at the instance of one of the parties to the marriage. Thus the beneficial and benevolent provision of conferring legitimacy, may be for a specific purpose only, became inapplicable unless a decree of nullity is passed and this legal lacuna was brought out in Gouri amma v Thulasi Amma. In this case the high court held that where the statute defines the limits for the purpose of the grant of benefit of legitimacy to children born of void marriages in a particular way, the courts are bound to give effect to such limitation without traveling outside those limited on a presumed intention of the legislature, however, great the hardship might be to the parties.

In this case the High Court held as follows;

29 Further Legitimacy Act 1959 Section 2 regarding child of Void Marriage.
30 AIR 1962 Mad. 510.
(i) To have the protection of Section 16, there must be a decree of nullity.
(ii) Such a decree is to be obtained by either of the party to the marriage by a proceeding under the act.
(iii) Decree of nullity cannot be passed after death of one of the spouses.

Thulasi Ammal v Gowri Ammal. This is an appeal against the order of the High Court in AIR 1962 Mad. 510 to the Division Bench. Their Lordships affirmed the decision of the single bench court of Ramakrishna J. and said that it was a matter which the legislature alone could rectify and that it was not open so to interpret Section 16 as amounting to conferring the right of legitimacy on children born of void marriages without a decree of nullity having been obtained. The honourable court did not offer any opinion on the obtaining of decree in view of death of one of the spouses and advised the affected party to take steps as may be open to her to have a declaration of nullity of her marriage.

Banshidhar Jha v Chhabi Chatterjee. It is a case under Section 5(1), 11, 12, 16 and 17 of Hindu Marriage Act 1955. The honourable court held that there is a clear distinction between void and voidable marriage. A marriage void ab initio does not alter or affect status of parties nor does it create between them rights and obligations which normally arise from a valid marriage except such rights as are expressly recognized by the Act. A voidable marriage remains valid and binding and continuous to subsist for all purposes unless a decree is passed by court annulling the same under Section 12. So the words "void" and "voidable" are in two distinct senses. Void marriage is non-existent in eye of law, only a declaration under Section 11 is sufficient. Since a voidable marriage is valid until annulled by a decree of nullity, annulment is necessary under section 12. Under section 16, children born to a parties whose marriage is solemnized but is void or voidable, are legitimate until a decree of nullity or of annulment is passed by court.

T. Ramayammal v T. Mathummap. In this case the point was again agitated about the requirement of a decree of nullity even in the case of a void marriage as

31 AIR 1964 Mad. 118.
32 AIR 1967 Pat. 277.
33 AIR 1974 Mad. 321.
contemplated in Section 16. The court referred to AIR 1962 Mad. 510\textsuperscript{34}. It is held that it is a "casus omissus" which the courts cannot reach for no canon of construction will permit the court to supply what is clearly a lacuna in the statute and it is for the legislature to set right the matter by a suitable amendment of the Section.

**Ponnuthayee Ammal v Kamakshi Ammal**\textsuperscript{35} This is a case of annulment of marriage under Section 11 of Hindu Marriage Act 1955 with the object to take shelter under Section 16 of the said Act. The court said that "the matter indeed has now become academic by reason of the amendment made to the Hindu Marriage Act in Section 16 and referred to the amended Sections 16.

But there was another point involved as to whether such petition can be filed when one of the spouses is dead. The High Court held that whether the application for nullity is filed by the spouse for establishing the invalidity of the marriage for its own sake or for collateral purpose of deciding the legitimacy of the issue, the real purpose of such a proceeding is only to establish the petitioner's own status and for establishing that question it is not necessary that the other spouse should be living. Thus the High Court relied on AIR 1964\textsuperscript{36} Mad. 118 and dissented from AIR 1962 Mad. 510\textsuperscript{37} and AIR 1974 Mad. 321\textsuperscript{38}. As pointed out by the various High courts\textsuperscript{39} of the lacuna in Section 16 of the Act, suitable charges have been made in respect of marriages affected by both sections 11 and 12 and the amended Section under the Amendment act, 1976 is as given below:

**Section 16 as Amended**-Legitimacy of children of void and voidable marriage:-

(1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such a child is born before or after the commencement of the marriage laws (Amendment) Act, 1976 (68 of 1976)

\textsuperscript{34} Supra note 30.  
\textsuperscript{35} AIR 1978 Mad. 226  
\textsuperscript{36} Supra note 31  
\textsuperscript{37} Supra note 30  
\textsuperscript{38} Supra note 33  
and whether or not the marriage is held to be void otherwise than on a petition under this Act.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in sub-section (1) and sub-section (2) shall be construed as conferring, upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person, other than the parent, in any case where, but for the passing of this Act such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Now Section 16 stands amended and the lacuna is removed. It is by a “fictio juris” that the legislature has brought about this result. When a statute enacts that something shall be deemed to exist or some status shall be deemed to have been acquired which would have not been so but for the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical collusion. Now this “fictio juris” is to be seen through the lens of the judicial pronouncements:-

Laxmibai v Limbabai40. In this case section 8, Schedule class I heris, Section 3 (f) and 16 were discussed. In this case Limbabai was the legally wedded wife and Laxmibai was considered also wedded wife on the doctrine of factum valet. Laxmibai had a son and a daughter the husband nagappa. Point agitated before the court was that the children born to the second wife are illegitimate being the second marriage as null and void. The honourable court referred to various sections of Hindu succession Act, 1956 regarding disqualification for inheritance and section 8,3(f), Schedule class I heirs and section 16 and held that the law of succession is principally a law that recognized a class of persons who can succeed to the property when the succession open. It is both a law of status as well as law made in recognition of rights in or to the

40 AIR 1983 Bom. 222.
property of the deceased. In the entire body of the Hindu succession Act, there exists no disqualification with regard to the offsprings or the children born out of void marriage. Illegitimate children are recognized to be legitimate by virtue of the declaration available in section 16 of the Hindu marriage at, 1955. The policy and principles underlying the Codification of Hindu law clearly go to show that the legislature intended to avoid the effects of bastardization and to clothe the children notwithstanding the fact of the marriage of their parents being void, with the status of legitimacy and with conferring rights in the property of their parents and as such held that such children are heirs to the property of their parents.

Margabadhu v Kothnadarama\(^{41}\). In this case Section 16(1) was discussed and consequently Section 16(3) followed. In this case the cases referred were before the Section 16 was amended. The honourable court without much discussion held that Section 16 of the amended Act clearly treats the illegitimate children also as if they would have been legitimate if the marriage had been valid. The court further held that it is fundamental that sons, let anole illegitimate sons, cannot claim any share in the self-acquired property of the father during lifetime. In the present case, it is common ground that he properties are ancestral properties. Therefore, the father and the four sons take equal shares by virtue of the amendment. According to this decision and the earlier decision in AIR\(^{42}\) 1983 Bom. 222, children born of void or voidable marriage have been placed also under Section 3(f) which says:-

1.2.2. Section 3(f)

Section 3(f) "heir" means any person, male or female, who is entitled to succeed to the property of an intestate under this Act.

So Section 16 by necessary implication is deemed to have reference to schedule class I heirs.

1.2.2.1. Judicial Interpretation

\(^{41}\) AIR 1984 Mad. 270.

\(^{42}\) Supra note 40.
Shantram v Dagubai\(^{43}\). In this case the honourable court discussed the scope of section 16(3) of Hindu Marriage Act, 1955 and held that under the provisions of Hindu marriage Act, whether a decree of nullity is passed or not, is a legitimate child. Such a child does not acquire right to property which a legitimate child would, but the legitimacy confers upon him right to property of his parents under section 16(3), Hindu Marriage Act.

The property to which such a child can lay claim must be the separate property of the parents and not the coparcenary property in which the parent has a share. Since no child, whether legitimate or otherwise, acquires right by birth in the separate property of its parents, a child of a void marriage can only succeed to the property of its parent in accordance with the provisions of Section 8 or Section 15 of the Hindu Succession Act. A child of a void marriage is related to its parent within the meaning of Sec 3(i)(j), Hindu Succession Act, because of the provisions of Section 16, Hindu Marriage Act; Proviso to Section 3(i)(j) must be confined to those children who are not clothed with legitimacy under Section 16, Hindu Marriage Act. Thus the honourable court criticized the decisions AIR 1979 Bom\(^{44}\). 176 and AIR 1983 Bom\(^{45}\). 222 and overruled (1985) 87 Bom\(^{46}\). L.R. 488.

Surjit Singh v Mohinder Pal Singh\(^{47}\) In this case Section 16 of Hindu Marriage Act, 1955 was discussed as a side issue and the court held that Section 16 has retrospective effect. The language of the said provision makes it clear that any child of a marriage which is null and void under Secti.:\(\)\(^{11}\) of the Act who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the amendment of 1976 and whether or not a decree of nullity is granted in respect of that marriage under the Act and whether or not the marriage is held to be void otherwise than on a petition under the Act. There is, therefore, no scope for doubt that such child is the legitimate child and has the right to succeed to estate of his parents.

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\(^{43}\) AIR 1987 Bom. 182.
\(^{44}\) Atmaram V Raghunath.
\(^{45}\) Supra note 40.
\(^{46}\) Raghunath v Nana.
\(^{47}\) AIR 1988 P&H 156.
In this case the honourable court interpreted Section 16 of Hindu Marriage Act, 1955 in the light of the solemnization of marriage. It is held that Section 16(1) comes into operation only in a case in which a marriage is in fact proved to have taken place between two persons, but which may be otherwise null and void as per the provisions of Section 11. Section 11 provides for getting a marriage declared null and void on certain grounds as stated therein. The present is a case of no marriage between these persons. As such Section 16(1) does not come in aid to the case of the children.

Thus the honourable court laid stress on marriage as a condition precedent for the application of Section 16(1).

It was a case under Section 125 Cr. r.c. in which Sections 5(1), 11, 12, 14 and 16 of Hindu Marriage Act, 1955 were discussed and the Apex Court held that marriages covered by Section 11 are void 'ipso jure', that is, void from the very inception and have to be ignored as not existing in law at all if and when such a question arises. Although the section permits a formal declaration to be made on the presentation of a petition, it is not essential to obtain in advance such a formal declaration from a court in a proceeding specifically commenced for the purpose. The provisions of Section 16 also throw light on this aspect. Thus the Apex Court kept two Sections 11 and 12 on different pedestals. Marriage under Section 12 is valid until it is avoided. Moreover Section 16(3) has upheld the legitimacy of the child born out of void marriage. It has not extended the same to the mother of the child. She is not considered wife under a void marriage.

In this case two points were agitated. (i) Whether the benefit of Section (16) is available to children born prior to the commencement of Hindu Marriage Act, 1955. (ii) Whether the said provision is violative of Article 14 of the constitution of India.

(i) The honourable court held that legitimacy conferred by sub-section (1) of Section 16 is on the children born of a marriage null and void under Section 11. Section 11 applies only to marriages solemnized after the commencement of the Hindu Marriage Act.
Act and does not relate to marriages solemnized prior to the said Act. Clause (i) of Section 5 invalidates a marriage if either party has a spouse living at the time of marriage.

(ii) The honourable court held that the benefit of section 16 is available only to the children born of marriages, which are declared void under section 11 of the Act. The section deals with only invalidity of marriage under the Act and not of marriages otherwise invalid. In the present case the second marriage was null and void under section 5 of the Madras Marumakkathayam Act. And the children born of such a marriage neither are nor conferred legitimacy by section 16 of the Hindu Marriage Act. There is no discrimination in conferring legitimacy by S-16 of the Act only on those who will be otherwise illegitimate for the reason of applicability of S-11 of the Act. The disqualification of illegitimacy under the Hindu Marriage Act alone is removed under Section 16 of the Act. The fact that the section does not confer legitimacy on those who are already illegitimate apart from the provisions of the Act does not render the section discriminatory or violative of Article 14 of the Constitution. It deals only with cases of illegitimacy under the Act and does not go beyond the same. Words in section 16 restricting the benefit to children born of marriages void under S-11 are not to be deemed to be extending to all those children born of second marriage when the first was subsisting. So the honourable court declared that section 16 is not discriminatory.

Mahila Mathuro Bai v Ramwati51 It was a case of property dispute wherein the marriage and the legitimacy of the children was challenged. The honourable court discussed Section 5, 11, 16 and the custom pleaded and came to the conclusion that Section 16 is applicable. The court referring to Section 16 of Hindu Marriage Act, 1955 held that as per facts proved and as the law leans in favour of legitimacy and frowns upon bastardity; the right of the inheritance of the children to the property of their parents cannot be taken away or challenged because of the provisions of Section 16 of the Act. In this case the court referred to various52 cases in support of the applicability of Section 16.

51 AIR 1990 M.P. 276.
Perumal Gounder v Pachayappan\textsuperscript{53} It is a case of void marriage under the Madras Act. It continues to be void under Hindu Marriage Act, 1955. Children born of second marriage though hit by Section 5(1) yet are protected under Section 16(1) of the Hindu Marriage Act, 1955. But the honourable court held that though the children are entitled to the benefit under Section 16, yet they cannot be treated as coparcener. They cannot seek partition. They get right to the property of their parents and they might be entitled to rights in property after their father's death.

Jagarlamudi Sujata v Jagarlamudi Jagdish Krishna Prasad\textsuperscript{54} In this case the honourable court held that child born of marriage which is void under the Act, the rights of such child to the property of the parents is governed by Section 16 of the Hindu marriage Act but the property which such a child can claim must be separate property of the parents and not the coparcenary property. The court relied on AIR 1990 Mad. 110 and AIR 1987 Born. 182.

ReshamIal v Balwant Singh\textsuperscript{55}. In this case the honourable court discussed two issues.

(i) The word "son" has not been defined in the Hindu Secession Act, 1956, but every word need not be defined in the Statute itself. The General Clauses Act defines "son" and includes only the adopted son. In case, the illegitimate son was also included within this definition, a correspondent amendment would have been made in the definition given in the General Clauses Act. So illegitimate son is not a "son" within Section 8 read with Schedule and cannot inherit to his father's property.

(ii) Marriage Laws (Amendment) Act, 1976 provides legitimacy to children of a marriage hit by Section 11 of Hindu Marriage Act. There must be a marriage, which would be hit by the provisions of the Act and would not cover a relationship resulting from any other arrangement than the marriage. When there is no proof of solemnization of marriage, the provision of Section 16 of the Hindu Marriage Act as amended by Marriage Laws (Amendment) Act, 1976 is not attracted.

\textsuperscript{53} AIR 1990 Mad. 110.
\textsuperscript{54} AIR 1992 A.P. 291.
\textsuperscript{55} 1994 M.P.L.J. 446.
P.E.K. Kalliani Amma v K. Devi\textsuperscript{56} It is case of appeal against the judgement of Kerala High Court in AIR 1989 Ker. 279\textsuperscript{57}. In this case three points were discussed in the light of Kerala Joint Hindu Family System (Abolition) Act (30 of 1976), Marumakkattayam Act (22 of 1933), Kerala Interpretation and General Clauses Act and Section 16 of Hindu Marriage Act as amended by Act 68 of 1976.

(i) Section 16(1) starts with the word "Notwithstanding." So Section 16(1) starts with a "non abstante" clause. "Non-abstante" clause is sometimes appended to a Section in the beginning, with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision of Act mentioned in that clause. It is equivalent to saying that in spite of the provision or Act mentioned in the non-abstante clause, the enactment following it, will have its full operation or that the provision indicated in the non-abstante clause will not be an impediment for the operation of the enactment\textsuperscript{58}.

(ii) After explaining the concept of "Non-abstante" clause, the Apex Court discussed its application to Section 16 as follows:-

(a) Section 16(1) stands de-linked from Section II.

(b) Provisions of Section 16(1) which intend to confer legitimacy on children born of void marriages will operate with full vigour in spite of Section 11 which nullifies only those marriages which are held after the enforcement of the Act and in the performance of which Section 5 is contravened.

(c) Benefit of legitimacy has been conferred upon the children born either before or after the date on which Section 16(1) is amended.

(d) Mischief or the vice which was the basis of unconstitutionality of un-amended Section has been effectively removed by amendment.

\textsuperscript{56} AIR 1996 S.C. 1963.
\textsuperscript{57} Supra note 50.
(e) Section 16(1) now stands on its own strength and operates independently of other sections with the result that it is constitutionally valid as it does not discriminate between illegitimate children similarly circumstanced and classifies them as one group for conferment of legitimacy.

(iii) Section 16 contains a legal fiction. It is by a rule of "fictio juris" that the legislature has provided that children, though illegitimate, shall, nevertheless, be treated as legitimate notwithstanding that the marriage was void or voidable. When an Act of Parliament or a State Legislature provides that something shall be deemed to exist or some status shall be deemed to have been acquired, which would not have been so acquired or in existence but for the enactment, the court is bound to ascertain the purpose for which the fiction is created and the parties between whom the fiction was to operate, so that full effect may be given to the intention of the legislature and the purpose is carried out to its logical conclusion 59. To this effect their Lordships quoted what Lord Asquith has said 60.

"When one is bidden to treat an imaginary state of affairs as real, he must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which inevitably have flowed from it-one must not permit his "imagination to boggle" when it comes to the inevitable corollaries of that state of affairs 61."

The Statutory provision contained in Section 16 of the Hindu Marriage Act, 1955, reinforced by a catena of judicial decisions lays down the following propositions of law:-

(i) Marriage is a condition precedent.
(ii) The marriage is hit by Section 11 of the Act.
(iii) The marriage if voidable, is declared null and void by a decree of nullity
(iv) Children born of such void or voidable marriages are legitimate.
(v) Such children are vested with rights in or to the property of their parents.

60 East End Dwellings Co Ltd. v Finisby Borough Council (1951) 2 All E.R 587.
61 M. Venugopal v Divisional Manager LIC (1994) 2 see 323.
(vi) They are not having any right in or to the property of any other person.

1.2.3. Section 11 and 12

Though Section 16 of the said Act is self contained so far as legitimacy of the children born of void or voidable marriages is concerned, it has many riders and there is a reference to Section 11 and 12 of the said Act which also need to be screened.

1.2.3.1. Section 11 Void Marriages

Section 11 Void Marriages—Any marriage solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party; be so declared by a decree of nullity if it contravenes anyone of the conditions specified in clauses (i), (iv) and (v) of Section 5.

The said Section 11 only speaks about a void marriage and is silent about the legitimacy of the children born of a void marriage and as such under Section 11 both the aspects of void marriage and legitimacy of children of void marriage cannot be considered because two declarations are distinct in nature though are interconnected. In Tulsan Devi v Krishni Devi they held that the remedy of either party of the marriage is only a petition under this Section and not a civil suit. However, a regular suit is to be filed for declaration of legitimacy. So there is reference of Section 5, clauses (i), (iv) and (v) in Section 11, violation of which renders the marriage null and void and as such a further reference is to be made to Section 5 of the Act.

1.2.4. Section 5 Condition of a Hindu Marriage

Section 5. Conditions of A Hindu Marriage—A marriage may be solemnized between any two Hindus if the following conditions are fulfilled, namely—

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of marriage, neither party

62 AIR 1973 Punj. 442.
(iii) is incapable of giving a valid consent, to it in consequence of unsoundness of mind; or
a. though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
b. has been subject to recurrent attacks of insanity or epilepsy\textsuperscript{63}

c. The bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Out of the five clauses of Section 5, three clauses (i), (iv) and (v) are the basis of Section 11. Violation of any of the clauses renders the marriage void. So to take shelter under Section 11, violation of any of the three clauses of section has to be shown.

1.2.4.1. Section 5(1)

Section 5(1). This section is to read in the light of sastrik law. Under the old law there was a bar against a woman marrying a second husband while her first husband is alive unless custom permits such marriage. There was no such bar against men till some states passed laws for prevention of bigamous marriages so as to introduce the principle of monogamy.

1.2.4.1.1. Apastamba

Though there was no bar against men marrying a second wife while the first wife is alive but there was moral bar in this regard. Apastamba\textsuperscript{64} says that if a man has a wife who is willing and able to perform religious duties and who bears sons, he shall not take a second wife.

\textsuperscript{63} Central Cabinet has taken a decision to remove epilepsy-as ground for avoiding marriage.

\textsuperscript{64} Apas II 5, 11, 12-13.
1.2.4.1.2. Manu

One text of Manu65 seems to indicate that there was a time when a second marriage was only allowed to a man after the death of his former wife.

"Having thus kindled the sacred fires and performed funeral rites to his wife, who died before him, he may marry and again light the nuptial fire."

Another text of Manu66 says that a man is justified in taking a second wife only when a wife is barren, diseased or vicious.

1.2.5. The Principle of monogamy

1.2.5.1. Judicial Pronouncement

But now the principle of monogamy is enshrined in Sec. 5(1) with all legal vehemence and vigour. Violation of Sec. 5(1) renders the marriage void under Sec. 11, punishable under Section 17 read with Sec. 494 or 495 as the case may be. So violation of Section 5(1) is not only a matrimonial offence but also a criminal offence. The rigidity of Section 5(1) is such that in Santosh Kumari v Surjeet Singh67 the honourable court held that the court is not competent to grant permission to solemnize the second marriage during the subsistence of the first marriage, even where the request is made by the first wife to permit her husband to marry a second time. So a marriage in contravention of Section 5(1) is void even though it is not declared to be void68. Supreme Court in Yamuna v Anantha Rao69 has said that the fact that the husband has been treating the woman, as his wife and did not inform her of his first marriage is immaterial and the principle of estoppel cannot be invoked to defeat the provisions of the Act.

1.2.6. Prohibited relationship

65 Manu V 168 and IX 101,102.
66 Manu IX. 77-82, Yaj I. 73.
68 Shah v Kaneda 1979 Mah. L.J. 693
69 (1988) 1 HLR 375 (S.C).
Section 5 (iv) & (v). Clause (iv) speaks of "prohibited relationship" and clause (v) speaks of "sapinda relationship." There is exception to these two clauses in the shape of "custom and usage."

"Sapinda relationship" is defined under section 3(f) and "Prohibited relationship" under section 3(g) of the Act and as such are overriding by virtue of Section 4(a) of the Act.

1.2.6.1. Ancient Hindu Text

For academic purposes as per Gautma and Vasishta\(^\text{70}\) the prohibited degrees were four on the mother's side and six on the father's side. According to Vishnu, Yagnavalkya and Narada, five on the mother's side and seven on the father's side. All these writers add the restriction that the bride and the bridegroom must not be of the same gotra or parvara. Manu\(^\text{71}\) says:- A damsel....... who is neither a sapinda on the mother's side nor belongs to the same family on the father's side is recommended to twice born men for wedlock and conjugal union and that the sapinda relationship ceases with the seventh degree.

1.2.6.2. Judicial Interpretation

In Sudarsan Naskar v Amina Mondal\(^\text{72}\) The court held that it is not permissible to import the concepts of "Sapinda" and "prohibited relationship" according to the texts and rules of Hindu law, which under Sec 4(a) of the Act ceased to have effect in respect of matters provided for in the Act.

In Shakunatala Devi v Amar Nath\(^\text{73}\) it is said that if custom or usage permits marriage between persons in "prohibited degree of relationship" and "Sapinda relationship" as defined in Section 3(g) & 3(f) of the Act, such a custom is saved and the marriage would be valid.

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70 Gautma IV. 3, 5; Vas III 1, 2; Vishnu XXIV 10; Yaj. 152-53, Narada XII-7.
71 Manu V-60.
73 AIR 1982 Pb 221.
So far as these clauses are concerned, violation of any of the clause renders the marriage void under section 11 of the Act. But the great lacuna lies in section 11 of the Act in that it does not cover section 5(iii) which is a legal infirmity to be looked into.

1.2.8. Critical Evaluation


Section 5(iii). A Lacuna in Section 16. Section 5(iii) is amended by the Child Marriage Restraint Amendment Act (2 of 1978) whereby the age of the bride and bridegroom is prescribed as 18 and 21 years to have capacity to marry.

Under the old Hindu Law, prior to the Hindu Marriage Act, 1955 and notwithstanding the Indian Majority Act, 1875, even a minor, provided he attained the age of discretion was competent to marry. According to Kautilya and Manu the age of discretion is three years after she becomes marriageable. As per Kautilya the age of discretion was 12 years for the girl and 16 years for the boy. In Ram v Chand and Venkamma v Mahalaxmi it is said that such marriages below the age prescribed though restrained under law yet are not invalid.

Now by virtue of Section 5(iii) and Section 4(a) the ages fixed are mandatory and the condition must be fulfilled failing which it is a matrimonial offence punishable under section 18 of the said Act. But Section 11 or Section 12 is silent over Section 5(iii) and as such we have to depend upon the judicial pronouncements.

1.2.8.2. Judicial Pronouncements

In Suramma v Ganapathi the High Court held that a marriage solemnized in contravention of Section 15(iii) is void. However, In Venkataramana v State, the
honourable High Court of Andhra Pradesh, overruling AIR 1975 A.P. 193 and dissenting from *Krishna Devi v Tulsan Devi*\(^7\) held that the omission of clause (iii) of this section from the category of void marriages under Section 11 or voidable marriages under section 12 appears to be deliberate on the part of the legislature. Hence, the marriages in contravention of the age limits can neither be void nor voidable, though it is punishable.

It is really a paradox that this decision of the High court is confounding. It speaks three things:-

(i) It is not void (ii) It is not voidable (iii) However, it is punishable under Section 18.

The expression "it is not voidable" is legally significant. Any marriage which is voidable, is valid till it is declared void. So as a necessary corollary such marriage may be called valid. *In Duryodhan v Bengabati Devi*\(^7\) the Orissa High Court held that such marriage is valid.

The Supreme Court in *Lila Gupta v Laxminarayana*\(^8\) while discussing the nature of marriage under Section 15 Proviso of the Act also referred to the marriage solemnized in contravention of Section 5(iii) and it is said that when minimum age of the bride and bridegroom for a valid marriage is prescribed in condition (iii) of section 5, it would only mean personal incapacity for a period because every day the person grows and would acquire the necessary capacity on reaching the minimum age. Now before attaining the minimum age of a marriage is contracted, Section 11 does not render it void even though Section 18 makes it punishable. Therefore, even where a marriage in breach of a certain condition is made punishable yet the law does not treat it as void.

The Apex Court further said that if void marriages were specifically provided for it is not proper to infer that in some cases express provision is made and in some other cases voidness had to be inferred by necessary implication. It would be all the more hazardous in the case of marriage laws to treat a marriage in breach of a certain

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\(^7\) AIR 1972 Punj. 142 Raghu v Sriramulu AIR 1968 A.P. 315.

\(^8\) AIR 1978 S.C 1351.
condition void even though the law does not expressly provide for it. The Apex Court referred to Craies on statute law 6th Ed. Pages 263 and 264 as follows:-

"The words in this section are negative words, and are clearly prohibitory of the marriage being had without the prescribed requisites, but whether the marriage itself is void .......... is a question of very great difficulty. It is to be recollected that there are no words in the Act rendering the marriage void and I have sought in vain for any case in which a marriage has been declared null and void unless there were words in the statute expressly so declaring it .............". From the examination of these Acts two conclusions can be drawn. First, that there never appears to have been a decision where words in a statute relating to marriage, though prohibitory and negative, have been held to infer a nullity unless such nullity was declared in the Act.

Secondly; that, viewing the successive marriage Acts, if appears that prohibitory words, without a declaration of nullity, were not considered by the legislative to create a nullity.

Thus the Supreme Court while discussing Section 15 Proviso and referring to Section 5(iii) and child Marriage Restraint Act said that similarly a reference to Child Marriage Restraint Act was enacted to carry forward the reformist movement of prohibiting child marriages and while it made marriage in contravention of the provisions of the Child Marriage Restraint Act\(^81\) punishable, simultaneously it did not render the marriage void.

It would thus appear that void-ness of marriage unless statutorily provided for is not to be readily inferred.

Later on Rajasthan High Court in Durgabai v Kadurmal\(^82\) and Punjab High Court in Kiloba v Sabhachand\(^83\) has held that a wife is not entitled to any declaration that her marriage was void or voidable by reason of the contravention of Section 5(iii) as the legislature excepted that provision from the preview of Section 11 and 12 of the Act.

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81 Amendment of age in The Child Marriage Restraint Act was incorporated also in Section 5(iii) (Act 2 of 1973).
82 (1980) HLR 166 (Raj).
83 (1978) HLR 547 (Punj).
Comments. The judicial pronouncements have settled the law that marriage in contravention of Section 5(iii) is not void though punishable under Section 18 of the Act.

However, if we look from the angle of offence in terms of section 3(38) of the General Clauses Act 1897 which says, "Offence shall mean any act or omission made punishable by any law for the time being in force," it is definite that Section 5(iii) is clothed with some unlawful act if it is contravened. The Supreme Court kept the matter in suspense. It has not come out straightforwardly that marriage contracted in contravention of Section 5(iii) is still valid. There is bound to be a legal suspense about the status of children born out of such marriage i.e. children born during the "marriage minority" of their parents and children born during the "marriage majority" of their parents. It is suggested that this clause (iii) of Section 5 of the Act be amended by Explanation or Proviso that marriage in contravention of clause iii though punishable but is valid.

Section 16 also speaks of Section 12 and Section 12 is as follows:-

Section 12. Voidable Marriages.-

(1) any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely-

(a) that the marriage has not been consummated owing to the impotence of the respondent; or
(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or
(c) that the consent of the petitioner was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning respondent, or
(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.
(2) Notwithstanding any thing contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause, shall be entertained if

(i) the petition is presented more than one year after the force had ceased to
operate or, as the case may be, the fraud had been discovered;
(ii) the petitioner, has, with his or her full consent, lived with the other party to
the marriage as husband and wife after the force had ceased to operate or, as
the case may be the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless
the court is satisfied

(i) that the petitioner was at the time of the marriage ignorant of the facts
alleged;

or

(ii) that proceedings have been executed in the case of a marriage solemnized
before the commencement of this Act within one year of such commencement
and in the case of marriages solemnized after such commencement within one
year from the date of the marriage, and
(iii) that marital intercourse with the consent of the petitioner has not taken
place since the discovery by the petitioner of the existence of the said ground.

Section 16 speaks of legitimacy of children of voidable marriages under clause(2). In
this clause the expression usee! is "any child begotten or conceived before the
decree is made." In Section 12, clause (l)(b) expressly covers clause (ii) of Section 5
regarding various aspects of unsoundness of mind. Clause (l)(c) and (l)(d) of Section
12 is subject to clause (2) of the said section which starts with non-abstante clause
wherein prohibition is expressly provided for initiating proceedings after the
prescribed time and also expressly provided other prohibitions or negative provisions.

1.2.8.2. Child conception

Another Lacuna Particularly clause 1(d) of the Act expressly speaks of the child
(conception and not begotten) before the marriage and speaks of three alternatives.
(i) That she must be pregnant at the time of the marriage by some person other than the petitioner. So if she is pregnant by the petitioner~ then the petitioner is having the knowledge of pregnancy at the time of the marriage. In other words it is a case of conception before marriage and birth during wedlock. This situation is covered by the maxim. "Legitimatio per sub sequens Matrimonium" though there is no such law in India called legitimation by subsequent marriage, Section 12(1)(d) indirectly implies this doctrine.

(ii) Section 12(2)(b)(iii) speaks of the doctrine of condonation. Knowing fully well the state of affairs, still the marital intercourse took place with the consent of the petitioner. In other words the conception is accepted by the petitioner.

(iii) If the respondent is pregnant at the time of the marriage by some one else and the petitioner having such knowledge of conception did not have marital intercourse with the respondent, then what shall be the fate of the child so born because in such case the marriage will be declared null and void.

1.2.8.2.1. Judicial Pronouncement

The Supreme Court in Nanavati v Nanavati\(^84\) held that the mere fact of pregnancy prior to the marriage is not sufficient to grant a decree under this section and the husband has to prove beyond reasonable doubt that she was pregnant by some one other than the petitioner.

In Chanderasekhar v Rosaline Pushpamani\(^85\) both the spouses lived together even when the wife was in the 8th and 9th month of the pregnancy and even after the child was born there was co-habitation. It was held that the husband was not entitled to a decree under this clause as he condoned the conduct of his wife.

Now the real question that stares is that if the conception is before the marriage and is proved then the decree of annulment will be passed. The marriage becomes null and void as the conception of the child is not from the loins of the petitioner. So two situations arise.

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\(^{84}\) AIR 1965 S.C 364.
\(^{85}\) AIR 1970 Mad. 211.
(i) conception of child before marriage.
(ii) marriage as a condition precedent is satisfied.
(iii) the child is not from the loins of the petitioner.

Such case neither falls under the doctrine of subsequent marriage nor under the doctrine of condonation. But section 12 embraces four grounds for avoiding the marriage with many prohibitions and negative provisions. In view of the completeness of section 12 falling under section 16(2) the child shall be legitimate. This legal inconsistency needs to be removed because section 16 provides for annulment of marriage only but does not establish the legitimacy of the child so born. So it is suggested that section 16 needs to be amended because the basic object is to legitimate the children and clause 12(1)(d) appears to be doubtful to fall under section 16 in the situation explained above.

1.2.8.3. Secular Aspect of Marriage

Another Lacuna

Section 7. Section 16 speaks of Sections 11 and 12 and consequently Section 5 of the Act but is silent about Sec. 7 of the said Act. It is said that Section 5 is the secular aspect of marriage and Section 7 is the religious one and both are complementary and supplementary to each other. Rather Section 7 is overriding section 5 but section 7 does not find place in Section 16. Section 7 stipulates:-

Ceremonies for a Hindu Marriage

(1) A Hindu Marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the sapatpadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding.

If we go by the Section, we notice two special ingredients:-
(i) Solemnization of marriage with customary rites and ceremonies which means rites and ceremonies as approved by custom and usage and this expression has been defined under Section 3(a) of the Act that it must be continuous, and must have been followed for a longtime, must be certain and not apposed to public policy and as defined or laid down by the courts in a number of decisions.

(ii) But if in customary rites and ceremonies, there is sapataapadi then the marriage becomes complete and binding when the seventh step is taken.

The stress is on customary rites and ceremonies. Custom should not be differentiated from sastrik ceremonies. It means that there are numerous ceremonies in Graha sutras and what ceremonies are adopted by the community, tribe etc. out of those sastrik ceremonies, have been taken as customary rites and ceremonies. Customary rites and ceremonies are not divorced from sastrik ceremonies. There also appears a word "Solemnization" which means to celebrate the marriage with proper ceremonies.

1.2.8.3.1. Judicial Pronouncement

In Babu Rao v State of Maharashtra\(^{86}\) the Apex Court spoke of proper ceremonies with the intention that the parties should be considered to be married. Merely going through certain ceremonies with the intention that the parties to be taken as married would not make these ceremonies either prescribed by law or approved by any established custom. The Apex Court held that if the marriage is not a valid marriage it is no marriage in the eye of law. The Supreme Court reiterated the same view in Kanwal Ram v H.P.Administration\(^{87}\), Priyabala Ghosh v Suresh Chandra\(^{88}\), and Gopal v State\(^{89}\).

The fundamental question that arises is that if customary rites and ceremonies are not performed or some ceremonies not approved by established custom are not performed, then what will happen to the marriage?

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\(^{86}\) AIR 1965 S.C 1564.
\(^{87}\) AIR 1966 S.C 614.
\(^{88}\) AIR 1971 S.C 1153.
\(^{89}\) AIR 1979 S.C 713.
Section 494 and 495 Lr.C. give the answer. The ingredients of the said Sections read with See. 17 of Hindu Marriage Act are

(i) Existence of the first wife or husband when the second marriage was celebrated.
(ii) The second marriage being void by reason of the subsistence of the first according to the law applicable to the person violating the provisions of the Section.
(iii) Marriage means valid marriage.

So the validity of marriage is fulfillment of all the conditions of Section 5 and compliance with section 7 of the Hindu Marriage Act, 1955. Now in Section 7, the word valid or void or voidable is not used and another expression "becomes complete and binding" is used.

Though it is used in clause (2) of Section 7, but it also applies to clause (1) of Section 7. So if the expression "becomes complete and binding" does not operate i.e. if the ceremonies are not performed as per established custom, then the marriage does not become complete and binding. The dictionary meaning of "complete" is "brought to an end", "concluded," "fully carried out," "to make whole or perfect." The dictionary meaning of "binding" is "imposing an obligation." Combining the two, we can say that if the marriage is solemnized with customary rites and ceremonies, it becomes complete and binding; failing which there is no marriage in the eye of law.

The next question is that if a child is born in "not complete and binding marriage," what will be the status of such a child. The second marriage is performed but the customary ceremonies are lacking. Even if it is assumed that the marriage is void, then such expression should have found place in Section 11 of the Act and then it would have the benefit of Section 16 of the Act and the child so born should have been considered legitimate for the purpose of Section 16.

It is suggested that Section 11 should be read as follows:-
"Any marriage, solemnized after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto against the other party, be so declared by a decree of nullity if it contravenes anyone of the conditions specified in clauses (i), (iv) and (v) of Section 5 and non compliance with ceremonies approved by established custom as stipulated in Section 7."

Another Lacuna

1.2.8.4. Dissolution of marriage

The next question arises in regard to Section 15 of the Hindu Marriage Act.

Section 15. Originally the Sections was that "when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."

Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage at least one year has elapsed from the date of the decree in the court of the first instance.

1.2.8.4.1. Judicial Pronouncement

Section 15 contemplates that the spouses who have obtained a decree of divorce should not and would not rush to marry again and thus the doctrine of Lis pendent lite and the doctrine of Locus Poenitentiae were incorporated in this provision. So the Proviso contained a prohibition and such prohibition if violated was held to render the marriage void as held in Lilavathi Gupta v Laxmi Narain90 and Umacharan Roy v Kajal Roy91. However this proviso was omitted, by Act 68 of 1976, Section 19. So now with the omission of the Proviso, the divorced parties can marry again subject to the prohibition in the Act itself.

90 ILR (1969) 1 All 92.
91 AIR 1971 Cal. 307.
However, there was a detailed discussion on Section 15 in *Lila Gupta v Laxmi Namin*\(^92\) wherein the matter came in appeal from *Allahabad ILR (1969) 1 All* 92. But by that time the Proviso to Section 15 was omitted by Act 68 of 1976. The Supreme Court held that a marriage contracted in contravention of or violation of the Proviso to Section 15 is not void but merely invalid not affecting the core of marriage and the parties are subject to a binding tie of wedlock flowing from the marriage. The Supreme Court further held that if a child is born in a marriage in contravention of Proviso to Section 15, he would have no protection under Section 16 of the Act.

Since the Proviso is omitted, it clearly shows that the parties, whose marriage is dissolved, can contract marriage soon thereafter provided of course the period of appeal has expired. But the Supreme Court reaffirmed the warning as given in *Chandra Mohini v Avinash Prasad*\(^93\)

In that case the decree of divorce was granted by the High Court reversing the dismissal of the petition of the husband by the trial court. Soon thereafter, the husband contracted second marriage. After sometime the wife moved for obtaining special leave to appeal under Article 136, which was granted. The husband thereafter moved for revoking the leave. While rejecting the petition for revoking the leave Wanchoo J (as he then was) speaking for the court observed that even though it may not have been unlawful for the husband to have married immediately after the High court's decree as no appeal as of right lies from the decree of the High Court to this court, still it was for the respondent to make sure whether an application for special leave had been filed in this court and he could not deprive the wife, by marrying immediately, of the chance of presenting a special leave petition to this court. If a person does so, he takes risk and could not ask the court to revoke the special leave on that ground.

The Supreme Court then referred to the case of *Marsh v Marsh*\(^94\) wherein the Privy Council held that the statute prohibited marriage by parties whose marriage was dissolved by a decree of divorce during the period of limitation prescribed for the

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\(^92\) AIR 1978 S.C.1351.
\(^93\) AIR 1967 S.C 581.
\(^94\) AIR 1945 P.C 188.
appeal. The contention was that such marriage in violation of a statutory prohibition is void. Negativing this contention it was held that the decree absolute was a valid decree and it dissolved the marriage from the moment it was pronounced and at the date when the appeal by the intervener abated, it stood un-reversed. The fact that neither spouse could remarry until the time for appealing had expired, in no way affects the full operation of the decree. It is a judgement in rem and unless and until a court of appeal reversed it, the marriage for all purposes is at an end. So the court held that an incapacity for second marriage for a certain period does not hilve effect of treating the former millTiage as subsisting. During the period of incapacity the parties cannot be said to be the spouses within the meaning of clause (i) of Section 5. Thus such a marriage within the period of prohibition is invalid.

Now if a person remarries during the limitation period when the appeal is pending and a child is born, then what will be the status of such a child when such marriage is legally considered as invalid. Such provision is also not there at all. So it is suggested that Supreme Court in Chander Mohini v Avinash Parshad by way of passing reference said that the question while child born of new wedlock would become legitimate or not need not be considered as Section 16 may come to the aid of the new child. In view of this obiter dicta it is necessary that Section 16 be amended to cater for such eventuality if it arises due to contravention of Section 15 and the child is born. Clause 4 to Section 16 can be added to cover such contingency.

Birth of a Child out of Wedlock Marriage Laws (Amendment) Act, 1976 provides legitimacy to children of a marriage hit by Section 11 of Hindu Marriage Act. There must be a marriage which would be hit by the provisions of the Act. When there is no proof of solemnization of marriage, the provisions of Section 16 of the Hindu Marriage Act as amended by Marriage Laws (Amendment) Act, 1976 is not attracted. So Section 16 would not cover a relationship resulting from any other arrangement than the marriage. So a child born out of wedlock is "Filius Nullies." It is recognized as a child of the mother as per Section 3(1)(j) Proviso of the Hindu Succession Act 1956 but not under Section 16 of the Hindu Marriage Act 1955.

95 AIR 1967 S.C 581.
Section 16 is, indeed, an attempt to legitimate illegitimate children with an object to confer some specific property rights but subject to marriage as condition precedent. In other words it is on account of valid or void marriage that children are classified as legitimate or illegitimate. In other words the social status and respective rights of children is determined by the act of their parents. If they have entered into a valid marriage the children are legitimate but if the parents commit a folly as a result of which a child is conceived, such child who comes into existence as an innocent baby is labeled as illegitimate.

Its innocence, its no-fault is sacrificed at the alter of marriage. Relationship created by a Hindu marriage is treated to be eternal marriage among Hindus is distinguished as a sacrament and is, therefore, most solemn relationship of the Hindu polity. It is understandable but what is not understandable is that whether it is a civilized act to punish the child for the sin committed by its parents. Society has punished such child by tagging a social stigma to it permanently and law has punished it by depriving it of the rights which it would have otherwise enjoyed, had their parents not committed an unethical act. Their adulterous act resulted in adulterine bastardy. Law ignored the former but recognized the latter. Is it to save morality that immorality has gone unpunished?

Section 16, no doubt, is a bold attempt but it is not all embracing and thus can be appreciated only as a half-baked provision. Law is needed in the country like the Legitimacy Act of England, 1959, status of children Act 1969 of New Zealand, Uniform parentage Act of U.S.A., of course on the foundation of Hindu Social ethos and also on the touchstone of the maxim that child is divine. The truly realized soul is one who does not discriminate between a friend and a foe, indifferent and neutral, hater and a relative, saint and a sinner. (Geeta 6-9)

Let us rectify our acts of sin and let compassion prevail. Let it not be too late. It is appropriate to quote children poet Gabriel Mistral.

We are guilty of many errors and faults
But our worst crime is abandoning the children
Neglecting the foundation of life
Many of the things we need can wait,
The child cannot
Right now is the time,
his bones are being formed
His blood is being made
And his senses are being developed
To him we cannot answer
"Tomorrow" "His name is today..........." Dare we answer "Tomorrow."

1.3 Hindu Adoption and Maintenance Act, 1956

The topic of maintenance of an illegitimate child shall be best served and recognized if we look to the child from the angle that it is life's longing for itself. This is what KHALIL GIBRAN, the Prophet has said, "your children are not your children. They are the sons and daughters of life's longing for itself."

Sastriek Law. By way of introduction, we have to look to the past as to how our sastriek law dealt with the maintenance of an illegitimate children. In Hindu Law the illegitimate child and putative father and natural mother have never been considered as stranger to each other. The putative father of a dasiputra can exercise all paternal power over the illegitimate child and he can exercise some control over the mother. Before and after 1955 the mother has been recognized as natural guardian of her illegitimate children. During the lifetime of the mother the putative father was not entitled to guardianship of the illegitimate children though his obligation to maintain them has always been recognized.

The modern Hindu Law recognizes the putative father as natural96 guardian of his illegitimate children after the death of the mother. His obligation to maintain97 them has now been given statutory recognition. Under Hindu Law an illegitimate child has

96 Hindu Minority and Guardianship Act, 1956, Section 6.
97 Hindu Adoptions and Maintenance Act, 1956, Section 20.
never been considered as filius Nullius. In some cases he has been considered to be a member of the family. Illegitimate sons under Hindu Law may be classified under two heads.

(i) an illegitimate son born of casual connection
(ii) an illegitimate son born of a dasi i.e. of a permanently and exclusively kept concubine.

The son in the former category was not considered to be the member of the father's family but he was entitled to maintenance against the father\(^{98}\). The same ought to be the position of the daughter. The illegitimate son of a dasi was considered to be a member of his father's family though not as coparcener, he has full rights of maintenance\(^{99}\). The dasiputra among sudras enjoyed still a higher place. His position was covered by special texts\(^{100}\). An illegitimate son has the status of a son and he is a member of his father's family although his rights are limited as compared to "Aurases" son\(^{101}\). Coming to the Codified Hindu Law, there are many provisions governing maintenance of illegitimate child.

1.3.1. Section 20,21,22

Section 20. Maintenance of Children and Aged Parents

(1) Subject to the provisions of this Section a Hindu is bound, during his or her life time, to maintain his or her legitimate or illegitimate children and..............

(2) A legitimate or illegitimate child may claim maintenance from his or her father so long as the child is a minor.

(3).................................

Explanation. In this Section "parent" includes a childless step mother.

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98 Rahi v Govind ILR 1 Bom 97.
99 Mitakshra I. 12,3.
100 Manu IX-179; Yaj. II 133-134; Mitakshara 1-12; Dayabhaga IX, 28; Dattaka Chendrika V 30-31.
101 Vellayappan Chetty v Natarajan AIR 1931 PC 294.
Section 21. Dependants Defined

This section enumerates the persons who are to be considered as "Dependants," whether related by blood or by marriage, to a deceased male or female Hindu. Section 21 (viii) says, "his or her minor illegitimate son, so long as he remains a minor." Section 21 (ix) says "his or her illegitimate daughter, so long as she remains unmarried."

Section 22 states that the heirs of the deceased male or female are bound to maintain the dependent from out of the estate inherited by them from the deceased and provides certain guidelines for the purpose of providing maintenance to the dependants.

Reading that three sections together, the following legal propositions come forth:

(i) A Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children.
(ii) The maintenance is only up to the minority of the child.
(iii) Minor illegitimate son is a dependant so long as he remains minor.
(iv) Minor illegitimate daughter so long as she remains unmarried.
(v) The heirs of the deceased are bound to maintain the dependants and dependants have been defined under Section 21.
(vi) That maintenance by the heirs of the dependents is subject to guidelines given in Section 22 itself.

Now these sections and their scope is to be seen as judicially interpreted.

1.3.2. Judicial Interpretation

Muktabai v Kamalakshi In this case the question arose as to whether the provision is retrospective in operation. The court held that it cannot be disputed that the right to maintain his or her legitimate or illegitimate children during his or her lifetime but Sec. 0 is a departure from the old Hindu law so far as the maintenance is

102 AIR 1960 Mys. 182.
concerned and the provision is prospective in operation. Section 21 and Section 22 speak of the dependents and are to be maintained even by the heirs of the deceased Hindu.

**Ammireddy Ramamoorthi v Ammireddy Sitharamamma**\(^{103}\). The court held that Section 21 and 22 do not bear on the pre-existing rights of maintenance holders. The Act does not abridge those rights and leaves them untouched. Consequently, a right of maintenance, which a concubine had acquired against the estate of her deceased paramour prior to the Act, is not nullified by the Act, since Section 21 and 22 leave the estates of Hindus whose death occurred before the Act unaffected. Those sections apply only to estates of Hindus whose death overtakes after the commencement of the Act.

The court further held that an illegitimate son is not entitled to only a compassionate rate of maintenance but to maintenance as long as he lives in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. The honourable court followed AIR 1953 S.C 433\(^{104}\). It is a case prior to the commencement of the Adoptions and Maintenance Act, 1956, as wherein illegitimate son has maintenance for life and under the Act, now it is only up to his or her minority.

**Kalla Maistry v Vanniammal**\(^{105}\). In this case the point agitated was whether children born of adulterous intercourse are entitled to claim maintenance. The court held that the rule of Hindu law that illegitimate children born of adulterous intercourse would not be entitled to rank as heirs of sudras applies only to maintenance as heirs and does not apply to a claim for maintenance as illegitimate children.

**Gopal Rao v Sitharamamma**\(^{106}\). This is a case in appeal from Andhra Pradesh AIR 1961 A.p. 131(EB.) wherein the point agitated is of vested rights of maintenance prior to the Hindu Adoptions and Maintenance Act.

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103 AIR 1961 AP. 131-F.B.
104 Ratna Raja Kumar v Narayana Rao.
The Supreme Court stated that section 21 and 22 read with section 4 of the Hindu Adoptions and Maintenance Act, 1956 do not destroy her right of maintenance out of the estate of a deceased Hindu which had vested in her under the Hindu Law in force at the time of his death before the commencement of the Hindu Adoptions and Maintenance Act 1956;

The Supreme Court further said that the right of the illegitimate sons of a sudra and his Brahmin concubine of maintenance during their lives from the estate of the sudra, which vested in them on his death in 1948, and the corresponding liability of his heirs to pay maintenance, are not affected by sections 21 and 22 of the Act as their claim was not founded on any right arising after the commencement of the Act.

**J. Mafatlal v A.N. Mafatlal**\(^{107}\). In this case Section 20, 21 and 22 of the Act have been agitated and the issues that were examined were whether these provisions are retrospective. In this case an illegitimate daughter claimed maintenance from the heirs of the deceased who died prior to the commencement of the said Act. The court held that the provisions are not retrospective and prior to the Act she had no vested interest under Hindu Law.

**K.M. Adam v Gopalakrishan**\(^{108}\). It is a case of an illegitimate minor son of Mohammedan by a Hindu Concubine and Section 20(1) and (2) were invoked. It was challenged that the Act is not applicable to the Muslim. The honourable court after going through the section read with explanation held that the child cannot be deprived of his right. There is nothing in Section 20(2) to construe it in such a way that the right conferred under sub-See. (2) is to be merely a corollary of sub-section (1). Held the Section is applicable.

**A.B.S. Krishna Kumari v A. Varalakshmi**\(^{109}\). In this case Section 20, 28 of the Hindu Adoptions and Maintenance Act, 1956 and Section 39 of Transfer of Property Act 1882 were invoked. The honourable court held that under Section 20, a Hindu, he be a male or female, is bound to maintain his legitimate and illegitimate children so long as they are minor. The right of legitimate and illegitimate children of a person

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107 AIR 1968 Bora; 314.
who come within the purview of section 20 of the Act, is a personal right vested in them, with a corresponding legal obligation on the person bound to maintain them as a personal obligation. Reading Section 20 with section 28 and section 39 of the Transfer of Property Act it is held that there is nothing in the Act excluding the application of section 39 of the Transfer of Property Act to such cases, the court cannot refuse to create a change.

This Act abolishes all distinctions between illegitimate sons, otherwise it is virtually a reproduction of the old law laid down in the Smriti Texts with reference to the personal obligation to maintain minor children. The changes brought in are that in addition to son, the daughter is also placed under the personal obligation and further this personal obligation is both on the parents as the words used "his or her" indicate.

So far as daughter is concerned Section 20(2) is to be read with Section 5(iii) of Hindu Marriage Act 1955, wherein the age of the girl is fixed as eighteen years. So legally speaking she is to be maintained up to the age of minimum 18 years or later as the case may be.

In Wali Ram v Mukhtiar Kaur\textsuperscript{110}. It is held that so far as the unmarried daughter is concerned, the liability of her parents has no relation to her age and it continues so long as the daughter is unable to maintain herself. In Chander Kishore v Nand K. Chand\textsuperscript{111} it is held that an obligation to maintain an unmarried daughter includes an obligation to provide her marriage expenses in view of the definition of "maintenance" under Section 3(b)(i) and Section 3(b)(ii) of the Act.

So Section 20, 21, 22 augmented by Sections 23 to 28 of the Act have given a comprehensive meaning to the Act. The legislature has rather improved upon the old Hindu Law. Presumably that deprivation under Hindu Succession Act 1956 is compensated under the Hindu Adoptions and Maintenance Act, 1956. If it is so then it is a very poor compensation.

\textsuperscript{110} AIR 1969 Pn. 285
\textsuperscript{111} AIR 1975 Delhi 175.
"Maintenance is not a concept of right. It is a concept of compassion to save the child from seeking sanctuary on the pavements and sustenance from the unguarded premises. It is to save the child from being becoming a parasite on the society either as a helpless child or a juvenile delinquent.

1.3.2. Section 125 Cr.P.C. 1973

However, this Enactment has to be read with Section 125 Cr. P. C. which is an antivagrancy Act and is applicable to all persons included in the Act without any consideration of personal law and this provision is an independent provision of personal law of any community or religion.

This provision is on a different footing than the Hindu Adoptions and Maintenance Act, 1956. This Act casts a personal obligation on the parents to maintain their, legitimate and illegitimate children, whereas section 125 is riddled with many riders such as:-

(1) The person against whom the maintenance is sought must have sufficient means.
(2) The child seeking maintenance must show that he is neglected or refused to be maintained.
(3) That the child is unable to maintain itself.

1.3.2.1. Judicial Interpretation

In Nanak Chand v Chandra Kishore\(^\text{112}\) the Supreme Court spoke about the meaning of the word "child" that if the concept of majority is imported into the Section (old Section 488), a major child who is an imbecile or otherwise handicapped will fall outside the purview of this section. The emphasis is always on inability to maintain himself. Of course now this lacuna is removed under section 125 (1)(c)

\(^{112}\text{AIR 1970 S.C. 446.}\)
Regarding "Sufficient means". The expression should not be confined to the actual pecuniary resources but should have reference to the earning capacity\textsuperscript{113}.

A "Neglect or refusal" to maintain may be by words or by conduct. It may be express or implied\textsuperscript{114}. Neglect or refusal may mean something more than mere failure or omission but where there is a duty to maintain, such as, in the case of a child who has no will or volition of its own, mere failure or omission may amount to neglect or refusal\textsuperscript{115}.

The expression "unable to maintain itself" is an inability which has reference to the absence of sufficient physical and mental development in the child rendering it, in consequence, unable to earn its living by its own efforts\textsuperscript{116}.

**Illegitimacy of the child.** In this regard the statutory provision is self-explanatory. The section says:-

Order for Maintenance of Wives, Children and Parents

**Section 125(1).** If any person having sufficient means neglects or refuses to maintain-

(a).................................

(b) his legitimate or illegitimate minor child, whether married or not, unable to maintain itself, or

(c) his legitimate or illegitimate child (not being a married daughter) who has attained majority; where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or

(d).................................

In this above said provision the word "His" is used which refers to "father". So a child is entitled to maintenance from the father, whether it is his legitimate or illegitimate

\textsuperscript{113} Kandaswami Moopan v Angammal AIR 1960 Mad. 348, Chander Prakash v Shila Rani AIR 1968 Delhi 174.
\textsuperscript{114} Bhikaji v Maneckji (1907) 9 Bom. L.R. 359.
\textsuperscript{115} Chand Begam v Hyderbaig 1972 Cr L.J. 1270.
\textsuperscript{116} AIR 1965 All 125
child. It is the duty of the court, before making the order under this section, to find definitely, though in a summary manner, the paternity of the child\textsuperscript{117}.

When the question of illegitimacy arises and the paternity is doubtful, it is for the woman claiming maintenance on behalf of her child to prove that the child would only have been born to the alleged father under the circumstances of exclusive relationship\textsuperscript{118}.

So the foundation of the maintenance of illegitimate child is the paternity. Its right of maintenance is independent of the right of maintenance of its mother and consequently is not affected either by reason of bad character of the mother\textsuperscript{119}.

The object of the proceedings for maintenance is to prevent vagrancy by compelling a person to maintain\textsuperscript{120}. It is not a penal provision but is only intended to for the enforcement of duty to save from default which may lead to vagrancy\textsuperscript{121}. So if the illegitimate child proceeds under Section 125 Cr. P. C. he has to cross all the riders. If it proceeds under the Hindu Adoption and Maintenance Act, 1956, then the obligation either on the male or female imposed by the Act to maintain is without reference to the possession of any property\textsuperscript{122}.

1.3.2.2. Summing up

In short, the Hindu Adoption and Maintenance Act, 1956 is echoing the old sastrik Law where it is said that illegitimate sons, when not entitled as heirs are to be maintained and the maintenance for their lives may be secured by a charge on the family estate\textsuperscript{123}.

\textbf{Manu}\textsuperscript{124} has said that the aged parents, a virtuous wife and an infant child must be maintained even by doing hundred misdeeds.

\footnotesize{\textsuperscript{117} AIR 1960 S.C 882.  
\textsuperscript{118} 1981 Cr. L.J. 674.  
\textsuperscript{119} AIR 1960 Raj. 255.  
\textsuperscript{120} AIR 1963 S.C. 1521.C  
\textsuperscript{121} (1963)1 Cr.L.J. 131, AIR 1959 Mad 396, AIR 1917 Lah. 213.  
\textsuperscript{122} Challaiyan v Sathia Krishnan AIR 1982 Mad. 148.  
\textsuperscript{123} Mitakshara I, 12,3, Ananthayya v Vishnu (1894) 17 Mad. 160}
Brihaspati\textsuperscript{125} has said that a man may give what remains after the food and clothing of the family, the giver who leaves his family naked and unfed may taste honey at first but afterwards finds it poison.

Thus Hindu Adoption and Maintenance Act, 1956 is fairly in accordance with Geneva Declaration 1924 that "Mankind owes to the child the best it has to give." But still there is scope for improvement in terms of section 13 of the Hindu Minority and Guardianship Act, 1956 which speaks of, "\textit{welfare of minor to be of paramount consideration}" and Article 21 of the Constitution which speaks of life as "dignified life" and the constitutional law being the Supreme Law needs to be looked into from the angle of the dignity of the child.

2.0. PART:B

2.1 CONSTITUTIONAL IMPERATIVES

The Constitution of India is the Supreme Law and Chapter III is the soul of the Constitution. It is said that any law that asserts against the provisions of Chapter III is ultra vires of the constitution and any law in this regard must be consistent with the spirit of fundamental rights that govern every aspect of human life.

Article 13 had a magnificent role in the constitutional development. It deals with "Laws inconsistent with or in derogation of the fundamental rights." Having asserted its significance in serving as balance wheel between the power of judicial review and constitutional development, this Article retains itself yet as the conscience of Part III of the constitution.

When pressed into service this Article has a double role. On the first hand, this Article is the sheet anchor of the valid laws or any provision or provisions thereof. On the other hand, this Article is a deaths blow to the laws or provisions thereof found to be

\textsuperscript{124} Mitakshara II-175
\textsuperscript{125} Brihaspati XV-3.
invalid either as contravening any provision of Part III of the constitution or otherwise unreasonable or ultra vires.

2.1.1 Article 13 stipulates

(1) All laws in force in the territory of India immediately before the commencement of this constitution, in so far as they are inconsistent with the provisions of this part, shall, to the extent of such inconsistency be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this Article, unless the context otherwise requires,-

(a) "Law" includes any ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law.

(b) "Laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this constitution........"

(4) Nothing in this Article shall apply to any amendment of this constitution made under Article 368\textsuperscript{126}.

Thus any law which is inconsistent with the fundamental rights is ultra vires and no law or legal principle can prevent a court from giving remedy for violation of fundamental rights once it is found to exist\textsuperscript{127}.

2.1.2 Preamble

Along with Article 13, we have to look to Preamble because the preamble of a statute conveys the general object and intention of legislature in enacting it. It sets out the main objectives which the legislation intended to achieve\textsuperscript{128}. It is a sort of introduction

\textsuperscript{126} Inserted by the constitution (Twenty fourth Amendment) Act, 1971.
\textsuperscript{127} Yusuf Ali Abdulla Fazalbhoy v MIS Kasbekar AIR 1982 Born. 135.
\textsuperscript{128} Golak Nath v State of Punjab AIR 1967 S.C 1643.
to the statute and is usually very helpful to understand the policy and legislative intent. It is a way to open the mind of the makers of the Act\textsuperscript{129}.

PREAMBLE

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR\textsuperscript{130} DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, Social, economic and political;
LIBERTY of thought, expression, belief, faith and worship;
EQUALITY of status and of opportunity;
and to promote among them all;
FRATERNITY assuring the dignity of individual and the unity and integrity\textsuperscript{131} of the nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

In the Preamble, four expressions, "socialist secular," "Justice, social," "Equality of status," "Dignity of individual" are very relevant and have a far reaching bearing on an illegitimate child as in a sovereign socialist secular democratic Republic, the illegitimate child is denied social Justice, equality of status and dignity of individual when the constitution is outcome of a "solemn resolve." The expression "solemn resolve" can be aptly translated as "Dharma." or "sacred assurance of guarantee." Then from here we go to the various Articles of the constitution concerning the child and the various enactments that flow out of the mandate of the constitution that govern the child.

2.1.3. Article 14

\textsuperscript{129} Re Berubari Union AIR 1960 SC 845.
\textsuperscript{130} Words, socialist secular are inserted by the constitution (Forty second Amendment) Act, 1976.
\textsuperscript{131} Words, "and integrity" are inserted by the constitution (Forty second Amendment) Act, 1976.
Equality before law- "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

This Article is based on the inspiration provided by the English conception of the rule of law and the 14th Amendment of the Constitution of the United States of America. Article 14 which refers to "equality before law" is an expression of English Common Law and "Equal protection of laws." owes its origin to the 14th Amendment of Constitution of United States of America, indicates these as separate concepts by the use of the disjunctive.\(^ {132}\)

2.1.3.1. Judicial Interpretation

Nagpur High Court put this concept similarly but in a different way stating that while both the expressions "Equality before the law" and "equal protection of the laws" aim at establishing what may be regarded as equality of legal status for all, there is some difference between those expressions. The former expression is somewhat a negative concept implying the absence of any special privilege in favour of an individual, while the latter is a more positive concept implying equality of treatment in equal circumstances.\(^ {133}\) The Supreme Court stated that "Equality before law" is a negative concept; "Equal protection of law" is a positive one. The former declares that everyone is equal before law; that no one claims special privileges and that all classes are equally subject to the ordinary law of the land; the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed.\(^ {134}\)

However, the Supreme Court in one shape or the other discussed the statutes in the light of Article 14 and in Ram Krishna Dalmia\(^ {135}\) v Justice Tandulkar the Supreme Court again summarized the principles to be borne in mind by the court, when called upon to adjudge constitutionality of any particular law under this Article.

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133 AIR 1951 Nag. 58 (F.B.).
134 AIR 1960 S.C. 1125
A close perusal of the Supreme Court decisions would show that a statute which may come up for consideration on a question of its validity under Article 14 may be placed in one or other of the following five classes:-

(i) A statute may itself indicate the persons or things to whom the provisions are intended to apply and the basis of classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances known to or brought to the notice of the court. In determining the validity or otherwise of such a statute the court has to examine whether such classification is or can be reasonably regarded as based upon some differentia which distinguishes such persons or things grouped together form those left out of the group and whether such differentia has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply to a particular person or thing or only to a particular class of persons or things. Where the court finds that the classification satisfies the test the court will uphold the validity of the law.\(^{136}\)

(ii) A statute may direct its provisions against one individual person or thing or to several individual persons or things but no reasonable basis of classification may appear on the face of it or be deducible from the surrounding circumstances or matters of common knowledge. In such a case the court will strike down the law as an instance of naked discrimination.\(^{137}\)

(iii) A statute may not make any classification of the persons or things for the purpose of applying its own provisions but may leave it to the discretion of the Government to select and classify persons or things to whom its provisions are to apply. In determining the validity or otherwise of such a statute, the court will not strike down the law out of hand only because no classification appears on its face or because a discretion is given to the government to make the selection or classification but will go on to examine and ascertain if the statute has laid down any principle or policy.

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for the guidance of the exercise of discretion by the government in the matter of selection or classification. After such scrutiny the court will strike down the statute if it does not lay down any principle or policy for guiding the exercise of discretion by the government in the matter of selection or classification, on the ground that the statute provides for the delegation of arbitrary and uncontrolled power to the government so as to enable it to discriminate between persons or things similarly situate and that, therefore, the discrimination is inherent in the statute itself. In such a case the court will strike down both the law as well as the executive action taken under such law.138

(iv) A statute may not make a classification of the persons or things for the purpose of applying its provisions and may leave it to the discretion of the government to select and classify the persons or things to whom its provisions are to apply but may, at the same time, lay down a policy or principle for the guidance of the exercise of discretion by the government in the matter of such selection or classification, the court will uphold the law as constitutional.139

(v) A statute may not make a classification of the persons or things to whom their provisions are intended to apply and leave it to the discretion of the government to select or classify the persons or things for applying those provisions according to the policy or the principle laid down by the statute itself for guidance of the exercise of discretion by the government in matter of such selection or classification.

(vi) If the government in making the selection or classification does not proceed on, or follow such policy or principle, in such case the executive action but not the statute should be condemned as unconstitutional.140

Before, 1974, the legal stress was on reasonable classification and this doctrine has been incorporated in the Article not by the framers of the constitution but by judicial decisions and after these judicial decisions the Article reads like this:-

"The state shall not deny to any person equality before the law or equal protection of the laws provided that nothing herein contained shall prevent the state from making a law based on or involving a classification founded on an intelligible differentia having a rational relation to the object sought to be achieved by the law.\textsuperscript{141}

However, in \textit{E.P. Royappa v State of Tamil Nadu}\textsuperscript{142} the Supreme Court laid bare a new dimension of Article 14 and said that Article 14 and 16 strike at arbitrariness in state action and ensure fairness and equality of treatment. They require that state action must be based on valid relevant principles applicable alike to all similarly situate and it must not be guided by any extraneous or irrelevant consideration because that would be denial of equality.

This view of the Supreme Court or the new dimension given to Article 14 was repeated in \textit{Maneka Gandhi v Union of India}\textsuperscript{143} and in \textit{R.D Shetty v Airport Authority}\textsuperscript{144} and \textit{Ajay Rasia v Khalid Mujib}\textsuperscript{145}.

In Ajay Hansia's case the supreme court formulated the claim thus\textsuperscript{146} : "The true scope and ambit of Article 14 has been the subject matter of numerous decisions..... ..... It is sufficient to state that the content and reach of Article 14 must not be confused with the doctrine of classification. Unfortunately, in the early stages of evolution of our constitutional law, Article 14 came to be identified with the doctrine of classification because the view taken was that Article forbids discrimination and there would be no discrimination where classification making the differentia (sic) fulfils two conditions, namely, (i) that the classification is founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia has a rational relation to the object sought to be achieved by the impugned legislative or executive action. It was for the first time in \textit{E.P. Royappa v State of Tamil Nadu} that this court laid bare a new dimension of Article 14 and pointed out that that Article was of highly activist magnitude and it embodies a guarantee against arbitrariness—we cannot countenance any attempt to

\textsuperscript{142} AIR 1974 S.C. 555.
\textsuperscript{143} AIR 1978 S.C. 597.
\textsuperscript{144} AIR 1979 S.C. 1628.
\textsuperscript{145} AIR 1981 S.C. 487.
\textsuperscript{146} Ajay Hansaria AIR 1958 S.C. 414.
truncate its all embracing scope and meaning, for to do so would be to violate its activists magnitude. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined, within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies. One belongs to the rule of law in a republic and while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that is unequal both according to political logic and constitutional law and is, therefore, violative of Art. 14.

Now the problem of the illegitimate child is that whether it satisfies the test of reasonable classification or not and secondly whether it falls within the ambit of arbitrary legislation as it is itself a symbol of innocence and its birth is due to the fault of its parents and it is being impleaded as an accused and punished.

2.1.4. Article 15(3)

The imperatives of Article 14 and 15 project equal opportunity for all. 'Each according to his ability' is of pervasive validity and the philosophy and pragmatism of Universal equal opportunity is the constitutional creed. Yet institution wise preferential treatment may still be consistent with the rule of equal opportunity where it is calculated to correct an imbalance or handicap and permit equality in the largest sense.  

Article 14 guarantees the general right of equality as the expression used therein is "any person," whereas Articles 15 and 16 are instances of the same right in favour of citizens in some special circumstances. However, Article 15 clause (3) is constitutionally significant. It says:-

"Nothing in this Article shall prevent the state from making any special provision for women and children."

147 Jagdish Saran (Dr.) v Union of India AIR 1980 S.C. 820.
This clause should be read in the light of the principle of "Correction of imbalance wherever exists to ensure equality. Women and children are considered vulnerable, weak and invertebrate and as such a constitutional mandate is provided in Article 15 and constitutional mandate is not subject to Article 13. The constitutional position as by now settled is that a constitutional amendment Act passed in exercise of the constituent power is not law under Article 13 and it can only be declared invalid if it damages the basic or essential features of the basic structure of the constitution".

So Article 15(3) covers any provision governing women and children. It may be for betterment or it may be to save them from oppression or it may be as a social reform as needed but not as a whim or caprice. The following judicial decisions illustrate this notion.

2.1.4.1. Judicial Interpretation

Anjali v State of West Bengal\(^{149}\). It is a case of refusal of admission to the appellant to a college where both male and female students are studying. This refusal of admission was challenged under Article 15(1) and 15(3) of the constitution. The honourable High Court held that on facts, the refusal to admit the appellant to a mixed college was not malafide or based solely on the ground that she was a woman, but because under a scheme of better organization of both male and female education at that place, which covered development of the women's college as a step towards the advancement of female education, it was considered reasonable to restrict further admission of women students to the mixed college and hence there was no discrimination within Art. 15(1). The High Court further explained Art. 15(3) in terms of the expression "For" used in the clause. It means concerning women and favourable to women but the clause 15(3) should be read only as a provision to Art. 15(1) and 15(2) to forbid discrimination and special law if needed to remove the decimation against women on the grounds stated in the Article.

Dattatraya v State of Bombay\(^{150}\). In this case Provisions made in Section 10(1)(a) of Bombay Municipal Boroughs Act for reservation of seats for women and the rules made by the government with regard to the reservation of seats for their election to

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149 AIR 1952 Cal. 825.
150 AIR 1953 Bom. 311.
the Jalgaon Municipality was challenged. The High Court held that in construing a proviso one must not nullify the section itself. A proviso merely carves out something from the section itself but it does not and cannot destroy the whole section. Art. 15(3) is obviously a proviso to Art. 15(1) and proper effect must be given to the proviso. The proper way to construe Art. 15(3) is that whereas under Art. 15(1) discrimination in favour of men only on the ground of sex is not permissible, by reason of Art. 15(3) discrimination in favour of women is permissible and when the State does discriminate in favour of women, it does not offend against Art. 15(1). The constitution has permitted the State for such discrimination.

Ramchandra v State of Bihar\textsuperscript{151}. In this case Section 5(i)(v)(b) of Bihar Panchayat Samitis and Zila Parishad's Act 1961, governing Co-option of women to panchayat samiti, where no women elected was challenged as ultra vires. The High Court referred to Art. 15(1) and 15(3) and held that section 5(1)(v)(b) is a special provision and is covered under Art. 15(3). In interpreting clause (1) and (3) of Art. 15 as standing together, clause (3) operates in the nature of proviso to clause (1). The High Court followed:-

(i) Yusuf Abdul Aziz v State, AIR 1951 Bom. 470.
(iii) Dattatraya v State of Bombay AIR 1953 Bom. 311.

Shamsher Singh v State\textsuperscript{152}. In this case Art 15(3) and Article 16(2) were agitated as to whether Art 15(3) covers also Art 16(2). The High Court held that Articles 14, 15, 16, being the constituents of a single code of constitutional guarantees, supplementing each other, clause (3) of Art. 15 can be invoked for construing and determining the scope of Art 16(2). And if a particular provision squarely falls within the ambit of Art 15(3), it cannot be struck down merely because it may also amount to discrimination solely on the ground of sex. Only such special provision in favour of women can be made under Art 15(3) which are reasonable and do not altogether obliterate or render illusory the constitutional guarantee enshrined in Art 16(2). Their

\textsuperscript{151} AIR 1966 Pat. 214
\textsuperscript{152} AIR 1970 Pb. 372 (F.B.).
lordships held that the provisions of clause (3) of Art 15 cannot be invoked for restricting the scope of application of clause (2) of Art 16 of the constitution.

Savitri v K.K. Bose\textsuperscript{153} It is a case where the excise authorities preferred women applicants for the issue of excise license. Art 15(1) and 15(3) were invoked. The High Court interpreted Art 15(3) in the light of the expression. "Provision" used in the clause. The word "provision" includes within its meaning a legislative enactment, a rule, a regulation and a general order and it is in this sense it has been used in Art 15(3). What Article 15(3) contemplates is the making of special provision for women as a class and not the making of a provision for an individual woman and held the decision of the excise authorities as violative of Art 15(1) and also it can take shelter under Art 15(3).

2.1.5. Critical Evaluation of Article 15

This is a constitutional mandate and only one aspect has been dealt with. Another aspect is that "nothing in this Article shall prevent the state from making any special provision for......... And children." Thus the state is empowered under this constitutional mandate to make special laws for the children and the children Act, 1960 and as amended by way of removing inadequacies by Act 15 of 1978 is to be seen in the light of this constitutional mandate.

2.1.5.1. The Children Act, 1960.

The object and reasons\textsuperscript{154} are that children are the most vulnerable group in any population and are in need of the greatest social care. On account of their vulnerability and dependence they can be exploited, ill treated and directed into undesirable channels by anti social elements in the community. The State has the duty of according proper care and protection to children at all times as it is on their physical and mental well being that the future of the nation depends. With increased industrialization and urbanization, the State needs to be even more alert and vigilant in this respect. It provides for the care, protection, maintenance, welfare, training, education and rehabilitation of neglected or delinquent children and for the trial of

\textsuperscript{153} AIR 1972 All. 305.
\textsuperscript{154} Gazette of India, 1959, Extra. Pt. II, Page 1487.
delinquent children in the Union territories for which the central government has direct responsibility.

It should also be remembered that the children become delinquent by force of circumstances and not by choice. By improving the unfavourable environment and giving suitable training, it is possible to reform his anti-social attitudes and to mould him into a responsible citizen. Measures for juvenile delinquents should, therefore, aim at rehabilitation rather than punishment. The programmes proposed to be undertaken under this bill are meant to be of a positive character. Now all the states have their own children Act. The earliest was Bombay children Act, 71 of 1948 which gave impetus to bring in a central Act for union territories. This Act speaks of four types of children and various provisions relevant herein are stipulated.

2.1.5.1.1. Section 2(e),2(j),2(1).

Child means a boy who has not attained the age of sixteen years or a girl who has not attained the age of eighteen years.

Section 2(j). "Delinquent child" means a child who has been found to have committed an offence.

Section 2(1). "Neglected child" means a child who -

(i) is found begging; or (ii) is found without having any home or settled place of abode or any ostensible means of subsistence or is found destitute, whether he is an orphan or not; or (iii) has a parent or guardian who is unfit or unable to exercise or does not exercise proper care and control over the child; or (iv) lives in a brothel or with a prostitute or frequently goes to any place used for the purpose of prostitution or is found to associate with any prostitute or any other person who leads an immoral, drunken or depraved life.

2.1.5.1.2. Section 17
**Uncontrollable children.** Where a parent or guardian of a child complains to the Board that he is not able to exercise proper care and control over the child and the Board is satisfied on enquiry that proceedings under this Act should be initiated regarding the child, it may send the child to an observation home or a place of safety and make such further enquiry as it may deem fit and the provisions of Section 15 and section 16\(^{155}\) shall, as far as may be, apply to such proceedings.

So thus and so far the Act dealt with the child, whether neglected or uncontrollable but in section 50 which deals with "contribution by parents" a new concept of the child was introduced i.e. illegitimate child.

2.1.5.1.3. Section 50(3)

The person liable to maintain a child shall, for the purposes of subsection (3) included in the case of illegitimacy, his putative father;

Provided that where the child is illegitimate and an order for his maintenance has been made under section 125 of the Code of Criminal Procedure, 1973 the competent authority shall not ordinarily make an order the whole or any part of the sums accruing due under the said order for maintenance to be paid to such person as may be named by the competent authority and such person shall be paid by him out of his own maintenance of the child.

2.1.5.1.4. Section 50(4)

Any order made under this section may be enforced in the same manner as a order under section 125 of the Code of Criminal Procedure, 1973

Without, going into the details of the measures prescribed in the Act such as children homes (Section 9), special schools (Sec. 10), Observation Hones (Sec. 11) and other care organizations (Sec.12), as meals of care and protection, it is to be seen that even by way of incidental incorporation of the expression "illegitimate child" in Section 50 can we secure the object of the Act i.e. "the future of the nation depends on the

\(^{155}\) Section 15 deals with enquiry by Board regarding neglected children. Sec. 16 deals with suitable custody.
children," as stated therein? India has suffered and still is suffering on the basis of caste, colour, creed, religion; sex, and Articles 14 to 18 are introduced in the constitution to remove this centuries long malady but the statutory provisions are still persisting and insisting on a different kind of discrimination which is purely social in nature and connected with the origin of birth. Child is God's gift, is still not being felt in the hearts with compassion.

2.1.5.2. Juvenile Justice Act

There is another enactment called the juvenile Justice Act, 1986. This Act has been enacted by the Parliament of India in recognition to the constitutional commitments the country had made in respect of the care, protection, treatment, development and rehabilitation of neglected and delinquent juveniles. It marks the beginning of a new era of justice for the Juveniles within the overall framework of social justice, as adumbrated in the Constitution of India. It aims at fulfilling our constitutional obligations towards all such children who need care and protection which they are denied either due to their own doing or doings of others and are deprived of social justice and in consequence thereof their rights.

Before going into the complexity of juvenile justice, we may peep into some of the provisions of the Act. It is an Act to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to, and disposition of, delinquent juveniles. This Act is almost a true replica of the Children Act 1960 except the word "Juvenile" has been used in place of "child." Thus the only expression used herein is "Justice" which needs some study.

Roscoe Pound has written that while justice is the chiefest interest of man, the meaning of justice remains a matter of dispute in philosophy, ethics and jurisprudence. Otto Bird has brought out three notions that specify the concept of justice:

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(i) A social norm providing guidance for people in their dealings with one another;
(ii) It is a standard against which actions are evaluated;
(iii) It is a prescription or requirement that people act justly.

Thus Justice has been put under three different thoughts:-

(i) Positive Law theory (ii) Social good theory (iii) Natural right theory.

The preamble of the constitution speaks of Justice-social, economic and political. Social justice has been placed in the first place. So social justice speaks in terms of best interest of society and that man made laws are to be tailored and judged against that best interest of society. The concept of justice is relative to society. If social condition changes, the law in order to serve the society has to undergo a change compatible with the need of society and accordingly the concept of justice should undergo a change to serve social good. Thus justice gives two notions i.e. justice according to law and justice is above law.

To put it more vividly when the provisions of the Act are rigidly adhered to and applied in its strictest technical sense it is law. However, when the same law is applied with compassion, it is justice.

Basically speaking the concept of equality as enshrined in Article 14 is the foundation of social justice. A provision in the Constitution of EIRE 1937, Section 40(1) states that "all citizens shall, as human persons, be held equal before the law." The word "human persons" connotes the social element. The Constitution of Burma 1948, section 13 states:"All citizens irrespective of birth, religion, sex or race are equal before law." The word "birth" is missing in Art 15 and 16 of the Indian Constitution. The social element, in fact, starts from birth.

Illegitimacy is connected with birth and "birth" does not find place in the constitution of India. In spite of high claims of social justice, can we boast of social justice if the illegitimate child, which is a human person, is still denied the rights and is still a victim of indignities heaped upon it. Perhaps the State searched its soul and found that putting child under various categories is unwarranted and hence brought an enactment.
called The Juvenile Justice (Care and Protection of Children) Act, 2000. Which received the assent of the President on 30th December 2000. The title of the Act is crystal clear and the Aim and Object of the Act clearly opens the mind of the Act.

2.1.5.3. The Juvenile Justice (Care and Protection of Children) Act, 2000 "

An Act to consolidate and amend the law relating to Juveniles in conflict with law and children in need of Care and protection, by providing for proper care, protection and treatment by catering to their development needs, and by adopting a child friendly approach in the adjudication and disposition of matters in the best interest of children and for their ultimate rehabilitation through various institutions established under this enactment.

Whereas the constitution has, in several provisions, including clause (3) of Article 15, clauses (e) and (f) of Article 39; Articles 45 & 47, imposed on the state a primary responsibility of ensuring that all the needs are met and that their basic human rights are fully protected;

AND WHEREAS, the General Assembly of the United Nations has adopted the Convention on the Rights of the Child on the 20th, November, 1989;

AND WHEREAS, the Convention on the Rights of the Child has prescribed a set of standards to be adhered to by all State parties securing the best interests of the child;

AND WHEREAS, the Convention on the Rights of the Child emphasizes social integration of child victims, to the extent possible, without resorting to judicial proceedings;

AND WHEREAS, the Government of India has ratified the Convention on the 11th December 1992.

AND WHEREAS, it is expected to re-enact the existing law relating to Juveniles bearing in mind the standards prescribed in the Convention on the Rights of the Child,
the United Nations standard minimum rules for the Administration of juvenile Justice (the Beijing Rules), The United Nations Rules for the protection of Juveniles deprived of their Liberty (1990) and all other relevant international instruments.

The aims and objects of the Act embrace the constitutional imperatives enshrined in the constitution of India, Conventions on the rights of the child and other relevant international instruments. It clearly lays emphasis on two main objectives which cover every aspect of child:-

(i) Best interest of children (ii) Protection of basic human rights of the child

Some of the salient provisions of the Act also need to be mentioned which are essential as to how the child's interest is cared for.

2.1.5.3.1 Section 2(k) "Juvenile" or "child" means a person who has not completed eighteen years of age.

This definition has brought out three elements.

(i) Juvenile or child are two synonymous words and have the same meaning in the Act.

(ii) Earlier the age for the boy was (not attained the age of sixteen years) and for the girl (not attained the age of eighteen years). This anomaly is removed.

(iii) The discrimination between boy and girl is abolished.

2.1.5.3.2. Section 23

Whoever, having the actual charge of or control over, a juvenile or a child, assaults, abandons, exposes or willfully neglects the Juvenile or causes or procures him to be assaulted, abandoned, exposed or neglected in a manner likely to cause such Juvenile or the child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to six months, or fine, or with both.
In this section the expression, "mental & physical suffering" is used. This expression is having a deep-rooted meaning. It is a torture of human being and thus falls within the ambit of Human Rights of which the child cannot be deprived of under any circumstances.

2.1.5.3. Section 39(1)

Restoration of and protection to a child shall be the prime object of any children's home or the shelter.

Section 39(2) ..... ........... ........
Section 39(3) ......................

Explanation for the purpose of this section, "Restoration of child" means restoration to-

(a) Parents
(b) Adopted parents
(c) Foster parents

These three expressions used in the Explanation mean that the child is to be given to the parents as the child cannot be deprived of family environment (clause 2 of section 39). Firstly, the expression "parents" is used. It is in plural which clearly means "father and mother" as Manu has said that husband, wife and off-spring constitute a family.

Secondly, the expression "adopted parents" is used. This expression is to be read with section 40(1) which deals with adoption and stipulates, "the primary responsibility for providing care and protection to children shall be that of his family." The "adopted parents" means, one who take the child voluntarily born to other parents. It is a noble deed as it is said that "Jesus of Nazareth became son of God by adoption." Thirdly, "foster parents means, one who give parental care to the child though not related by blood or legal ties.
Thus the underlying spirit behind this provision is that the child needs parental love from both the father and the mother and there lies the best interest of the child, as he will not ever be deprived from family environment.

2.1.5.3.4. Section 60 deals with contribution by parents. In this provision the expression "Illegitimate child" is not used but instead the expression "Juvenile or child" is used.

However, in section 50(3) of the Children Act, 1960 the expression "Illegitimate child" is used. This omission appears to be deliberate and in tune with constitutional imperatives and international instruments. Child is child, nothing else but child and at no cost should be qualified by any notorious adjective.

This Act is a much-improved enactment, showing inborn desire to protect the child from any deprivation, in particular to protect from any social taint or stigma. It appears that it is a well thought statute really aiming at the welfare of the child as the Act is totally free from any discrimination.

2.1.6. Article 16(2)

There is another Article 16(2) in the constitution which states:-

"No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated in respect of any employment or office under the state."

2.1.6.1. Parallel Assessment

This Article is to be read with some provisions of constitutions of other countries. Article 4 of the constitution of Switzerland says, "In Switzerland there are no objects nor any privileges of rank, birth, person or family." Constitution of Japan, Article 14 says, ".............. there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin, "Article 3(3) of the constitution of Germany says," "No one shall be prejudiced or privileged
because of his sex, descent, race, language, homeland, origin, faith or his religious or political opinion." In this constitution the word "Descent" has been used.

The dictionary\textsuperscript{158} meaning of descent is, "the act or process of descending from a higher on to a lower level," "derivation from an ancestor," "birth," "lineage." transmission or devolution of an estate by inheritance," "the fact or process of originating from an ancestral stock," "one generation in an ancestral or genealogical scale."

2.1.6.2. Judicial Interpretation

Supreme Court in \textit{Dasratha Rama Rao v State of Andhra Pradesh}\textsuperscript{159} discussed the scope of section 6(1) of the Madras Hereditary village offices Act (3) of 1895 and held that in so far as it makes discrimination on the ground of Descent only, is violative of the fundamental right under Article 16(2) of the constitution and is void.

The Supreme Court here has taken descent in terms of "hereditary" and "hereditary" has been defined in Lloyd v Jones\textsuperscript{160} It signifies all such things, whether corporeal or incorporeal, which a man may have to him and his heirs, by way of inheritance, and which, if they be not otherwise bequeathed, come to him which is next of blood and not to the executors or administrators as chattels do.

2.1.6.2.1. Hindu Adoptions and Maintenance Act 1956

Another face of descent in the shape of "dependents" can be seen as to how it is statutorily discriminated. In \textit{Hindu Adoptions and Maintenance Act 1956} dependants have been shown in section 21 of the said Act.

\textbf{Section 21 of the Act.} For the purposes of this chapter "dependants" mean the following relatives of the deceased;

(i) his or her father

\textsuperscript{158} Webster's Seventh New Collegiate Dictionary
\textsuperscript{159} AIR 1961 S.C. 564
\textsuperscript{160} (1848) 6 e.B. 81. Also refer The Citizenship Act, 1955, Section 4, which speaks of conferment of citizenship by Descent.
(ii) his or her mother
(iii) his widow, so long as she does not marry
(iv) "his or her son or the son of his predeceased son or the son of a predeceased son of his predeceased son so long as he is a minor; provided.............. ."
(v) "his or her unmarried daughter or the unmarried daughter of his predeceased son or the unmarried daughter of a predeceased son of his predeceased son; so long as she remains unmarried; provided .................... ."
(vi) "his widowed daughter; provided and to the extent that she is unable to maintain herself .................... ."
(vii) "any widow of his son or of a son of his predeceased son so long as she does not remarry, provided ............... .......... ....... ."
(viii) his or her minor illegitimate son, so long as he remains a minor.
(ix) His or her illegitimate daughter, so long as she remains unmarried.

2.1.6.2.2. Section 2(1)(d) of The Workmen’s Compensation Act.

This section defines dependant.

Under this sub-section relations of a workman are divided into three classes. However, there is no preferential right amongst dependants to maintain claim application. The dependants are not classified in different categories in the sense that those specified in category I will exclude others161. Class I includes a widow, a minor legitimate son, an unmarried legitimate daughter and a widowed mother. They are deemed in law as dependants of workman whether they are in fact dependent on the earnings of the workman or not.

In class II dependants are included, a son and a daughter. They have to fulfil the following conditions namely,

(i) they must be wholly dependent on the earnings of the workman at the time of his death;
(ii) They must be infirm; and
(iii) They must have attained the age of 18 years.

In class III, 10 types of relatives are shown as dependants which include a minor illegitimate son, an unmarried illegitimate daughter. But there is a condition that they must be wholly or partly dependant on the earnings of the workman at the time of his death. Thus the illegitimate minor son or daughter has to prove that they were wholly or partly dependent on his or her earnings on his or her death.

So even the statutes have treated the legitimate and illegitimate children differently. Thus the word "Descent" used in Article 16(2) has a limited significance. It is not all embracing which it should be as Article 16 falls within the embrace of Article 14, which is the womb of Article 15 and Article 16. Arbitrariness is as much alien to Article 16 as to Article 14.

Though Article 14 expresses a general rule regarding quality before law. Articles 15 and 16 enact particular applications of this general rule. These Articles have to be read together and if a matter is not specifically covered by Article 15 or Article 16, it will have to be decided on the basis of the residuary provision contained in Article 14.\(^{162}\)

Now the problem posed is that whether the illegitimate child has a remedy under the 3 Tier Constitutional mandate of equality covered by Article 14, 15, 16 read together or read independently. Whether he is entitled to social equality which is a pre-requisite of social justice. If the answer is no, then the preamble of the constitution and the Articles particularly incorporated in the constitution to this effect may became illusory for some who are still clothed with social indignity.

Article 21 Article 21 of the constitution lays down that "No person shall be deprived of his life and personal liberty except according to procedure established by law."

This Article has both positive and negative aspects; positively, what this Article enshrines is the importance of the procedure established by law, because the basic principle of criminal jurisprudence is of fair trial and negatively what this Article implies is that who commit offences must suffer because it ensures liberty to law abiding citizens and order in society.

There are analogous provisions in the constitution of other countries, such as Article 40(4) of the constitution of EIRE which says, "No person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law." United States of America, Fifth Amendment says, "No person shall be deprived of life, liberty or property, without due process of law." Fourteenth Amendment says." ..................... "nor shall any state deprive any person of life, liberty or property, without due process of law."

2.1.7. Article 21 & 22.

2.1.7.1. Judicial Interpretation

The position being so, three important cases came before the Supreme Court wherein Art 21 and 22 were discussed threadbare.

1. A.K. Gopalan v State of Madras
2. Bombay v Atmaram Sridhar Vaidya
3. Punjab v Ajaib Singh

In Gopalan's case the expression "Procedure established by law" came for interpretation. On behalf of Mr. Gopalan three points were agitated while challenging his detention under preventive Detention Act, 1950.

(i) That the word "Law" in Article 21 does not mean merely enacted law, but incorporates principles of Natural Justice so that a law to deprive a

163 AIR 1950 S.C. 27.
165 AIR 1953 S.C. 10.
person of his life or personal liberty cannot be valid unless it incorporates these principles in the procedure laid down by it.

(ii) That the law of preventive detention affects the right of movement of a person detained, the reasonableness of this law cannot be judged under Articles 19 (1)(d) and 19(5).

(iii) That the expression "Procedure established by law" introduced into Indian Constitution has been borrowed from the American concept of procedural due process which enables the courts to see whether the law fulfils the requisite elements of due procedure.

The Supreme Court rejected these three points taking a stand

(i) That "procedure established by law" meant nothing but such procedure as may be laid down by a law made by a legislature and that the courts could not, under Article 21, go into the reasonableness of the law so made or procedure so laid down. Nowhere in the constitution the word "law" has been used in the sense of abstract law or natural justice. The courts look to the law as made by the legislature and that whether it is made by a competent authority or not and whether it violates the fundamental rights or not. Beyond this the courts have no power to go.

(ii) Regarding Art 19 and Art 21, the Supreme Court held that Article 19 had no application because if one loses his freedom by detention, he loses all other attributes of freedoms enshrined in Article 19(2). Right secured by Article 21 is distinct from the right under Art.19(1)(d).

(iii) Regarding "due process of law" of American concept, the Supreme Court took the stand that the expression "due process of law" was discussed in the constituent Assembly but did not adopt it as this concept may introduce uncertainty, as there would be no consistency in judicial decisions, as concept of reasonableness would vary from judge to judge.

However, S.B. Das J. commented on it and said that a very narrow meaning was given to this concept. It means that if law has made some procedure to deprive a person of his life, it is enough and further commented that "if a law provided that the Bishop of Rochester he boiled in oil, it would be valid under Art 21."
The Gopalan logic was reiterated in *Jagmohan Singh v Utter Pradesh* \(^{166}\), where the petitioner challenged the validity of death sentence on the ground that it is was violative of Arts 5, 19 & 21 because it did not provide any procedure as prescribed under criminal procedure code. The Supreme Court held that the choice of awarding death sentence is done in accordance with the procedure established by law. Accordingly a 5 member Bench of the court held that capital punishment was not violative of Art 14, 19 &21 and was therefore constitutionally valid.

Then came the case of *Rajender Parshad* \(^{166(a)}\) *v State of U.P.* Krishna Iyer J. held that capital punishment would not be justified unless it was shown that the criminal was dangerous to the society and held that giving discretion to the judge to make choice between death sentence and life imprisonment on "special reasons" under Section 354(3) Cr. Pc. would be violative of Art 14 which condemns arbitrariness.

However, in *Bachan Singh v State of Punjab* \(^{166(b)}\) the supreme court by 4:1 majority (Bhagwati J. dissenting) has overruled *Rajender Parsad’s decision* and has held that the provision of death penalty under sec 302, I.PC as an alternative punishment for murder is not violative of Art. 21. Thus the supreme court reiterated the Gopalan logic once again.

This interpretation of Article 21 of the constitution was given when the supreme court had not reached the stage of the need of dissection of law, being afraid of that legal blood may ooz out and concentrated more on the preservation of law or procedure as the sacred gift of the legislature.

However, a stage came when the Supreme Court felt the necessity of judicial charge to give new orientation to the constitutional law and the result is the *Maneka* \(^{167}\) Gandhi's case which marks a watershed in the history of the development of constitutional law. It has opened vast vistas. It was held that if the procedure established by law is not reasonable, fair and just, it would be violative of Article 21.

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\(^{166}\) AIR 1973 S.C. 947.
\(^{166(a)}\) AIR 1979 S.C. 916.
\(^{166(b)}\) AIR 1980 S.C. 898.
\(^{167}\) AIR 1978 S.C. 597.
Then followed the case of Sunil Batra\textsuperscript{168} which is the sanctuary of human values and which prescribes procedure and forbids barbarities. Then in Prem Shanker v Delhi Administration\textsuperscript{169} the question arose about the handcuffing of prisoner as to whether it is violative of Article 14,19 and 21. The Supreme Court showed its utmost legal compassion and said that, "Hand cuffing is prima facie inhuman and, therefore, unreasonable, overharsh and at the first flush, arbitrary. Absence of fair procedure and objective monitoring to inflict "irons" is to resort to Zoological strategies repugnant to Article 21." In Francis Coralie Mullin v Administration, Union Territory of India\textsuperscript{170}, the supreme court held that Article 21 is wide enough to cover the entire process by which deprivation is effected and that would include not only the objective but also the substantive part of the law. Every fact of the law which deprives a person of his life or personal liberty will have to stand the test of reasonableness, fairness and justness otherwise it will violate Article 21 of the constitution.

In Union of India v Tulsi Ram Patel\textsuperscript{171} The Supreme Court summed up its onward March to the interpretation of Article in terms of human life and liberty thus,

"The majority view in Gopalan's case\textsuperscript{172} was buried in R.C. Cooper's case\textsuperscript{173}, its burial service was read in Shambhu Nath Sarkar v State of West Bengal\textsuperscript{174}; and Khudiram Das v State of W.B\textsuperscript{175} and its funeral oration was delivered in Maneka Gandhi's case\textsuperscript{176}. The entire burial service was done in the name of onward march of the country to progress, prosperity and establishment of a welfare state. Thus the judicial activism bloated Article with the air of all the Articles of part III of the constitution" and further said that "let us hope and pray that the ghost of that majority view does not at some future time raise from its grave and stand, clanking its chains seeking to block the onward march of our country to progress, prosperity and the establishment of a welfare state."

\textsuperscript{168} AIR 1978 S.C. 1675.  
\textsuperscript{169} AIR 1980 S.C. 1535.  
\textsuperscript{170} AIR 1981 S.C. 746.  
\textsuperscript{171} AIR 1985 S.C. 1416  
\textsuperscript{172} AIR 1950 S.C. 27  
\textsuperscript{173} (1970) 1 SCC. 248.  
\textsuperscript{174} (1973) 1 SCC. 856. Haradhan Saha v State of W.B. (1975) 3 Sec. 198.  
\textsuperscript{175} (1975) 2 SCC. 81  
\textsuperscript{176} AIR 1978 S.C. 597.
The Supreme Court did not rest here. Onward march continued. In *People's Union for Democratic Right v Union of India* \(^1\) the supreme court on the basis of its earlier decision had taken the view that non-payment of minimum wages to the workers employed in various projects in Delhi was a denial to them of their right to live with basic human dignity and violative of Article 21 of the constitution. Thus the expression "life" used in Article 21 was given a divine outlook full of compassion and compatibility with dignity.

So life is to live with basic human dignity.

Again in *Bandhua Mukti Morcha v Union of India* \(^2\) where a mere letter addressed to the judge was considered as a writ petition, pleading the cause of bonded labour, the supreme court held as follows:-

"We have on more occasions than one said that Public Interest Litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the government and its officials to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our constitution ......... It is the fundamental right of everyone in this country assured under the interpretation given to article 21, by this court in Francis Mullin's case to live with human dignity free from exploitation.

In *M.C. Mehta v Union of India* \(^3\) though the Industry concerned was not within the ambit of "State" as defined in Article 12 of the constitution, still the supreme court held it responsible for leakage of gas affecting the persons living in the vicinity of the factory and applied strict liability rule of *Ryland v Fletcher*, life means to live with basic human rights wherein the right of a person to live in unpolluted atmosphere was considered as basic human right.

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It may be further mentioned that the Supreme Court in *Makhan Singh v State of Punjab*\(^{180}\) and *Jaichand v State of W.B*\(^{181}\) held that notwithstanding the suspension of Art. 21, it was still open to a person to challenge such an order on the ground that it was ultra vires or malafide or based on extraneous considerations. However, this aforesaid view was overruled in *A.D.M. v S.K. Shukla*\(^{182}\) that so long as Article 21 is under suspension, the courts have no power to entertain any petition for *Habeas Corpus* even though the order of detention was vitiated by malafides or based on extraneous considerations. In this *Khanna J.* dissented. This dissent of Khanna J. is now the law. The Constitution (44th Amendment) Act, 1978 has provided that right to move any court for the enforcement of Article 21 which shall not be suspended even during emergencies. The words of Khannil J. are the golden words worth mentioning:-

"What is at stake is the rule of law. If it could be the boast of a great English Judge (Lord Mansfield) that the air of England is too pure for a slave to breathe, cannot we also say with justifiable pride that this sacred land shall not suffer eclipse of the rule of law and that the constitution and the laws of India do not permit life and liberty to be at the mercy of absolute power of the executive, a power against which there can be no redress in courts of law even if it chooses to act contrary to law or in an arbitrary and capricious manner\(^{183}\)."

Now the scope of Article 21 is vast, varied and legally versatile which encompasses every aspect of human life and every limb of human life to live with human dignity. The all-important question is whether the illegitimate child who is socially stigmatized can have shelter under the compassionate umbrella of Article 21 to live with human dignity.

Will Article 21 give him protection and shelter? The answer is "yes." From here onward we shall glance through other constitutional provisions specially governing the child.

2.1.8 Article 23(1). Prohibition of Traffic in human beings and forced labour.

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180 AIR 1964 SC. 181.
181 AIR 1967 SC. 483.
183 Ibid.
"Traffic in human beings and 'begar' and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

2.1.8.1. Judicial Interpretation

It has used two expressions "Traffic in human beings" and "Begar". Traffic in human beings includes, men, women and children. Basically it would be traffic in women and children if they are used for immoral or other purposes as was held in Raj Bahadur v Legal Remembrance. The parliament passed a law, namely, Suppression of Immoral Traffic in Women and Girls Act, 1956 for punishing acts which result in Traffic in human beings. In this Act Sec. 2(b) defines "girl" means a female who has not completed the age of twenty one years. Irrespective of the age here the girl falls within the ambit of child.

The other expression "Begar" is used which means involuntary work without payment. In Suraj Narain v State of M.P the court held that Begar commonly connotes forced labour for which no wages are paid or, if some payment is made it is grossly inadequate.

The provision that Traffic in human beings and begar and other similar forms of forced labour are prohibited, is self-executing provision like the similar provision in the 13th Amendment of the American Constitution. In AIR 1962 Bombay 55(67) the honourable court held that Begar refers to the system under which persons are pressed to carry burdens for individuals or public or to perform other forms of menial service under compulsion. It refers to labour exacted by the Government or any person in power without paying for it.

The Supreme Court in two landmark cases highlighted this aspect quite illustratively.

184 AIR 1953 Col 522.
185 AIR 1960 M.P. 303.
In People's Union\textsuperscript{186} for Democratic rights v Union, (The Asiad worker's case), the Supreme court held that where a person provides labour or service to another for remuneration which is less than the minimum wage fixed by the Minimum Wages Act, 1948, he renders forced service which is "begar" within the meaning of Article 23.

In Bandhua Mukti Morcha v Union\textsuperscript{187} the Supreme Court considered a large number of very important questions relating to bonded labour. Their Lordships discussed at length the various enactments and held that "Bonded labour" means the system under which one person can be bonded to provide labour to another for years and years until an alleged debt is wiped out, (an event) which never seems to happen during the life time of the bonded labourer. This was totally incompatible with the principles underlying our constitution and this system stood prohibited by Article 23 of the constitution.

In between these two landmark cases, came the case of Sanjit Roy v State of Rajasthan\textsuperscript{187(a)}. It is a case where labour was employed under Rajasthan Famine Relief Works employees (Exemption from labour laws) Act (21 of 1964), by which the payment can be made less than the minimum wages Act for those labourer who are employed on famine relief work.

The Supreme Court held the Act in so far as it excludes the applicability of the Minimum Wages Act, 1948 to workmen employed on famine relief work and permits payment of less than the minimum wage to such workmen is invalid as offending the provisions of Article 23 of the constitution and also violates Article 14 of the constitution as the rights of workers are the same whether they are drawn from an area affected by drought and scarcity conditions or come from elsewhere.

In Gurder Singh v State of Himachal Pradesh\textsuperscript{187(b)}. In this case, the prisoners under the Prison Act 5-35 was challenged as ultra vires of the constitution. The Supreme Court said that the payment has to be equivalent to the services rendered, otherwise it

\textsuperscript{186} AIR 1982 S.C. 1473.
\textsuperscript{187} AIR 1984 S.C. 802.
\textsuperscript{187(a)} AIR 1983 S.C. 328.
\textsuperscript{187(b)} 1992 Cr. L.J. 2542.
would be forced labour within the meaning of Article 23 of the constitution. Prisoners are entitled to get wages not below minimum wages.

Though the Article is couched in a wide language and the expression used is "Human beings", it includes also children. Thus this Article directly points towards social justice and dignity of human person.

**2.1.8.1.1. The Children (Pledging of Labour) Act 1933**

It shall be appropriate if a reference is made to *The Children (Pledging of Labour) Act 1933*, which is a true spirit of begar as exhibited in the Act. However, this Act appears to be lying in the Law Archive enjoying a sound slumber and time has come for its ouster from the archive and its activation. Section 3 to 6 are penal provisions who pledge the labour of the child.

**2.1.8.1.2. Bonded Labour System (Abolition) Act, 1976**

Of course a bold step has been taken by the Parliament by enacting the *Bonded Labour System (Abolition) Act, 1976* towards the abolition of forced Labour and of economic and physical exploitation of the weaker section of the society. This enactment is in pursuant to Art 23 (1) of the constitution and is in compliance with Art 35(a)(ii) for prescribing punishment for contravention.

There are further two Articles which are relevant to the child. One falls under Part III of the constitution and the other under Part IV of the constitution.

**2.1.9 Article 24**

*Prohibition of employment of children in factories.* "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment."

**2.1.9.1 Parallel Provision**
Article 45

Provision for free and compulsory education for children. "The state shall endeavour to provide, within a period of ten years from the commencement of this constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Article 24 prohibits employment of children, below the age of fourteen years, in any factory, mine or any other work which involved danger or risk to the physical or mental health of the children. So Article 24 is to be read along with Article 39 (e) of the constitution.

Article 39(e) "that the health and strength of the workers, men and women and the tender age of the children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."

Thus we have many enactments such as "The Employment of Children Act, 1939," "Indian Factories Act, 1948 (section 67) and Mines Act, 1952 (section 52) where the employment of children below the age of 15 years is prohibited. But Article 24 has one lacuna. It does not prohibit their employment in any innocent or harmless job or work."

2.1.9.2 Judicial Interpretation

The Supreme Court in Salal Hydro Project v State of J&K\textsuperscript{188} held that children below the age of 14 years of age cannot be employed on construction work of hazardous nature.

Here the Supreme Court considered the construction work as hazardous.

Now if we read Article 24 with Article 45, there is both disharmony and harmony. Harmony in the sense that that there is prohibition of employment of children in the factories etc up to the age of 14 years in Article 24. In Article 45, the directive given to the state which is fundamental in governance, is to provide free and compulsory

\textsuperscript{188} AIR 1984 SC. 802.
education to the children until the age of 14 years. If these two Articles or rather if Article 45 is strictly complied with, Article 24 automatically gets merged in Article 45 itself. But the most unfortunate thing is that Article 45 falls under Part IV of the Constitution and is protected under Article 37 that is not justiciable i.e. shall not be enforceable by any court.

So the various Articles in Part IV governing children are only by way of directives to State, but enactments to be made thereto, the implementation of these directives depends on the wish and desire of the State. However, the Supreme Court finally in Minerva Mills Ltd v Union of India\(^{189}\) gave primacy to the Directive Principles of State Policy over the fundamental rights.

The basic concept behind referring to the various Articles of the constitution was that these Articles refer to citizens, persons, women, children, human beings etc. These conceptions in themselves act as a "whole." Can this whole be dissected in parts? Can we act as we like? Can be put them into such categories irrespective of the trampling of social or economic justice? Can we say that child is child nothing else that child? It does not need any notorious adjective. It is innocent but not undignified. Can we treat him as a person and not a chattel?


If we take fundamental rights as one constituent and Directive principles of state policy as the other Constituent and then we blend them harmoniously, the product which we get can be very aptly called Human Rights. "Human Rights" has been defined under Section 2(d) as follows:-

"Human rights' means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the International Covenants and enforceable by courts in India."

\(^{189}\) AIR 1980 S.C. 1789
International Covenants as per Section 2(f) means the International Covenant on civil and political Rights and the International Covenant on Economic, social and cultural rights adopted by the General Assembly of the United Nations on the 16th December 1966.

2.1.9.2.1. Judicial Interpretation

When we talk of civil and political rights, we, according to our constitution, refer to the fundamental Rights and economic, social and cultural rights as Directive Principles of state policy. Rajeev Dhawan describes the Directive Principles as a "massive socialist" empowerment of the State for securing social and economic rights and argues for dispelling the myth that socialism and human rights are incompatible. To him at the root of the problem lies the troubling assertion that while CPR\textsuperscript{190} are inherent in human beings; ESR\textsuperscript{191} are the gift of the state\textsuperscript{192}.

Thus we can say that Part III and Part IV of the Constitution constitute the Magna Carta of Human Rights and the inspiration is derived from the Universal Declaration of Human Rights, 1948. The only thing left to be seen is that to what extent the Indian Constitution and Indian statutory laws, have recognized Art 25(2) of the Universal Declaration of human rights which says,

"Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection."

2.1.9.3. Section 13 of The Hindu Minority and Guardianship Act, 1956.

However, the most significant and important provision is section 13 of The Hindu Minority and Guardianship Act, 1956, which speaks of welfare of minor to be of paramount consideration.

(1) In the appointment of any person as guardian of a Hindu minor by a court, the welfare of the minor shall be the paramount consideration.

\textsuperscript{190} CPR stands for Civil and Political Rights.
\textsuperscript{191} ESR stands for Economic and Social Rights
(2) No person shall be entitled to the guardianship by virtue of the provisions of this Act or of any law relating to guardianship in marriage among Hindus, if the court is of the opinion that his or her guardianship will not be for the welfare of the minor.

The central theme of this provision is welfare of the minor and the court is to act as "parens patriae" and this provision overrides the theory of natural guardians. While appointing or declaring a guardian the court itself acts as a parent.

2.1.9.3.1. Judicial Interpretation

In *Jijabai v Pathan Khan* the court held that if the father did not take any interest in the minors it was as good as he was non-existent and the mother was appointed as guardian.

In another case where the supreme court found that the father was convicted for a serious criminal charge and was a man without character, the custody of the boy of 9 years was given to the mother.

In *L. Chandran v Venkatalakshmi*. In this case there was a writ petition under Article 226 and 21 of the constitution wherein the court relied upon Madras High Court Decision of *Atchayya v Kosaraju Naraharj* wherein father's unlimited power of custody of the child without reference to child's welfare was accepted. The court held that it is now well known that such a broad view is not acceptable. Child is a person within the meaning of Article 210f the constitution. It has, therefore, a right to its life as guaranteed by Art. 21. The word life should be understood in this context as expansively as it has been understood in other contexts as comprehending more than mere animal life. Father's unlimited right will reduce the child to a chattel from the position of a person.

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195 AIR 1981 A.P.I.
196 AIR 1929 Mad. 81.
In Marggarate v Chacko\textsuperscript{197}. In this case it was held that the court has "parens patriae jurisdiction." If the court as "parens patriae" comes to a conclusion that it is necessary in the paramount interest of the child to entrust it to the custody and care of one of its parents who is residing outside India, it has full powers to pass orders and there is nothing in Art 19(1)(e) or 21 of the constitution which abrogates to any extent the court's jurisdiction in this respect.

But it is unfortunate that this provision (section 13) is not of universal nature. It is restrictive to the appointment or declaration of a guardian of a minor child and thus this utmost beneficial provision could not have its say in other aspects of matrimonial law. Again the same question arises. Is child a person or a chattel? Has it social rights guaranteed by the constitution? Can it have the right of dignity as the Preamble States (dignity of individual). There must be an answer to these questions. If we are convinced that they are the assets of the future of the nation and then such asset must be nourished and preserved in white spotless garments and not stained with the taint which contravenes Article 21 of the constitution.

Though this Section overrides section 6 of the said Act, the section itself shows the distinction. Sec 6(a) speaks of father as the natural guardian of a boy or unmarried girl and sec 6(b) speaks of mother as the natural guardian of an illegitimate boy or an illegitimate unmarried girl. Section 13, no doubt, has looked to the welfare of the minor child and ignored the natural guardian, but the distinction in Section 6 is intact and the child is not one person but is under two categories, legitimate and illegitimate. How sad the situation is and how cruel the law is. Innocence of the child is always at stake despite much compassion in the mind of the social reformers.

\textsuperscript{197} AIR 1975 Ker. 1 (F.B.).