Conclusion and Suggestions

From the narrative and somewhat explanatory description on the concept of illegitimate child in the preceding chapters, it is seen that the title of legitimacy or illegitimacy when attached to the status of an individual in any jurisdiction, reflects the capacity or lack of capacity which the law of that jurisdiction recognizes in the case of the individual concerned. The word legitimate when used in relation to a child is only a symbol employed to designate the legal rights and obligations which flow from being born in wedlock so the word "illegitimate" is used to denote the limitations of capacity which attach to being born out of wedlock and the word "legitimation" is descriptive of the legal effects incident to being relieved of these limitations. This wider spectrum of limitations is like a refraction that passes from one medium to another giving a changed direction to the reality of the object and thus needs analysis from all angles like:-

(i) Sanctity of Hindu marriage
(ii) Idealism of the institution of sonship
(iii) Equality before law and equal protection of laws
(iv) Dignity of the individual in terms of life
(v) Social Justice
(vi) Human Rights.

We will conclude the thesis in 3 parts A, B & C and in the light of above mentioned points along with a model legitimate Bill (Proposed) to the protection of the child.

PART I

CONCEPT OF HINDU MARRIAGE

Sir John Hanner in Durham v Durham\(^1\) has said that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. However, Vina Gradof\(^2\)

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1. (1885) 2 P.O. 80.
contrary to Sir John Hanner, kept the matter in suspense when he remarked that marriage, being a complex phenomenon, cannot be explained by one single principle, idea or notion, as it represents a synthesis of several principles, ideas and notions and one cannot draw from it a perfectly logical set of rules. Thus he kept the options open to define marriage as one looks at it from the angle he views it. Similarly, Lord Jowitt\(^3\) puts it in an oscillating way that what marriage means to different people will depend upon their upbringing, their outlook and their religious beliefs. Bertrand Russell\(^4\) succinctly puts it that marriage differs, of course, from other sex relations by the fact that it is a legal institution. It is also in most communities a religious institution but it is the legal aspect which is essential.

But Hindu scriptures speak very highly with a clear tinge of religious favour about the ideal of marriage. Several words were employed in ancient India to denote the idea of marriage\(^5\). Thus the words "Udvaha," i.e. taking the girl out of her paternal home, "vivaha," i.e. taking the girl for making one's wife, "parinaya or parinayana," i.e. going round or making a "pradakshina" to fire, "upayama," i.e. to bring near and make one's own, and "panigrahna" i.e. taking the hand of the girl, are employed to convey the sense of marriage\(^6\).

In the Vedic period the sacredness of marriage\(^7\) tie was repeatedly declared. The high value placed on marriage is shown by the long and striking hymn, "Be thou, mother of heroic children, devoted to the gods, Be thou, queen in thy Father-in-Law's household.

May all the Gods unite the hearts of us two into one." From Vedic period it continued to be so in the entire Hindu period.

Wife is called "Ardhangini." According to Satpatha Brahmana\(^8\), "The wife is verily the half of the husband. Man is only half, not complete until he marries. The Taittiriya Samhita\(^9\) says, Half is she of the husband that is wife."

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3 Wealthery v Wealthery 1947 A.C. 628.
7 Rigveda, X, 85
8 Satpatha Brahmana, Vol-16, 10.
9 Taittiriya Samhita, III, I, 2, 57.
Manu\textsuperscript{10} has very eloquently spoken about it. He said, "the husband receives his wife from the gods, (he does not wed her) according to his own will; doing what is agreeable to the gods, he must always support her (while she is faithful)."

This being so, Hindu scriptures speak of marriage as samaskara which has its own religious and spiritual connotations. The word 'samaskara: means the performance which removes evils and creates good qualities in man. The act of marriage uplifts the soul of the married. The purpose of this Union is to inculcate disappearance of all harmful propensities in the two, bringing in them chastity, masculinity, restraint, pure love and the qualities of performing religious ceremonies, for the welfare of the progeny and society\textsuperscript{11}.

Shri V.A.K. Ayer\textsuperscript{12} has said that in short, the whole gamut of samaskaras is designed to channel the entire energies of man towards the creations of a perfect secular as well as spiritual life in himself in a manner that is not only ingenious but essentially practical, dignified and compulsory in the interest of all round human welfare.

Manu\textsuperscript{13} to this effect has said, "The nuptial ceremony is stated to be the Vedic sacrament for women (and to be equal to the initiation), serving the husband (equivalent to) the residence in (the house of the) teacher and the household duties as the (daily) worship of the sacred fire."

Yajnavalkya\textsuperscript{14} has also stated that, " By this the taint (derived from both parents literally) produced from the seed and the embryo is destroyed. These ceremonies, in cases of women, are (to be) performed in silence, but, however, their marriage is with (the recitation of) mantras."

Sir Henry Mayne\textsuperscript{15} has spoken about twelve samaskaras of importance and "vivaha" (marriage is one such important samaskara). Marriage is one of the necessary samaskaras or religious rites for all Hindus, whatever the caste, who do not desire to adopt the life of a perpetual Brahamchari or of

\textsuperscript{10} Manu IX-95.
\textsuperscript{11} Pt. Nachiketa on Vivaha Samaskara-A discourse on 21-12-92 at Delhi.
\textsuperscript{13} Manu II-67.
\textsuperscript{14} Yajnavalkya 1-13.
\textsuperscript{15} Mayne's, Hindu Law and Usage, 1991 Ed., p. 118.
a sanyasi, of course there has never been any doubt as to its being a necessary samaskara for a Hindu woman of any caste.

Even the judicial opinion gives full recognition that Hindu marriage is a sacrament, a samskara and fortifies what Dr. Paras Diwan has said, "Hindu Marriage is a tie once tied; is never untied."

**Binda v Kausilia**

It is a suit for restitution of conjugal rights, wherein the concept of Hindu marriage was also discussed and the honourable court referred to *S.C. Sarkar's Vyavastha Chandrika Vol II P. 480*. "The effect of marriage is the union of the bride and bridegroom, upon the performance of this text of Veda 'Bones (identified) with bones, flesh with flesh and skin with skin.'"

**Venkatacharyulu v Rangacharyulu** It is a case of a Brahman bride given in marriage by her mother without her father's consent and the validity of marriage was challenged. The honourable court held that when the marriage rite was duly solemnized and there was no force or fraud, the marriage is valid and further said that as a religious ceremony it becomes complete when the sapatpadi is performed. The honourable court referred to various Hindu scriptures and relied upon *Brindabun Chandra Kurmokar v Chundra Kurmokar*.

In the Matter of **RamaKumari**.

It is a case of bigamy under Section 494 L.P.C, where a conversion of Hindu wife to Islam and then marriage to a Muslim was under issue. The honourable court held the petitioner guilty of bigamy and held that we find no authority in Hindu texts for the proposition that a degraded person or an apostate is absolved from all civil obligations incurred before degradation or apostasy. So far as the matrimonial bond is concerned, such a view would, we think, be contrary to the spirit of the Hindu which regards that bond as absolutely indissoluble. The honourable court referred to

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16 (1890) 13 LL.R. All 126.
17 (1890) 14 I.L.R. Mad. 316.
18 LL.R. 12 Cal. 140.
19 (1891) 18 LL.R. Cal. 264.
Tekait Mon Mohini v Basanta Kumar Singh\textsuperscript{20} It is a suit for enforcement of conjugal rights wherein the nature of Hindu Marriage was discussed. The court said that it may be premised that though marriage under the Hindu Law is a contract, it is also a sacrament. It is more religious than secular in character. The Union is indissoluble for it is a "Union of flesh with flesh and bone with bone." The Union is a sacred tie and subsists even after the death of the husband. The court relied upon and referred Manu II-67, III-43, V 154-158 160, 165, IX-29, Dayabhaga IV-14, IX 1-2 and Hindu Liw on Marriage by Dr. Bannerjee P. 131.

Govindrajulu Narasimham v Devara Bhotla Venkatanarasayya\textsuperscript{21}

It is a case of sale by father of family lands for expenses of one son's marriage for which there was no assent of other sons. The question agitated before the court is as to whether it is a moral or religious duty of the father to bring about the marriage of his son.

The honourable court referred to smriti texts and held that Hindu Marriage is not a sacrament. This decision was overruled in (1911) 37 I.L.R. Mad. 273 (EB.).

Sundra Bai v Shivnarayana\textsuperscript{22}

It is a case of debt contracted for the marriage of a coparcener in a joint Hindu family. The point agitated is that whether such debt is for the benefit of the family and is binding on the other coparceners. In this case marriage as a samaskara was also discussed and held that under the

\textsuperscript{20} (1901) 28 I.L.R. Cal. 264.
\textsuperscript{21} (1903) 28 I.L.R. Mad. 206.
\textsuperscript{22} (1907) 31 I.L.R. Bom. 81.
Mitakshara as well as the Mayukha the word "samaskara" ordinarily includes marriage. Various Hindu scriptures were referred such as the text of Yajnavalkya, cited and expounded in Mitakshara and a text of Brihaspati quoted in Vyavahara Mayukha wherein sacramental ceremonies were called samaskara. Thus the court after referring to Gautma, Mitakshara and the Vyavahara Mayukha held that there is none among them who has interpreted these texts in the sense of excluding marriage from the meaning of the word "samaskara."

Kameshwar Shastri v Veeracharlu

It is a case of contracting debt for the marriage of a son, binding on the coparceners as being legal necessity and on this issue the marriage as a samaskara was discussed. The honourable court referred to Yajnavalkya (I-13), Apararka, Samaskara Mayukha of Nilkantha, Samaskara Bhaskara, Yama and held that it is necessary to point out that amongst sudras marriage is an initiary ceremony or samaskara and the most important samaskara performed for them. Dr. Bannerjee in his Tagore Law Lectures, 1st Ed. P. 31 speaks of marriage as the only samaskara for women and sudra. The honourable court dissented from Govindrajulu v Venkatanarsayya ILR 27 Mad. 206.

Gopal Krishna Raju v Venkatarasa Raju

The question before the court was whether a debt contracted for, the marriage of a male member is binding on the family. In this case many earlier decisions were referred and the Court held that marriage is obligatory on Hindus who do not desire to adopt the life of a perpetual Brahamachari or of a sanyasi. The honourable court overruled (1904) I.L.R. 27 Mad. 206 and approved (1911) LL.R. 34 Mad. 422.

Bhagwati Saran Singh v Kumar Parmeshwari Nandan Singh

It was a property matter wherein the validity of marriage was challenged on the ground that the marriage of a lunatic was invalid. This case in itself a treatise on the Hindu law of marriage.

23 34 I.L.R. Mad. 422.
24 (1911) 37 LL.R. Mad. 273 (FB.).
25 AIR 1942 All 267.
wherein various authorities and judicial decisions were referred and all aspects of marriage were threadbare discussed. The authorities like Mayne's Hindu Law, Macnaughten's Hindu Law, Strange's Hindu Law, Gooroodas Bannerjee's Hindu Law of marriage and stridhana, Mandlik's Hindu Law and cases like Deo Kishan v Budh Parkash, Muttusami Mudlari v Masilamani, Dabcharan Mitter v Radhachurn Mitter, Mouji Lal v Chandravati and various original texts were referred and the court held that the person married may be a minor or even of unsound mind and yet if the marriage rite is duly solemnized, there is a valid marriage.

However, the aggrieved party took the matter to the Federal Court. The court held that it cannot be disputed that none of the early smriti writers have mentioned lunacy is a disqualification for purposes of marriage, though insanity and various other physical and mental ailments are sufficient grounds for excluding a person from inheritance. The judgement of the Allahabad High Court was upheld.

Amrithammal v Vallimayil Ammal

In this case the validity of the marriage of a congenital idiot was considered. The honourable court referred to various authorities and case laws and said that it is undoubtedly abhorrent to a modern mind that a congenital idiot should be allowed to marry, but the court here can only have regard to the personal law and the personal law of Hindus undoubtedly regards such a marriage as being possible. The court in particular referred to the case of Venkatacharylu v Rangacharyulu wherein it is stated that the person married may be a minor, even of unsound mind and yet if the marriage rite is duly solemnized, there is a valid marriage.

Ratan Moni Devi v Nagendra Narain Singh

26 (1883) AW.N. 105 (FB.).
27 33 Mad. 342.
28 2 Morley's Digest 99.
29 38 Cal. 700.
30 Ratneshwari Nandan v Bhagwatisaran AIR 1950 FC 142.
31 AIR 1942 Mad. 693 (FB.).
32 14 Mad. 314
33 AIR 1949 Cal. 404.
In this case the court held that the marriage of an impotent person is a nullity and referred to various texts. In this case Narada Smriti and Parasra Smriti were cited and reference was also made to Hindu law by Sir. Earnest Trevelyan (3rd Ed. Page 38) where he suggested that since Niyoga system has become obsolete, the marriage with an impotent person is to be considered void. The court relying upon, these texts and more depending upon Rayden on Divorce held such a marriage as void. The decision is criticized as being made on the basis of English law and not on the basis of personal law of the Hindus.

Av B\(^{34}\)

It was a case of divorce under Bombay Hindu Divorce Act, 1947 or alternatively a suit for declaration that the marriage be held void on the ground that his wife was impotent at the time of marriage and still continued to be so. The honourable court dissented from AIR 1942 All 267 and AIR 1942 Mad. 693 (EB.) and approved AIR 1949 Cal 404. The court held that Hindu marriage is both a contract and a sacrament and that the husband was in that case entitled to declaration that the marriage is null and void and he could still be granted a decree for divorce. In this case original\(^{35}\) texts from Manu, Yajnavalkya, Narda, Katyayna, Kautilya, Viramitrodaya were cited and examined. The decision of the honourable court was criticized and was found erroneous as it clearly depended upon misinterpretation of various slokas finding place in various scriptures and their treatment in isolation and that once the marriage is solemnized with due religious rites, then the samaskara aspect of marriage is complete.

Kantilal Motichand v Vimla\(^{36}\)

In this case the court held that under Hindu Law a marriage of a person with a woman who is impotent cannot be treated as void or a nullity nor can it be dissolved. In this regard the honourable court reviewed various case laws and old texts on Hindu law and finally followed AIR 1942 All. 267 stating that these references only refer to disqualifications for marriage and not marriage itself. The court referred to the "preface" to Hindu Law by Mcnaughten where it is said that "It by no

\(^{34}\) AIR 1952 Bom. 486.


\(^{36}\) AIR 1952 Saurashtra.
means follows that because an act has been prohibited, it should, therefore, be considered as illegal. The distinction between the "vinculum Juris" and "vinculum Pudoris" is not always discernible."

**Devivanai Achi v Chidambram Chettiar**

In this case the point of non-performance of ceremonies prescribed for marriage, was agitated.

The court held that marriage has two aspects i.e. secular and religious. The secular aspect consists of the gift of the bride i.e. "kanyadana" and the religious aspect which is prescribed by the Grihasutras of the nature of ceremonies and rites and both are essential for the validity of marriage so much so that ceremonies are essential in all the eight forms of marriage and this rule applies even to sudras and this is the strict Hindu Law regarding the mode by which a valid marriage could be effected. The honourable court examined various case laws and Hindu scriptures to arrive at the decision.

To add to it it is not malapropose to mention what Narda\(^{38}\) mentioned in **Madraparijata**:-

"The mantras for marriage are considered to be essential to make girl a wife and the seventh step taken along with the girl is the culmination of that ceremony."

**Yama in Shudra Kamlakara**\(^{39}\) has spoken thus "The shudra should be purified by ceremonies in the following manner without mantras. The slokas that speak of samaskaras need not be recited but the "vivaha" samaskara with the recitation of mantras. Panigrahana is common to all varnas without making any distinction.

Hindu scriptures, scholars of Hindu Law and Judicial decisions all lay emphasis, on the religious aspect of Hindu Marriage that it is a samaskara and samaskara is indissoluble. The importance of marriage as samaskara is well illuminated in the verse\(^{40}\):-

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37 AIR 1954 Mad. 657.
38 Refer Appendix attached to AIR 1954 Mad. 657.
39 Ibid. 57
40 Taittiriya Ekagnikanda I, iii, 3.
"I seize thy hand to have a fine progeny, that thou mayst live with me, thy Lord, till thou shall attain decay The Gods, Bhaga, Aryaman, Savitri and Purendhi—have Given thee to me for householdship."

The next mantra of importance is 41:-

"A friend shall thou be, having paced these seven steps with me. May I retain thy friendship and never part from thy friendship. Let us unite together, let us propose together. Loving each other and ever radiant in each other's company, meaning well towards each other, sharing together all enjoyments and pleasures, let us join together our aspirations, our vows and our thoughts."

Now we have to look to the Hindu Marriage Act, 1955 of which it is said that it has made inroads in the religious aspect of Hindu Marriage and that it has "brought a contractual content into marriage. To understand the contractual content and examine whether it is there or not we have to concentrate on section 5 and section 7 of the said Act.

Section 5 of the Hindu Marriage Act, 1955 The peculiarity of section 5 is that if marriage is solemnized in contravention of clause (1), it is void. Marriage contravening clause (2) is voidable. Contravention of clause (3) does not render the marriage void or voidable and Marriage in contravention of clause (iv) and (v) is void but if custom permits it is valid. So in one section various concepts have been used making the section a hotch potch provision.

41 Taittiriya Ekagnikanda I, iii, 14.
The concepts of "void and voidable" are incorporated in section 11 and 12 of the Hindu Marriage Act 1955. Thus reading section 5, 11 & 12 one gets the feeling that Hindu Marriage is a contract. Two reasons come forth. First, the words "void" and "voidable" are imported from the Contract Act 1872 where these two expressions form the foundation of the contract Act regarding dissolution of the Contract or its non-enforcement. But this ground does not seem to be placed on sound footing as in an Act all expressions used therein are not defined and as such they are imported in the Act from some other statute but these expressions are to be read in the context of the Act wherein they are used.

Secondly, clause (ii) & (iii) of section 5 governing soundness of mind and age of the parties to the marriage have the semblance of a Contract as these two clauses look like in legal spirit as that of clause 11 of the Contract Act 1872.

"Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

Thus clause 5(ii) and (iii) need to be explained that these two clauses have their own connotation and integrity and do not represent section 11 of the Contract Act, 1872.

Clause 5(ii). It attracts more attention as it appears to be in consonance with Section 12 of the Contract Act, 1872. The essence of section 12 of the Act is that the law in regard to contracts made by parties, affecting their rights and interests is, that there must be full and free consent in order to bind the parties. Consent is an "let of reason accompanied by deliberations. It is upon this ground that there is lack of rational and deliberated consent that transactions of persons of unsound mind are held to be void. It may be mentioned here that violation of clause 5(ii) renders the marriage voidable and not void.

The main object of marriage, according to Hindu ideals, is the obtainment of a son who would be competent to offer gifts and oblations and perform religious ceremonies for the forefathers and a
religious institution whereby the entry into the "Grahista' Ashrama is opening of the doors of the discharge of multifarious duties as a householder. Thus it is expected that physical and mental capacity is an essential requisite and our sages laid great stress on this aspect as the procreation of son is the continuity of generation.

**Apastamba**\(^{42}\) has said:

"These (sons) who live, fulfilling the rites taught (in the Veda) increase the fame and heavenly bliss of their departed ancestors."

**Yajnavalkya**\(^{43}\) says:

"Because continuity (of family) in this world and getting of heaven in the next one through sons, grandsons and great grandsons, therefore women ought to be attended to and should be guarded carefully."

**Apastamba**\(^{44}\) at another places says:

"He should go to his wife and not another woman, for the sake of religion and progeny."

So the physical and mental capacity of a man is of paramount consideration and of women too so that the union becomes divine and good progeny is secured. Our scriptures have spoken enough on the qualities of the boy and the girl to be married and to be looked into.

Manu speaks that let a man carefully avoid ten families, be they ever so great, or rich in kine, horses, grain or other (property) and then Manu speaks about those as follows:-

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\(^{42}\) Apastamba Prasana II-9. 24-3.

\(^{43}\) Yaj. 1-78.

\(^{44}\) Apastamba II-5.11.12.
"One which neglects the sacred rites, one in which no male children (are born), one in which the Veda is not studied, one (the member of) which have thick hair on the body, those which are subject to hemorrhoids, phthisis, weakness of digestion, epilepsy, or white or black leprosy."

Manu further says:-

"Let him not marry a maiden (with) reddish (hair), nor who has a redundant member, nor one who is sickly, nor one either with no hair (on the body), or too much, nor one who is garrulous or has red (eyes)."

Manu further says:-

"Let him wed a female free from bodily defects, ....."

Manu at another place says:-

"He who gives (a damsel in marriage) having first openly declared her blemishes, whether she be insane, or afflicted with leprosy, or have lost her virginity, is not liable to punishment."

This sloka is to be read with another sloka of Manu which says:-

"Though (a man) may have accepted a damsel in due form, he may abandon (her if she be) blemished, diseased or deflowered (if she have been) given with fraud."

In the next sloka Manu has said:-

"If any body gives away a maiden possessing blemishes without declaring them (the bride groom) may annual that (contract) with the evil minded giver."

45 Manu III-7; vi. XXIV, 11; Yajn I-54.
46 Ibid, Yajn I-53; vi. XXIV 12-16.
48 Ibid VIII-205.
49 Ibid IX-72.
It may be here understood that G. Buhler, the author of the Laws of Manu has introduced the expression "contract" it may be read as meaning betrothal and not marriage. So contract is meant here to agree to give the maiden in marriage. But whatever may be the case the content of voidability is provided in the sloka and as such section 5(ii) may be taken in the light of what Manu has said.

**Manu**\(^{51}\) equally speaks about the qualities of bridegroom when he says:-

"(But) the maiden, though marriageable, should rather stop in (the father's) house until death, than that, he should ever give her to a man destitute of good qualities."

In **Vishnu Purana**\(^{52}\) it is said

"He must not marry a girl who is vicious or unhealthy, of low origin or labouring under disease, one who has been ill brought up, one who talks improperly, one who inherits some malady from father or mother ..............."

**Gautama**\(^{53}\) says that "a girl should be given to one who is educated and a man of character." Here character should be considered as all embracing. It speaks of the quality of head, heart and soul.

**Yama** says that the wise should give their daughter after investigating the seven qualities-family, mentality; health, age, education, wealth and support. To the same effect **Manu** has\(^ {54}\) comprehending every thing, said briefly that "to a distinguished, handsome suitor (of) equal (caste), should (a father) give his daughter in accordance with the prescribed rule though she has not attained (the proper age). There is a commentary by Medhatithi and Nandanarayana that proper age means that she is bodily fit for marriage.

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51 Manu IX-89.
52 Vishnu Purana BK III Ch. 10.
53 Gautama Dharam Sutra IV-5.
54 Manu IX-88.
Yajnavalkya says, "she should be of a great family of "srotriyas" whose ten ancestors are renowned, but not of a family, though prosperous that has any hereditary disease or taint."

Vijneshwara in Mitakshara has explained the expression "hereditary disease" as leprosy, epilepsy and the rest. Yajnavalkya puts the same conditions for the bridegroom when he says:-"The bridegroom too should posses these qualifications (and free from the same defects) and be of the same class (or of a higher) be a srotriya (himself), young, wise, beloved of all, and one whose virile power has been well examined.

Balambhatta commenting on this verse speaks of twelve rules to be applied regarding the fitness of bride and two of them are "not suffering from any incurable disease" and "not having any hereditary taint."

In Asvalyana Grihya Sutra it is said: -

"The girl should be free from disease i.e. she should be healthy."

In Apastarnba Grihya Sutra a detailed description about the choice of the bride is given and one of the defects given is "Avoid one who has withered limbs." He also mentions the qualities of a bridegroom, such as "possessing brothers and purity of character, learning, freedom from disease."

In Manav Grahya Sutra, five qualities of the bridegroom are mentioned. They are, wealth, handsomeness, knowledge, intelligence and relatives. The last two qualifications appear to be mandatory. Intellectually dull person may be dull to perform the duties of a householder and other duties of sharing marriage.
The above various verses have laid down rules to be looked into before fixing the marriage and these rules have been judicially commented upon in *Raghvendra Rao*\(^61\) v *Jayanana Rao*, wherein Subramia Iyer J. has said that a glance at the numerous rules laid down by the ancient Hindu legislators with reference to the selection of the bride is enough to show that they are, with very few exceptions rules of caution and advice. Later on in the case of *Ramachandra v Gopal*\(^62\) the same view was reiterated and also opined that they are only hortatory and not mandatory.

Thus the viewpoint given in the various scriptures and laying stress on the qualities of the bride and bridegroom is

(i) stability of marriage
(ii) fitness of the couple physically and mentally to discharge the duties of the household
(iii) to have good progeny.

*Harita* says that "Children are born according to their families' and families have been described to be free from hereditary disease or taint.

The framers of Hindu Marriage Act, 1955 brought this concept under section 5(2) and made it to be read with section 12 of the said Act. Such a marriage under the cover of such defect is made voidable and not void. Section 5 speaks of the conditions of marriage. The marriage under section 5(2) is valid unless avoided. The whole concept is stability of marriage and procreation of a good progeny and not the import of *section 12 of the Contract Act, 1872*. It is not the concept of "consent" in view, in framing section 5(2) but the ancient law was in view. Thus section 5(2) should not be clothed with the fabric of Contract Act simply because the word voidable is used in section 12 of the Hindu Marriage Act, 1955. Whereas section 12 of the Contract Act 1872, renders the contract void. Hindu Marriage is still considered even statutorily sacrament, but by way of reformation, this clause which was a piece of care, caution and advice in Hindu law has been given due consideration as a legal provision and is discretionary and nothing more is to be read into it.

**Section 5(3) stipulates:**

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61 20 Mad. 283.
62 32 Bom, 619.
"The bridegroom has completed the age of twenty one years and the bride the age of eighteen years at the time of marriage."

Violation of this clause does not fall either under void or under voidable. In other words violation under this clause does not either attract section 11 or section 12 of the Act. However, it is generally said that this clause is in semblance with section 11 of the Contract Act, 1872 which says:

"Every person is competent to contract who is of the age of Majority according to the law to which he is subject ..."

The age of majority is governed by the provisions of the Majority Act, 1875 in terms of section 3 of the Act. Thus section 5(3) is compared with section 11 of the Contract Act, 1872 which appears to be superfluous and having no relevance at all. However, to clear any misapprehension we have to refer to the aims and objects of the Child Marriage Restraint Act, 1929 (Act 2 of 1978).

This Act was enacted with a view to prevent child marriages, namely, a marriage to which either of the party to the marriage is under a specified age. Originally the age limit for a male was eighteen years and for a female fifteen years, Later on the age limit was raised for the male to twenty one years and for female eighteen years at the time of marriage and the same was incorporated in section 5(3) of the Hindu Marriage Act, 1955 in 1978.

The increase in age for the purpose of marriage was considered in the present context when there is an urgent need to check the growth of population in the country. Such increase of the minimum age will result in lowering the fertility rate on account of lesser span of married life. It will also result in more responsible parenthood and in better health of the mother and child.

Thus the object of this Amendment as introduced in section 5(3) is social in consideration and not having any contractual content. Now it needs to be seen as to what the ancient Hindu law says about it as we find a wide fluctuation in different periods, perhaps due to changing social scenario.
but any amendment with regard to change in the age specified for marriage even in future need not to be tagged to the contractual content as it is purely a social consideration.

In the Vedic\textsuperscript{63} age we find various references which give indication about the age of the bride. Various words are used for the bride such as "Kanya," "Duhita," "Yosa," "Yuvati," "Nari," etc. which means a grownup, mature and young maiden. C.K. Chatterjee\textsuperscript{64} holds the view, after reviewing the various hymns of Rigveda that bride was a youthful lady.

In Rigveda\textsuperscript{65} there is a hymn:-

"Let girls, who are virgins, resembling cows that have never been milked before, who have passed the period of childhood and are about to leave single lives, are well educated and cultured, fit to bear all the responsibilities of married life and are in the full bloom of youth, who by their practice of "Brahamcharya" have reached a state of excellence and wisdom, which only those of great learning and high virtues can attain, marry husbands of mature age and bear children by them.

In another hymn\textsuperscript{66} the same view is expressed about a man who enters married life in the full bloom of youth is as if born again (in knowledge and wisdom).

In Atharvaveda various hymns like VI-89-2, VI-13., XX 126-10 also give some indications and according to Usha M. Apte\textsuperscript{67} these references suggest that the bride is grown up.

To support this view a reference can be made to Rishi Dhanventri\textsuperscript{68}, the author of Susruta who forbids men and women of underage from attempting procreation. The impregnation of a woman less than sixteen years of age by a man less than 25 years of age is subject to misfortune.

\textsuperscript{63} RV. 1.48.6; 1. 124.3, IV, 85.5, VII 2.5., X 168.2., X 69-11.
\textsuperscript{65} RV 3.5.16.
\textsuperscript{66} RV,3.8.4.
\textsuperscript{67} Usha M. Apte-The sacrament of marriage in Hindu society Page. 24-25.
\textsuperscript{68} Susruta, Nimaya Sagar Press, Bombay, 1930, Chapter 10.47.
He further says that if it fruits in the birth of a child, the child will not live long, it will be weak in constitution. So a conception of a minor should not be encouraged.

So he advises celibacy for man up to 25, 30, 36, 40 or 44 and for a woman up to 16, 17, 18, 20, or 24 years respectively. It indirectly indicates that the marriageable age is 25 years for the boy and 16 years for the girl.

Then we come to the period known as sutra period, wherein the views of Gautama, Vasistha, Baudhayana and Apastamba are of much importance on this aspect. Gautama says that the father of a girl had to give his daughter in marriage as soon as she attained puberty. Any negligence on the part of the father was considered a sin.

The daughter should wait for three months after she starts menstruating. Then she should find her own partner giving away ornaments given to her by her father.

Vasistha says:-

"If through the father's negligence, a maiden is given away after the suitable age has passed, she, who was waiting for a husband, destroys him, who gives her away...... Out of fear of the appearance of menses, let the father marry his daughter while she still goes about naked, for if she stays in the house after the age of puberty, sin falls upon the father."

Baudhayana says:-

69 Ibid 10.48.
71 Vasishtha 17.61-62.
"One should give one's daughter, while she still goes naked, to a man who has not broken the law of chastity and who possesses good qualities or even to one destitute of good qualities. He should not keep the maiden in his house after she has reached the age of puberty. He further says that he who does not give away a marriageable daughter within three years of her puberty, doubtlessly contracts guilt to that of killing an embryo."

Coming to the period of smritis, reference be made to Manu, the law giver and his three slokas indicate the age of the girl when she should be married.

(i) "To a distinguished handsome suitor (of) equal (caste) should (a father) give his daughter in accordance with the prescribed rule, though she have not attained (the proper age)."

(ii) Three years let a damsel wait though she be marriageable but after that time let her choose for herself a bridegroom (of) equal (caste and rank).

(iii) "A man, aged thirty years, shall marry a maiden of twelve years who pleases him, or a man of twenty four a girl of eight years of age; if (the performance of) his duties would otherwise be impeded (he must marry) sooner."

Commenting on this verse Medatithi and Kulluka say that this verse is not intended to lay down a hard and fast rule, but merely to give instances of suitable ages. However, Kulluka, Narayana and Raghvanand, the commentators say that if (the performance of) his duties would be impeded i.e. if he has finished his studentship earlier, he must marry at once in order to be able to fulfil his duties as a householder.

Yajnavalkya says

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72 Baudh. Dh.S. 4.1.12.
73 Manu IX-88.
74 Manu IX-90.
75 Manu IX-94.
76 Yajn 1-52. Manu III-2.
"Without breaking (the rules) of studentship, let him marry a woman with auspicious characteristics who has not belonged to another man, who is lovely, who is not a sapinda and who is younger (than himself)."

He\textsuperscript{77} says further

"If they fail to give her away in marriage, they incur the sin of killing the embryo at every menstruation, in the absence of persons who can give her away in marriage, the girl herself may elect a proper bridegroom."

The other Smritikars have spoken too about it. According to Brihaspati a man of thirty should marry a girl of ten, while person of twenty-one years of age should marry a girl of seven years of age. \textit{Balambhatta} has spoken thus but he has not cited any reference. However \textit{Baibambhatta}\textsuperscript{78} while referring to \textit{Vishnu Purana} says that there is a Universal rule that bride should be one third of the age of a man. If he marries he must select a maiden who is of a third of his age.

If we critically examine the various verses and hymns we arrive at a safe conclusion that no age is prescribed for a marriage. The age of the bride went on undergoing a change according to the social evolutionary aspect kept under consideration. But the fact remains that the girl should be married when she attained puberty. It is only by way of abundant caution that the girls be married earlier as the father may not come to know about the attainment of puberty of the girl. However, it is seen even where the girl is married prior to the attaining of puberty she was not sent to the house of the bridegroom till she attained puberty. Being a sacred and heavy duty on the shoulders of the parents, they always tried to discharge that duty as early as possible. Also due to outer influence on Indian soil, the marriage of a minor girl was preferred. Too much need not be read in the age factor of the marriage, it was only to suit the then social circumstances and to fulfil the discharge of sacred religious duty. There was also a dominant religious mandate that the daughter is a sacred trust and the parents are the trustees and that trusteeship is up to the attainment of puberty and after the daughter becomes mature she must be guarded by the husband and thus she is married as soon as possible but the concept of attainment of puberty was always kept in view. If section 5(3) speaks of

\textsuperscript{77} Ibid 1-64.  
\textsuperscript{78} Balambhata BK III Ch. X-16 Commentary on Yajnavalkya.
age fixed for the boy and the girl as twenty one and eighteen respectively, it is not in view of section 11 of the Contract Act, 1872 which is unnecessarily being read in clause 5(3) of the Hindu Marriage Act, 1955 and this view is reinforced judicially also.

In *Ram v Chand*\(^{79}\), it is held that such marriages below the age prescribed though restrained under law, yet are not invalid.

In *Venkataraman v State*\(^{80}\) Andhra Pradesh High Court overruling *AIR 1975 A.P. 485*\(^{81}\) and dissenting from *Krishan Devi v Tulsam Devi*\(^{82}\) held that the marriage in contravention of the age limits can neither be void nor voidable though it is punishable under section 18 of the Act.

The Supreme Court in *Lila Gupta v Laxminarayana*\(^{83}\) observed that a reference to the Child Marriage Restraint Act would show that it was enacted to carry forward the reformist movement of prohibiting child marriages and while it made a marriage in contravention of the provisions of that Act punishable, it did not render the marriage void. The same reasoning would apply to the marriage contravening section 5(3) of the Hindu Marriage Act, 1955.

After the decision of the Supreme Court, various High Courts\(^{84}\) held that such a marriage is neither void nor voidable as the legislature excepted that provision from the view of section 11 and 12 of the Hindu Marriage Act, 1955.

Thus section 5(2) and 5(3) do not in any way show that Hindu Marriage is now a Contract. Rather these two clauses show the absence of contractual element in section 5 of the Act. This view is reinforced with section 7 of the said Act that Hindu Marriage is still a sacrament.

**Section 7 of Hindu Marriage Act, 1955 stipulates:**

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80 AIR 1977 A.P. 43. (F.B.).
81 Suramma v Ganapati. AIR 1955 SC 114.
82 AIR 1972 Pb 142.
84 1978 HLR 547 (Pb); 1980 HLR 166 (Raj) AIR 1977 Ori 36.
(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 when the seventh step is taken.

This section is clearly mandatory in nature though the word "may" is used or rather it overrides section 5 of the Act. The expression "customary rites and ceremonies" supplemented with the expression "solemnization" reflects clearly that Hindu Marriage is a sacrament. In the words of Usha M. Apte\textsuperscript{85} the sacrament of marriage is a very important samaskara from various points of view. It gives a religious and legal sanction to the matrimonial relations of the persons concerned. Particularly to the Hindu mind, it is a sacrament which lends a sort of permanency to the wedlock. The religious aspect of the Hindu marriage is very important from this point of view. The rites give a special meaning to sexual intercourse which otherwise would be a "imple gratification of the sex-instinct.

\textbf{The Vivahasukta of Rigveda i.e. Rig ved X-85} gives first clear picture of the primary marriage ritual. According to Rajbali Pande\textsuperscript{86} the rites of marriage mentioned in Rigveda have been bodily taken from Atharvaveda but with some important changes. The sutras and sastras give a fully developed marriage ritual prescribing a number of details to be followed. The Grihya Sutras mainly deal with the rituals of marriage, though there are some variations in details. The principal Girhya Sutras are Asvalanya Grihya Sutra, Gobhila Grihya Sutra, Apastamba Grihya Sutra, Manava Grihya Sutra, Parasra Grhya Sutra.

These rituals and ceremonies are not only having religious significance but also social significance and the invocation of God is to confer strength to discharge the duties of a householder and as Manu has said:–.

\textsuperscript{85} Usha M. Apte. Preface to the, The Sacrament of Marriage in Hindu Society, Page 60-64.
\textsuperscript{86} Rajbali Pande, Hindu Samaskara, Page 205.
"As all living creatures subsist by receiving support from air, even so (the members of) all orders subsist by receiving support from the householder."

"Because men of the three (other) Orders are daily supported by the householder with (gifts of) sacred knowledge and food, therefore (the Order of) the Householder is the most excellent Order."

So Marriage is the foundation of "Grihasta" and "Grihasta" is the foundation of the society and as such utmost sanctity is to be bestowed on marriage as its stability is the sine qua non of the harmony of the society.

Section 7 speaks of ceremonies as prescribed in the Grihya sutras and as adopted and accepted by the custom of either party to the marriage. In Kunta Devi v Sri-Ram Kaluram. It is said that the performance of homam, the panigrahnan or taking hold of bride's hand and going round the fire with Vedic Mantras, the treading on the stone and the seven steps or sapatpadi these are the more important rites.

The Supreme Court in Babu Rao v State of Maharashtra said that the word "solemnized" means to celebrate the marriage with 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 be taken to be married would not make the ceremonies prescribed by law or approved by any established custom. The Supreme Court reiterated the same view in Kanwal Ram v H.P. Administration.

However, Kerala High Court in Chakki v Ayyapan considered sapatpadi and invocation before sacred fire as essential and obligatory ceremonies and must be observed and if some ceremonies which are not definite or obligatory if not performed will not render the marriage invalid. Thus the whole stress is on "solemnization of marriage" which is essential and obligatory and without their observation the marriage is "no marriage in the eye of law."

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87 Manu III-77.
88 Manu I11-78. See also Vas VIII, 14-16; vi LIX 27-28.
89 AIR 1963 Pb. 235.
90 AIR 1965 S.C 1364.
91 AIR 1966 S.C 614.
92 AIR 1989 Ker. 89.
In *Rajaihi v Selliah*\(^3\), Mr. Justice Satyanarayana of the Madras High Court said that it may be laudable object to simplify the marriage ceremonies as laid down in Sastras and custom but it will be a dangerous doctrine to lay down that a community should have liberty to prescribe the requisites of a valid marriage without any statutory authority:

Thus in essence when Hindu Marriage Act, 1955 was enacted to amend and codify Hindu law, the intention of the legislature was not to destroy the sacrament character of Hindu Marriage.

In *Rani Bala v Ram Krishna*\(^4\) a clear picture has been thus given. The two statutes, the Hindu Marriage Act, 1955 and the Contract Act, 1872 are not pri-material. The former deals with marriages. The latter deals with contracts and commerce. A Hindu marriage is neither a contract nor a commerce. It is a sacrament. Sacrament apart, a marriage can never be regarded as a mere contract. The parties who enter into contract can at their will dissolve it, but the parties who contract a marriage cannot. The Hindu Marriage Act has no doubt made an inroad into the close preserve of that ancient law, but the concept of a sacrament still goes strong.

However, the propounders of the theory that Hindu Marriage is a contract, base their assertion On Divorce which dissolves marriage. Even this view does not appear to be sound and any such statement, being made is incorrect and untenable statement in law.

To quote *J.D.M. Derrett*\(^5\) "The introduction of divorce has not interfered with the samaskara still less abolished it " as too many jurists have pathetically and incautiously observed. Marriage performed according to sastras is still a samaskara and judicial divorce cannot end that aspect of marriage. It merely terminates (subject to orders, relating to alimony; matrimonial property and custody of children), secular rights of one spouse against the other and frees each other to enter into another union. ... The sastrik concept of marriage as a samaskara, a union of two persons for all purposes spiritual... has been trimmed but not destroyed by the Legislature.

\(^3\) (1966) 2 M.L.J. 40.
\(^4\) (1969) 73 CWN. 751
Thus, in short, it can be said that the concept that "Hindu marriage is permanent and indissoluble union" is no more tenable with the introduction of Divorce, but the concept that it is a "holy union" is still there and section 7 of the Act reinforces this concept. From the above, it may be said that the warmth in the Hindu marriage now appears to be lukewarm. Hindu Marriage Act, 1955 has definitely cast a shadow by which Hindu marriage looks like an assemblance of having some non-sacramental character.

The Special Marriage Act, 1954

A brief description of two provisions of the Special Marriage Act, 1954, is needed to show as to how the sanctity of Hindu Marriage has been placed under a lingering shadow.

Section 4 of the Special Marriage Act, 1954 is almost a true replica of Section 5 of the Hindu Marriage Act, 1955 except that that Hindu Marriage Act, 1955 applies to Hindus only and whereas under section 4 of the Special Marriage Act, 1954, it is a marriage between any two persons (it also includes two Hindus).

Thus the Special Marriage Act, 1954 provided discretion to the Hindus that they are at liberty to solemnise their marriage if they so choose and the marriage solemnized under the Act is a civil Marriage and whereas the marriage under the Hindu Marriage Act, 1955, section 5 read with section 7 make the marriage a holy union. Thus now there are two types of marriage in India for Hindus i.e. Civil Marriage and Religious Marriage and the choice is left to the parties concerned to marriage to opt under which Act they propose to have their marriage celebrated.

Section 12 of the Special Marriage Act, 1954 makes the matter very clear. Section 12(2) stipulates:

The marriage may be solemnized in any form which the parties may choose to adopt:
Provided that it shall not be complete and binding on the parties, unless each party says to the other in the presence of the Marriage officer and the three witnesses in any language understood by the parties,-"I, (A) take thee (B) to be my lawful wife (or husband)."

Here section 12 is in place of section 7 of the Hindu Marriage Act 1955, wherein customary rites and ceremonies of either party to the marriage are prescribed to be observed. In section 12 of the Special Marriage Act, in place of "customary rites and ceremonies" an expression "in any form" is used with a proviso which is mandatory that the parties to the marriage shall call each other as husband and wife. The Special Marriage Act, 1954 came after the demise of Hindu Code Bill and it was followed by the Hindu Marriage Act, 1955.

Thus in short, Hindu Marriage lost its mandatory religious character. It is discretionary. It is the choice of two Hindus as to under which Act they want to have their marriage celebrated. Do they without a religious marriage or a civil marriage? Reading the two Acts together, one can without any doubt, safely say that special Marriage Act, 1954 laid the foundation to create a parallel enactment in advance of the Hindu Marriage Act, 1955 so that the religious feelings of the Hindus do not become emotional. The special Marriage Act became a stepping-stone for the enactment of the Hindus Marriage Act 1955. The framers tried to play safe. Hindu Code Bill was exhumed from the grave and brought back to life through the four enactments without any untoward reaction from the Hindus.

No doubt, under Hindu Marriage Act, 1955 the concept of Holy Union was kept in tact but the preservation of the sanctity of this concept became optional in the presence of the Special Marriage Act, 1954. Religious marriage is not mandatory. It is the choice of the parties to the marriage. This itself is a significant blow to lower the sanctity of Hindu Marriage. It has definitely paved the way for further changes in the Matrimonial law if needed and seeds have been sown already and the reflection is as below:-

Section 12 (l)(d) of the Hindu Marriage Act, 1955. It stipulates:-
"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,—

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner."

**Section 12(2)(b).** Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(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;

(ii) that proceedings have been instituted 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.

In Section 12(1)(d) the expression used is "pregnant by some person other than the petitioner." This expression has further two ingredients i.e.

(i) pregnant by some other person.

(ii) not pregnant by the petitioner.

Though this ground is borrowed from English law, there is also a reference to this effect in Dharmasashtras that if a man knowingly marries a pregnant woman, she is his wife and the son born to her from her pre-marriage pregnancy is treated as his son, known as "Sahodaja" son. There is also a reference that if a man marries a pregnant woman without knowledge, he could repudiate.

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96 Matrimonial Causes Act, Section 8 (1)(b), 1950.
the contract. It is significant to note that this particular aspect refers to the concept of betrothal. Mayne has mentioned that either party to the contract is allowed to withdraw from it where certain specified defects are discovered and cited various authorities to this effect.

The first ingredient is legally significant because it is to be read with section 12(2)(b) which creates a prohibition and inherently conceives the doctrine of condonation and thus becomes in consonance with what Manu has said in chapter IX-73.

The second ingredient "Not pregnant by the petitioner," though looks negative in nature, is in fact positive in character. It clearly indicates that if the respondent is pregnant by the petitioner, then the marriage is not voidable. It is a valid marriage and thus the child conceived earlier and begotten later is legitimate. It propounds the doctrine of "subsequent marriage". Thus this provision is more inclined towards legitimation of the child. So it is to be taken in the same legal spirit of "Legitimato per subsequens matrimonium." This view is fully reinforced by judicial pronouncements.

Sushila v Mahendra

In a petition under section 12(l)(d), though the defendant, in her written statement stated that she was pregnant at the time of marriage, the court must require the petitioner to prove beyond reasonable doubt that she was so pregnant and that she was pregnant by some one other than the petitioner. The matter was taken to the Supreme Court and the Supreme Court dismissed the petition stating that it must be proved to the satisfaction of the court. The Supreme Court relied on AIR 1958 S.C. 441.

Surjit Kumar v Raj Kumarp It was a case under section 12(l)(c) wherein section 12(l)(d) was also discussed and the court said that section 12(l)(d) provides that the marriage may be annulled only if at the time of marriage the girl was pregnant by some person other than the husband. It

97 Manu IX-73.
98 Mayne's, Hindu UIW and usage, 13th Ed. 1991 p. 118 under the heading "Betrothal."
99 Narada XII 30-38; Yajn 1.65,66; Vas cited Dig. II 174-175; Katyayana cited Digest II, 127, 178.
100 AIR 1960 Bom. 117.
101 Mahinderav Sushila AIR 1965 S.C 364.
102 AIR 1967 Pb 172.
shows that the past unchastity is not made a ground for annulment of marriage. The court referred to Rattigan on Divorce 103 "Generally speaking, concealment'. or deception of one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health and the like is not sufficient ground for avoiding marriage. The parties must take the burden of informing themselves by acquaintance and satisfactory enquiry before entering into a contract of the first importance to themselves and to society in general. As a general rule pre-nuptial unchastity of the wife though unknown to the husband at the time of marriage is not a ground for a decree of nullity. To consider such plea could be inconsistent with reason and sound policy."

Nishit Kumar v Anjali 104
In this case the court held that the burden of proof is on the petitioner who alleges the pre-marriage pregnancy of the wife. It is a very heavy burden but a burden rightly placed on him.

Nand Kishore v Munnibai 105
In this case it is said that imputing unchastity to a woman is a charge of very serious nature. The charge if established may result in serious consequences. Not only would a woman be condemned in society and be lowered in the eyes of the relatives and associates but may also suffer a child, if any, being called a bastard. It shall be just to seek a more cogent and convincing evidence in such cases than the one which may only create a doubt. It must be proved beyond reasonable doubt. The court followed AIR 1965 S.C. 364.

Baldev Raj v Urmila 106.
In this case the marriage took place on 8-10-62. The married couple had cohabitation. The husband came to know on 30-10-62 that she is pregnant. There was no co-habitation later on. The husband filed a petition on 1-11-62 under section 12(1)(d) of the Act, 1955.
She gave birth to the child on 20-5-1963. It was a matured child. Medical evidence showed that the conception took place between 11th to 16th August 1962. The courts below dismissed the petition that the medical evidence is not that of a Gynecologist. The Supreme Court allowed the petition

103 2nd Edition Page 308.
104 AIR 1968 Cal. 105.
105 AIR 1979 M.P. 45.
106 AIR 1979 S.C 879.
that in this case the burden of proof lies on the respondent to show that the pregnancy is only due to her husband with whom she is married later on.

Vellinayagi v Subramanian\textsuperscript{107},

In this case it is held that if the petition is not presented within the time as laid down in section 12(2)(b), nothing can be done. The petitioner cannot take shelter under section 5 of the Limitation Act. The petitioner has to reconcile to his laches.

This section 12(1)(d) read with section 12(2)(b) should be taken not merely in the light of the ingredients mentioned therein but the principles involved. The provision tilts more towards doctrine of (i) subsequent marriage and (ii) doctrine of condonation. Thus this section is an indirect pleading for subsequent marriage and to save the child from being bastardized.

Now we turn our attention to another statutory provision i.e. \textit{Section 112 of the Evidence Act, 1872.}

The section provides that the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

The section speaks of two moments of time. The first moment of time is that relating to birth. In this regard, the section provides that it must have taken place during the continuance of a valid marriage. The second moment of time is to be found in the latter half where it is permissible to show that the parties had no access to each other at any time when the child could have been begotten. This speaks of conception of the child.

However, this provision differs and departs from the Hindu Law. \textit{Manu}\textsuperscript{108} defines the "aurasa" son thus:

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\textsuperscript{107} (1969) 1 MLJ 334 Savalaram v Yeshiarbhai AIR 1962 Born. 190; Rangaswami v Nanamma (1972) 2 Mys. L.J. 256; Nanikram v Drupdiben AIR 1974 Cuj. III.
\end{small}
"Him whom a man has begotten on his own wedded wife let him know to be the first in rank, as the son of his body." To the same effect are the texts of Vasistha, Devala, Baudhayana, Apastamba and Yajnavalkya as cited in Colebrook's Digest.

According to the Hindu sages, therefore, in order to constitute legitimacy, there must be not only birth but also procreation in lawful wedlock and some of the leading commentators, such as Kulluka, Vijneshwara and Nilkantha, confirm this view of the texts of the sages.

But the judicial pronouncements took a different view. In Pedda Amani v Zemindar of Marungapuri, Sir Barnes Peacock in delivering judgement in this case said, "the point of illegitimacy being established by proof that the procreation was before marriage, had never suggested itself to the learned council for the appellant at the time of the trial, nor does it appear from the authorities cited to have been distinctly laid down that, according to Hindu law, in order to render a child legitimate, the procreation as well as the birth must take place after marriage. That would be a most inconvenient doctrine. If it is the law that must be administered. Their Lordships, however, do not think that it is the Hindu law. They are of the opinion that "the Hindu law is the same in that respect as the English law."

It appears that the framers of the Bill seem to have preferred the English Rule to avoid minute enquiries as to the possible date of conception especially where there are border line cases and became content as a matter of social policy that it is enough if the married status and the birth coincide. However, this issue again arose in Krishanappa v Venkatappa. In this case the District Munsif held that the plaintiffs were born during lawful wedlock and hence legitimate even though the wife was leading an unchaste life and was living in her parent's house and having intimacy with her paramour. On appeal the subordinate Judge in a singularly perverse judgement upset the findings of the District Munsif and held that section 112 of the Evidence Act has no

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108 Manu IX-166.
109 Digest BK V 193, 195, 196, 199 and 200 referred to by Bannerjee, Marriage and Stridhana (1923) Page 177.
110 Mitakshara Ch. I Sec XL 2; Vyavahara Mayukha Ch.IV, Sec IV, 41 and Bannerjee-Marriage & Stridhana (1923) Page 177.
111 (1874) L.R.I. LA. 293 (P.C).
112 Emphasis supplied.
113 AIR 1943 Mad. 632.
application to marriages under the Hindu law which are sacraments and not capable of dissolution by act of parties or intervention of a court unless caste custom permits the same.

The matter was agitated before the High Court which held that such a view of section 112 of the Evidence Act is palpably absurd and cannot be countenanced for a single moment and further held that section 112 of the Evidence Act, to think that it is not applicable to Hindu Marriages, is absurd.

Thus this proposition of law as judicially propounded is applicable to Hindu marriages. However, so far as the legitimacy of the child is concerned, birth during wedlock is a conclusive presumption unless "Non Access" is pleaded and proved to the satisfaction of the court and "Access" means opportunity for sexual intercourse and not actual intercourse as held by the Privy Council in Karuppayya Servai v Mayandi\textsuperscript{114} and as followed by the supreme court in Venkteshwarlu v Venkatanarayana\textsuperscript{115}.

So even section 112 of the Evidence Act, 1872 not only tilts towards legitimacy but also has inclination towards "birth during wedlock" and not that much concerned towards "conception" and thus leads to the conclusion of favouring "subsequent marriage" to save the child, from being bastardized.

Perusal of sastrik law as embodied in the scriptures and other statutory provisions later on enacted raises the following propositions:-

(i) The sacramental marriage among Hindus has three characteristics. It is an eternal union; it is an indissoluble and permanent union and it is a holy union.

(ii) Its first characteristic i.e. "eternal union" is wiped out in 1856 when the widow remarriage was given statutory recognition.

(iii) Its second characteristic is destroyed with the incorporation of section 13 (Divorce) in the Hindu Marriage Act, 1955.

(iv) Its third characteristic i.e. "holy union" is somewhat retained in the Hindu Marriage Act, 1955 under the cover of section 7 of the said Act but in view of The Special Marriage

\textsuperscript{114} AIR 1934 P.C 49.
\textsuperscript{115} AIR 1954 S.C 176.
Act, 1954, this aspect of "holy union" is much diluted. These two enactments read
together make it evident that the aspect of "holy union" has lost its mandatory character.
It is now discretionary. It entirely depends upon the parties to the contract. They can go
in for a civil marriage contemplated under The Special Marriage Act, 1954. Thus there
are two types of marriages for the Hindus i.e. Religious Marriage under the Hindu
Marriage Act, 1955 and Civil Marriage under the Special Marriage Act, 1954.

(v) Section 12(1)(d) of the Hindu Marriage Act, 1955 has brought in the concept of
"Subsequent marriage" though not expressly, but definitely impliedly.

(vi) Section 112 of the evidence Act 1872, which equally applies to Hindu Marriages, laid
more focus on the legitimacy of the child rather than on the marriage.

Now a situation has reached that though marriage as an institution must exist as it is an institution
of preservation of morality also, the Center of Gravity has definitely shifted towards child as a
person and not as a chattel as hitherto considered in materialistic considerations. In the changed
circumstances of outlook, a deviation in mental thoughts and varying nature of modern ideals, law,
being dynamic, must look to the evolution and keep pace with it. It is suggested that to maintain the
sanctity of marriage and the divinity of the child, the doctrine of "subsequent marriage" must be
introduced by a legislative measure in consonance with the ethos and social moorings by which the
sanctity of marriage is saved and paramount interest of the child as a divine person is also
established.
PART-B

ILLEGITIMATE CHILD AND IDEALISM OF SONSHIP

Child is a divine gift. How beautifully Mari Montessori has expressed her feelings about the child from the inner core of her heart that humanity shows itself in all its intellectual splendour during this tender age as the sun shows itself at the dawn and the flower in the first unfolding of the petals; and we must respect religiously, reverently, these first indications of individuality. Khalil Gibran, the Prophet described the child in a spiritual tone that your children are not your children; they are the sons and daughters of life's longing for itself.

But if we dive even a bit in the materialistic spectrum which is clothed with legality then our attention is attracted towards the Roman Concept of "Nullius Filius" which was further transmitted to and assimilated in the common law of England so much so that Blackstone¹ in his commentaries on the law of England has said that a bastard, by our English Laws, is one that is not only begotten, but born, out of lawful matrimony. The Civil and Canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry² and herein they differ most materially from our law; which though not so strict as to require that the child shall be begotten, yet makes it an indispensable condition, to make it legitimate, that it shall be born, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage taken in a civil light; abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. However, the English law has almost wiped out the distinction³ and now the child is a person and not a chattel.

In spite of the modern philosophy of law that it should not discriminate against any child or impose disabilities on him by reasons of his birth, Muslim law still rigidly adheres to

2 Institutes of Gaius I, 10, 13.
the concept of 'Nullius Filius', though the preventive measures like "Iddat" and "acknowledgement of paternity" are there to save the child from being bastardized.

However, Hindu law has its own peculiar concept of sonship. It is a well settled law that if a particular 'word' or phrase is used in the statute then we have to find its meaning in the statute itself if given. The next alternative is to search its meaning in "The General Clauses Act, 1897" failing which we have to ascertain the judicial definition. The last resort is the dictionary meaning. But if any 'word' or 'phrase' is used in the statute pertaining to Hindu Law, we have five steps at our disposal i.e. the concerned statute, Sastrik law, General Clauses Act, Judicial definition and dictionary meaning. Reason is simple and obvious. Sastrik law is only amended and codified and not repealed. So if the statute is silent on the meaning of a particular 'word' or phrase, then we have to find, firstly, its meaning in Sastrik law and not to resort to the search in The General Clauses Act, 1897.

If we look to the four enactments on Hindu Law, there is a mention of son (daughter) but it has not been defined in any of the enactments. Section 16 of the Hindu Marriage Act, 1955 speaks of legitimacy of children of void and voidable, marriage (here children means both son and daughter), but in the Act there is no definition of son (daughter). However, section 3(f) and 3(g) speak of sapinda relationship and prohibited relationship. There is Explanation (ii) thereto which speaks "illegitimate blood relationship as well as legitimate. The Hindu Adoptions and Maintenance Act, 1956 and the Hindu Minority and Guardianship Act, 1956 only refer to section 3 of the Hindu Marriage Act, 1955 which deals with definitions. The Hindu Succession Act, 1956, also does not define son (daughter) but section 3(1)(j) speaks about "related:" which means related by legitimate kinship;"

"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."
Thus the Modern Hindu Law, though did not define son (daughter), it did maintain the
distinction between the illegitimate and legitimate children by defining "related." Now
from here we shall proceed to the General Clauses Act, 1897 wherein 'son' has been
defined.

Section 3(57). 'Son' in the case of anyone whose personal law permits adoption, shall
include an 'adopted son.'

Section 3(20). 'Father' in the case of anyone whose personal law permits adoptions shall
include adoptive father.

In these definitions we find two expressions:

(i) in the case of anyone

(ii) whose personal law permits adoption

In the case of anyone

The General Clauses Act, 1897, was enacted when the Hindus and the Mohammedans
were governed in their personal matters only by their personal law. Mr. Justice Field 4said
that the British rule at the beginning of its authority in this country recognized the rule as
applicable to Hindus and Mohammedans and various regulations were promulgated by
which succession, inheritance, marriage and caste and all religious usages and institutions
of the Hindus and the Mohammedans would be decided by the rules laid down in their
personallaws5.

Thus the definition of 'son' in the General Clauses Act, 1897 was provided keeping in
view the personal laws of the Hindus and Mohammedans. At that time Sastrik law was
the basis wherein 12 or 13 types of sons were recognized. Not only that even 'dasiputra'

4 Regulations of Bengal Code Page 169-171.
5 Regulation of 21st August, 1772; 5th July, 1781; Regulation III of 1793; Regulation IV of 1793; Regulation VIII of 1795,
Regulation VII of 1832.
was recognized as a member of the family. Thus "in the case of anyone" we must read all the 12 or 13 types of sons recognized in Sastrik law.

**Whose personal law permits adoption**

This expression specifically pertains to Hindu personal law or sastrik law. Under Muslim law the paternity of a child cannot be established by a Muslim if he adopts a child of another person. Adoption is not recognized in Muslim law as it has been disapproved by the Holy Prophet and Koran.

England had known de-facto adoption in the latter half of the nineteenth century, though a formal law of adoption was enacted for the first time in 1926. A comprehensive statute of adoption was passed in 1950 which was further modified and consolidated by the Adoption Act, 1958. Then came the Adoption Act of 1968 for the purpose of giving effect to the Hague convention on "Adoption of Children, 1965."

So this expression "**whose personal law permits adoption**" only pertains to Hindu sastrik law. So the definition is to be read as "anyone including the adopted son" so now we have to concentrate our attention on the idealism of sonship as manifested in the sastrik law.

**Sonship.** The Hindus have regarded the institution of sons hip as important as the institution of marriage and the desire to have a male offspring, though very natural in all the societies, is prized very much in the Hindu Society for the continuance of the family as well as for the performance of funeral rites and offerings. Right from the Vedic age Hindus have desired an auras a son to derive spiritual benefaction and to pay the three debts with which an Aryan is burdened when born. Smritikars on the authority of Vedic injunction speak the same language.

**Vasistha** says

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6 Sura 33.4 and sura 33.37.
7 Rigveda I, 21, 5.
8 Vas. XVII, 1-5. SBE.
"The father throws his debts on the (son) and obtains immorality if he sees the face of a living son."

It is declared in the Veda, "Endless are the worlds of those who have sons; there is no place for the man who is destitute of male offspring."

"There is a curse (in the Veda), "May our enemies be destitute of offspring."

"There is also (the following) passage of the Veda." May I obtain, O Agni, immortality by offspring."

"Through a son he conquers the worlds, through a grandson he obtains immortality, but through his son's grandson he gains the world of the sun."

To this effect Vishnu\(^9\) says

"Let a son present the funeral oblations to his father, even though he inherits no property."

"Because he saves (trayate) his father from the hell called Put, therefore (a male child) is called put-tra (protector from put, son) by Svayambhu himself." [Nandana (Nandanacharya according to Dr. Burnell) translated Svayambhu means the Veda]

"He (the father) throws his debt on him (the son); and the father obtains immortality, if he sees the face of a living son."

"Through a son he conquers the worlds, through a grandson he obtains immortality, and through the son's grandson he gains the world of the Sun."

\(^9\) Vis. XV, 43-46.
Brihaspati\textsuperscript{10} also says

"punnamno narakot putrah pitaram trayate yatah I
mukhasamdarsanenapi tadutpattau yateta sah" I I

"Because a son (putra) saves his father from the hell called Put by the very sight of the face, therefore should a man be anxious to beget a son."

Manu\textsuperscript{11} in his various verses speaks about the spiritual aspect of the birth of a son.

"When he has paid the three debts, let him apply his mind to (the attainment of) final liberation; he who seeks it without having paid (his debts) sinks downwards."

"Having studied the Vedas in accordance with the rule, having begotten sons according to the sacred law, and having offered sacrifices according to his ability, he may direct his mind to (the attainment of) final liberation."

"A twice born man who seeks final liberation, without having studied the Vedas, without having begotten sons, and without having offered sacrifices, sinks downward."

Manu\textsuperscript{12} at another place again speaks of the three debts.

"Neglected to kindle the sacred fires, theft, non payment of (the three) debts, studying bad books, and practising (the arts of) dancing and singing."

In this verse there is reference to the three debts and these three debts are:-

\textsuperscript{10} Brihaspati cited in Colebrook's Digest V, 4, 304.
\textsuperscript{11} Manu VI 35-37. See also Manu IX, 106-107.
\textsuperscript{12} Ibid XI, 66.
"According to the Veda, an Aryan is born burdened with three debts. He owes the study of Veda to the Rishis, sacrifices to the gods and a son to the manes."

Manu at another place stresses the need of an offspring as that without the offspring the family is incomplete.

"He only is a perfect man who consists (of three persons united), his wife, himself and his offspring; thus (says the Veda), and (learned) Brahmanas propound this (maxim) likewise.

Then Manu speaks of the spiritual aspect of the birth of the son thus:

"Through a son he conquers the worlds, through a son's son he obtains immortality, but through his son's grandson he gains the world of the sun."

"Because a son delivers (trayate) his father from the hell called Put, he was therefore called put-tra (a deliverer from put) by the self existent (Svayambhu) himself."

But it is really an astounding aspect of Hindu jurisprudence that on the one hand the sacredness of the institutions of sonship and marriage is emphasized by which the morality and chastity of the wife is considered supreme and on the other recognition is accorded to as many as thirteen types of sons, most of them are born outside the lawful wedlock. Dr. Paras Diwan is of the view that such sons existed under some customs and probably their existence could not be ignored, and, the devotion of our sages to systematization was so great that they placed them in the classification of sons. These sons probably have some importance in the psychology of the sonless who thinks that it is better to have a substitute of a son than to have none. Even John D. Mayne says that it is true that while the ancient Aryans longed for offsprings, they recognized at the same

14 Manu IX-45.
15 Ibid., IX 137-138.
16 Dr. Paras Diwan, Modern Hindu Law, 9th Ed. 1993, Page 44.
time, the need for their wives remaining chaste rather than they should have offspring anyhow. The emphasis on the need for male offspring was more than counterbalanced by the insistence on the need for morality. It appears that John D. Mayne derived his assumption from Manu\textsuperscript{18} wherein stress is laid on the chastity of a woman and in particular that of a widow. Manu\textsuperscript{19} has clarified the position when he said that "these eleven, the son begotten on the wife and the rest as enumerated (above), the wise call substitutes for a son (taken) in order (to prevent) a failure of the funeral ceremonies.

Even an indirect reference can be drawn from the Hindu scriptures\textsuperscript{20} that stress was always laid on religious merit. It is said that in particular places the religious merit is endless; it is inexhaustible in a Sradha at Gaya and in death and the like at Prayaga (or concourse of the Ganges and Jumna). All these sages sing and proclaim the following verse,

"Many sons should be secured, possessed of good character and endowed with virtue: if amongst them all, even if one goes to Gaya, and if having arrived at Gaya performs the Sradha, the paternal ancestors being saved by the same, attain the highest state.

\begin{verse}
\text{देशानात्तु विशेषेण कर्त्ति पुण्यम् अनन्तकं।}
\text{गयायाम् अक्षयं आद्वे प्रयागे मरणारिषु।}
\text{गायति गाय्या ते सर्वं कीर्त्यन्ति मनोदिषु।}
\text{एष्टवा वहवं पुत्रः शीलवतः गुणाविविहः।}
\text{तेषां तु समवेतानाः वधेकोडः गयाः ब्रजेत्।}
\text{गया प्राय्यानुपयगेन यदि आद्वे समाचरेत्।}
\text{तारितः पितरस्तेेन प्रयाण्ति परमां गतिम्।}
\text{उसाना।}\
\end{verse}

It speaks of many sons so that even if one of them performs the Sradha the religious merit will come to the ancestors. This gives an indication as to why there is a need to have

\begin{flushright}
\text{18 Manu V, 156-166.}\n\text{19 Ibid IX, 180.}\n\text{20 Usanas-Smriti cited in R.N. Sarkar’s Hindu Law, Page 34.}
\end{flushright}
many sons. This is an approach pragmatic in the sense that in no case there may be missing of the religious merit.

**Brihaspati**\(^{21}\) also speaks on this aspect.

"All the paternal ancestors apprehending fear of infernal regions are desirous that the son who will go to Gaya will become our saviour. Many sons should be secured even if one may go to Gaya, or perform the horse sacrifice, or dedicate the Nila Bull.

Looking to the concept of sons and spiritual benefit, it is essential to have a glance on the ancient Hindu Society and the law of sonship. **Apastamba**\(^{22}\) speaks of only the "Aurasa" son. **Gautama**\(^{23}\), **Vasistha**\(^{24}\), **Harita**\(^{25}\), **Kautilya's Arthasastra**\(^{26}\), **Vishnu**\(^{27}\), **Yajnavalkya**\(^{28}\), **Narda**\(^{29}\), **Brihaspati**\(^{30}\), **Sankha and Lakhita**\(^{31}\), **Devala**\(^{32}\), **Yama**\(^{33}\), **Kalikapurana**\(^{34}\) and **Brahmapurana**\(^{35}\) speak of twelve sons and whereas **Manu and Baudhayana** speak of thirteen sons.

**Manu**\(^{36}\) has spoken about the various sons as follows:-

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21 Brihaspati cited in R.N. Sarkar's *Hindu Law*, Page 36
22 Apastamba II, 6, 13 (Prasna II, Patala 6, Khand 13)
23 Gautama XXVIII, 32-33.
24 Vasistha XVII 12-38.
25 Harita, Dig. II, 331.
26 Kautilya's Arthasastra (Translation by R.P. Kangle).
27 Vishnu, XV, 1-27.
28 Yajnavalkya II 128-132.
29 Narada XIII 45-47.
30 Brihaspati XXV 33-35, Digest II, 337.
31 Sankha and Lakhita, Digest II, 331.
32 Devala, Digest II, 332.
33 Yama, Digest II 332.
34 Kaluka pur ana, Digest II, 333.
35 Brahma purana, Digest II, 334.
36 Manu IX, 166-175, 177-178.
(i) "Him whom a man begets on his own wedded wife, let him know to be a legitimate son of the body (AURAS A), the first in rank."

(ii) "He who was begotten according to the peculiar law (of the Niyoga) on the appointed wife of a dead man, of a eunuch, or of one diseased, is called a son begotten on a wife (KSHETRAGA)."

(iii) "That (boy) equal (by caste) whom his mother or his father affectionately give, (confirming the gift) with (a libation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (DATRIMA)."

(iv) "But he is considered a son made (KRITRIMA), whom (a man) makes his son, (he being) equal (by caste), acquainted with (the distinctions between) right and wrong, (and) endowed with filial virtues."

(v) "If (a child) be born in a man's house and his father be not known, he is a son born secretly in the house (GUDHOTPANNA) and shall belong to him of whose wife he was born."

(vi) "He whom (a man) receives as his son, (after he has been) deserted by his parents or by either of them, is called a son cast off (APAVIDDHA)."

(vii) "A son whom a damsel secretly bears in the house of her father, one shall name the son of an unmarried damsel (KANINA, and declare) such offspring of an unmarried girl (to belong) to him who weds her (afterwards)."

(viii) "If one marries, either knowingly or unknowingly, a pregnant (bride), the child in her womb belongs to him who weds her, and is called (a son) received with the bride (SAHODHA)."

(ix) "If a man buys a (boy), whether equal or unequal (in good qualities) from his father and mother for the sake of having a son, that (child) is called a (son) bought (KRITAKA)."

(x) "If a woman abandoned by her husband, or a widow, of her own accord contracts a second marriage and bears (a son), he is called the son of a re-married woman (PAUNARBHAVA)."

(xi) "He who, having lost his parents or being abandoned (by them) without Gust cause, gives himself to a (man) is called a son self given (SVAYAM Datta)."
(xii) "The son whom a Brahmana begets through lust on a sudra female is, (though) alive (parayan), a corpse (sava), and hence called a (Parasava), a living corpse."

It is worth referring to another sloka of Manu here itself "These eleven, the son begotten on the wife and the rest as enumerated (above), the wise call substitutes for a son (taken) in order (to prevent) a failure of the (funeral) ceremonies."

"Though Manu has not spoken that straight as about the other twelve sons, he evidently speaks daughter's son as equal to son's son and says:-

(13) "Between a son's son and the son of a daughter there exists in this world no difference; for even the son of a daughter saves him (who has no sons) in the next world, like the son's son."

"Let the son of an appointed daughter first present a funeral cake to his mother, then second to her father, the third to his father's father."

According to the Commentators, Medatithi and Kulluka, "dauhitra," the "son of a daughter," means here also the son of an appointed daughter. Nandanakarya reads "putravat," "like a son" and Govindaraga reads as "purvagan" "(and) the ancestors."

Vishnu too speaks as:-

"No difference is made in this world between the son of a son and the son of a daughter; for even a daughter's son works the salvation of a childless man, just like a son's son."

Three Alternatives
Now these thirteen sons are to be looked from three different angles. Firstly, "Aurasa" son and "putrikaputra" are to be placed in one category as in the absence of Aurasa son, the son of a daughter is considered equal to offer oblation.

Vasistha\textsuperscript{40} says:-

"Of the thirteen sons mentioned in succession by Manu, the legitimate son of the body (aurasa) and the appointed daughter (putrika) continue the family."

Vasistha\textsuperscript{41} says

"I shall give thee a brotherless damsel, decked with ornaments; the son whom she may bear, shall be my son."

Gautama\textsuperscript{42} says

"A father who has no (male) issue may appoint his daughter (to raise up a son for him) presenting burnt offerings to Agni (fire) and to Prajapati (the Lord of Creatures) and addressing the bridegroom with these words, "For me be (thy male) offspring." Some declare, that (a daughter becomes) an appointed daughter solely by the intention (of the father), owing to this doubt one should not marry a brotherless bride."

Since 'Aurasa' son and in the absence of 'aurasa' son, 'Putrikaputra,' are on the same pedestal, so a separate mention of 'putrikaputra' is not necessary.

Second Alternative

Now we take seven types of sons in one category i.e. Aurasa, Kshetraja, Gudhaja, Kanina, putrikaputra, sahodhaja and paunarbhava.

\textsuperscript{40} Vol. 33, Brihaspati XXV, 33
\textsuperscript{41} Vol. 14, Vasistha XVII, 17.
\textsuperscript{42} Vol. 2, Gautama XXVIII, 18,19.
(1) The Aurasa or a son begotten by a man on his own wife is what is now understood by the term son. Vasistha⁴³ says: "He who is procreated in one's own wedded wife by himself is the first." So it needs no further comments.

(2) Putrika putra, as explained above is considered equal to the son's son if the man is sonless.

However, the present statutory position is very crystal clear, daughter's son is a class I heir like a son's son as shown in the figure.

**HINDU SUCCESSION ACT, 1956**

(See Section 8)

The Schedule

Heirs in class I.

(1) Son; (2) daughter; (3) widow; (4) mother; (5) son of a predeceased son; (6) daughter: a predeceased son; (7) son of a predeceased daughter; (8) daughter of a predeceased mother; (9) widow of a predeceased son; (10) son of a predeceased son; (11) daughter of predeceased son of a predeceased son; (12) widow of a predeceased son of a predeceased son.

In the ancient texts, Vasistha⁴⁴ quotes a text of the Veda as showing that "the girl who is no brother comes back to the males of her own family to her father and the rest. Returning she becomes their son. According to Vasistha⁴⁵, the appointed daughter herself is treated as a son. According to Yajnavalkya, as interpreted in the Mitakshara⁴⁶ the term 'putrikaputra' is equally applicable to the son of an appointed daughter or to the daughter herself, becoming by special appointment, a son. The status of the putrikaputra

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⁴⁴ Vas. XXVII, 16.
⁴⁵ Vas. XXVII, 15.
is that of a son's son and being the nearest cognate, he was a specially adopted son. Now 'putrikaputra' is a heir in class I as statutorily recognized.

(3) Kshetraga. Kshetraga or appointed wife's son was a son begotten on one man's wife by another man who was appointed by the husband or his kinsmen for that purpose. According to Jolly, this practice was a widely spread custom occurring amongst many nations which have never practised polyandry. A reference may be made to the Holy Bible:

"If brethren dwell together, and one of them die, and have no child, the wife of the dead shall not marry without unto a stranger: her husband's brother shall go in unto her, and take her to him to wife, and perform the duty of an husband's brother unto her."

"And it shall be, that the first born which she beareth shall succeed in the name of his other which is dead, that his name be not put out of Israel."

"And if the man like not to take his brother's wife, then let his brother's wife go up to the gate unto the elders, and say, "My husband's brother refuseth to raise up unto his brother a name in Israel, he will not perform the duty of my husband's brother."

"Then the elders of his city shall call him, and speak unto him: and if he stand to it, and say, I like not to take her:"

Manu in this aspect says:

"On failure of issue (by her husband) a woman who has been, authorized, may obtain (in the) proper (manner prescribed), the desired offspring by (cohabitation with) a brother-in-law or (with some other) sapinda (of the husband)."

47 Jolly-TLL, 155.
48 Deuteronomy 25, 5-8.
49 Manu IX, 59-62.
"He (who is) appointed to (cohabit with) the widow shall (approach her) at night anointed with clarified butter and silent, (and) beget one son, by no means a second."

"Some\textsuperscript{50} (sages), versed in the law, considering the purpose of the appointment not to have been attained by those two (on the birth of the first), think that a second (son) may be lawfully procreated on (such) women."

"But when the purpose of the appointment to (cohabit with) the widow has been attained in accordance with the law, those two shall behave towards each other like a father and a daughter-in-law."

If we critically examine the position with respect to kshetraga son, the following points come forth.

1. The husband is either dead, a eunuch or a diseased person.
2. He was or is issueless.
3. Procreation of a son is a must for spiritual merit.
4. The woman is authorized by her husband or after his death by his relatives to have a son. According to Govindaraga, Raghvanand, Nandanakarya on failure of issues i.e. "of sons' or "of sons of an appointed daughter (Medh.). If the son born is not fit to offer the Sraddhas, a second may be begot (Medh., Kull., Nar.).
5. The exception is in view of the religious importance of offering pinda/ sraddha.
6. Necessity of only one son. Niyoga is with a spiritual view and not a matter of lust.
7. The doctrine of consent or doctrine of condonation is involved. So the birth of Kshetraga son is not presumed to be based on the laxity of morality and chastity of a woman but to fulfil the religious needs to discharge religious duties and as such, such a child has been recognized both by the society as well as by the ancient law subject to imperative conditions.

\textsuperscript{50} Commentators of Manu say that "he who has one son only, has no son. (Medh., Gov., Kull., Ragh.,).
It may appear imaginatively a moral lapse but in fact it is a well intentioned step to preserve the chastity of a woman as all her biological urges shall be concentrated in the son so born.

(4) **Gudhatpanna or Godhaja Son**, was a son whom a wife secretly brought forth by adultery and such a son became the son of the woman's husband. John D. Mayne's explanation appears to be very satisfactory. Evidently it refers to a case where it could not be established that the son was born of an adulterous connection but where suspicion arises afterwards. The case is on the pattern of the first part of **Section 112 of the Evidence Act 1872** which states:-

"The fact that any person was born during the continuance of a valid marriage between his mother and any man..., shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have begotten." Actually speaking this section is based on the maxim of "pater est quern nuptiae remonstrant" (father is he whom the nuptials indicate).

According to the commentators the condition is that there is no suspicion that the wife had intercourse with a man of lower caste. Nara. says that the case contemplated is, that a wife had intercourse with several men of equal caste. Gudhaja son is a case of suspicion as to his paternity but there is no proof that he is born to another. Thus Gudhaja son is not a son of proved adultery and it is the reason that he has been given a high position by all the Smriti writers including Manu. But our sages took note of every aspect and did not allow the suspicion to grow unnecessary and put the son under the category of subsidiary sons. He was recognized as a son and as such there was no question of moral degradation.

(5) **Kanina Son**. A son born of an unmarried daughter is called Kanina. He became the son of the maternal grandfather. The pervading principle appears to have been that a wife and a maiden daughter belonged respectively to the husband and the father and a son born of them belonged to their owner, in the same way as a calf produced by a cow

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becomes the property of the owner of that cow. He is mentioned next to Gudhotpanna (the son secretly born) on account of the similarity to him by reason of his being born in the field, more or less his own, in the shape of a daughter.

Vasistha 52 has said:

"If an unmarried daughter bear a son begotten by a man of equal caste, the maternal grand father has a son through him; he shall offer the funeral cake and take the wealth (of his grandfather)."

Manu 53 has clarified the position of such a son that:

"Such offspring of an unmarried girl (to belong) to him who weds her."

This verse of Manu (IX, 172) is to be read with another verse of Manu 54:

"If any body gives away a maiden possessing blemishes without declaring them, (the bridegroom) may annual that (contract) with the evil minded giver."

"Though (a man) may have accepted a damsel in due form, he may abandon (her if she be) blemished, diseased, or deflowered and (if she have been) given with fraud."

In this connection the word "Fraud" is significant. Fraud has been defined in Section 17 of the Contract Act, 1872. It means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent or to induce him to enter the contract. The section gives five types of acts that constitute Fraud and one of them is the active concealment of a fact by one having knowledge or belief of the fact. Thereby it means that the fact that at the time of marriage that unmarried girl having an offspring, must be disclosed. If the disclosure is

52 Vasistha XVII, 23.
53 Manu IX, 172.
54 Ibid IX, 73-72.
there, then if still marriage, knowing this material fact, takes place, such a marriage was valid under the ancient law as well as under the statutory law and sections 12(1)(c) and 12(1)(d) do not apply for making the marriage voidable.

Even the Judicial attitude has gone to the extent that concealment of a fact by a woman that she was not a virgin at the time of marriage and that she gave birth to a child out of illicit contact, does not amount to fraud.

So in the case of son (Kanina), situation under Ancient law and the modern law is the same so far as the disclosure of fact is concerned. So far as the status of child is concerned, sastrik law has not socially degraded him and he was recognized as a son and disclosure of the fact means that the son, on marriage of his mother will have the name of the father.

If, under any circumstances, the marriage does not take place the son belongs to the maternal grandfather. The clear conclusion is that the child is legitimate under all circumstances and the act of the unmarried damsel does not fall under the ambit of adultery.

Trend is clear and discernible.

(6) Sahodhaja. Sahodhaja is a son in the womb of the pregnant bride and was transferred by marriage to the bridegroom. There is no reference to a son begotten by another upon her. Very probably; this contemplates a case where a man, before his marriage with a maiden, had access to her. The reference to his knowledge of her pregnancy as one possibility makes this inference almost certain. Even on the alternative assumption that the Sahodhaja might have been procreated by another, it would be simply a case of adoption as in the case of the Kanina.

55 Harbhajan Singh v Brij Balabkaur AIR 1964 Punj. 359.
56 Manu IX, 173; Gaut. XXVIII, 33; Baudh. II, 2, 3, 25, Vas. XVII, 27 Vis. XV 15-17.
57 Sethu v Palani (1926) 49 Mad. 553,558 per Devadoss, J.
If we look to three categories of sons like Gudhaja, Kanina and Sahodhaja, we find that a satisfactory shelter can be taken under section 112 of the Evidence Act and the knowledge of such fact under section 12(1)(d) of the Hindu Marriage Act, 1955 and these provisions have complete tilting tendency towards the legitimation of the child. It is once again repeated that Sastrik law has looked upon the child from the angle of God's gift and accepted it without violating any social mores both legally and socially.

(7) Punarbhava. The son of a twice married woman called Punarbhava is now deemed aurasa or real legitimate son, but under the Sastrick law he is enumerated among secondary sons as remarriage of women was disapproved by the sages.

According to Vasistha, he ranks next after the Kshetraja and the Putrikapura. At that time as the remarriage of a woman was disapproved, her son was not in the strict sense an auras son. He was considered not fit to be invited to Sraddah nor was worthy of social intercourse. However, with the passing of the Hindu widows' Remarriage Act (XV of 1856), this son has the status of an aurasa son and presumably, out of abundant caution, the legislature has made the ancient nuptial texts applicable to the remarriage of widows.

Section 1 of the said Act is important:—

"No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage any custom and any interpretation of Hindu law to the contrary notwithstanding.

Such a son was recognized as a subsidiary son only on the basis of disapproval of remarriage and not on any other ground and such disability is removed by a statutory provision.

58 Vas. XVII, 18-20; Baudh. 112, 3, 27 and IV, 1-16.
59 Mil. on Yajn. I, 90,222-224 (Setlur Ed); Gautman XV-18.
60 Section 6 of the said Act, 1856.
A man became the father of the seven above described types of sons by the operation of law. Though they have been placed in the descending or ascending order, it is for the purpose of the satisfaction of the doctrine of spiritual benefit because then Hindu society drew its civilization and cultural heritage from religion and intellectual philosophy and versatility of knowledge.

Next we come to the description of five sons which contains invariably the element of adoption and they are, 'the Dattaka,' 'the Krita,' the 'Kritrima,' the 'Svayamndatta' and an 'Apaviddah.'

(8) Datrima or Dattaka. Manu speaks of Datrima son in sloka IX-168. In this sloka two significant expressions are used i.e. (1) his mother or father affectionately give, (2) in times of distress (to a man).

The first expression indicates willingness of both father and mother (Kulluka), mother if there is no father (Raghvananda). Then the meaning of "affectionately" Medatithi calls it "not out of greed," Kulluka and Nandana call it "not out of fear or so forth, Raghavananda calls it "not by force or fraud."

The second expression "in times of distress." Kulluka and Raghavananda call it "if the adopter has no son" and Narayana calls it "if the adoptee's parents are in distress." The Sanskrit word "apadi" is used in the sloka which has been differently interpreted but the majority view appears to be that it means that the adopter has no son and that view seems to be correct because this view represents the doctrine of spiritual benefit which a man will get only through a son. Thus it means that the father or mother give the child through love and not through fear or covetousness and in the event of the adopter having no son.

(9) Kritaka. Manu speaks of Kritaka son in sloka IX-174. In this sloka, again two expressions are used i.e. (1) Whether equal or unequal
(2) For the sake of having a son

"The Sanskrit verse speaks of "Sadrsho. Sadrsho piva' which means equal or unequal. This expression has been interpreted in two ways. Medatithi calls it that "Sadrsha" and "asardrsha" refer to son of the same caste but of diverse qualifications. Kulluka and Raghvanand call it "equal or unequal, by good qualities, not by caste." Regarding second expression "for the sake of having a son" it may be put in any form or way, it only means that the adopter should not have a son.

(10) Kritima. Manu speaks of Kritima son in sloka IX-169. In this sloka three expressions are used i.e.

(1) equal by caste
(2) acquainted with the distinction between right or wrong.
(3) endowed with filial virtues.

According to Medatithi "equal by caste" means" same caste" Aparaka also refers to the same that "sadrsham" used in the sloka refers to caste only. There is an other word of Sanskrit "Gunadosavichaksanam" in the sloka which, according to Kulluka, means that the child to be adopted must be knowing that by performing or not performing shraddhas and other religious offering, merit or sin will follow. There is another Sanskrit word used in the verse is "putragunaih" which means obedience and other such qualities. In this sloka, the stress is on the qualifications of the child to be adopted.

(11) Svayamdatta. Manu speaks of Svayamdatta son in sloka IX-177 where two expressions are used i.e.

(1) having lost his parents
(2) being abandoned without just cause.
In this sloka, the child himself surrenders to the adoptee. It refers to the condition of the child. Apararka considers that abandoning of the child is that he has become an outcast which does not appear to be correct. The other view as spoken to in Balambhatti, Viramitrodaya and other digests, appears to be correct where they have interpreted the Sanskrit word "Akaranat" as without fault. So it means that the abandoning of the child should be only because of inability to support it and not by reason of the child having become an out-cast and so forth.

12 Apavidda. Manu speaks about Apavidda son in sloka IX-171. Wherein the word used is deserted. Apararka interprets as abandoned by the parents for some cause other than his having become an 'out-cast: and the other digests also subscribe to this view that abandonment may be for some such reasons like extreme poverty and consequent incapability to maintain him or the presence of some defect in him but such child is given with the specific object that the receiver is to make him his son.

These six types of sons described above manifest various things such as:-

(1) The receiver of the child is childless and he has to make the child taken as his son.
(2) The child so given may be under various conditions.
(3) It is to provide child to the childless so that he should perform the after death rites of the parents.
(4) It is also to save the child from vagrancy or the rehabilitation of the child and providing him a congenial place to flourish in life. This is why every type of child, abandoned, deserted, neglected has been considered. Thus it speaks of very high of our sages that they cared for this divine and innocent creature of God to have a life of dignity

Third Alternative. Now we take another view of the matter. Manu has spoken of two categories of sons when he says:-

61 These explanations have been taken from Manu Smriti by Ganga Nath Jha part II, 1924, Page 86.
"Among the twelve sons of men whom Manu, sprung from the self existent (Svayambhu) enumerates, six are kinsmen and heirs and six not heirs (but) kinsmen."

"The legitimate son of the body (aurasa), the son begotten on a wife (Kshetraga), the son adopted (Datrima or Dattaka), the son made (Kritima), the son secretly born (gudhotpanna) and the son cast off (appavidda), are the six heirs and kinsmen."

"The son of an unmarried damsel (Kanina), the son received with the wife (sahodha), the son bought (krita), the son begotten on a remarried woman (paunnarbhru), the son self given (svaymdatta) and the son of a sudra female (parasava), are the six (who are) not heirs (but) kinsmen."

Manu 63 has not mentioned 'putrikaputra' in this list as he was considered next to the aurasa son as explained by Manu himself.

Vasistha 64 has also spoken in the same vein but his category consists of different types of sons. Under Category 65 II, i.e. who are not heirs but only kinsmen. It includes, Sahodaja, Datrima, Kritika, Svaaymdatta, Apavidd and Parasava. Under Category 66 I, i.e. who are heirs and kinsmen are Aurasa, Kshetraga, Putrikaputra, Punarbhu, Kanina and Gudhatpanna.

Baudhayana 67 also makes a mention of these two Categories:-

"They declare the legitimate son (Auras a), the son of an appointed daughter (putrikaputra), the son begotten on a wife (kshetraga), the adopted son (Datrima or Dattaka), and the son made (Kritima), the son born secretly (Gudhatpanna) and the son cast off (Apavidda), (to be entitled) to share the inheritance."

62 Manu IX, 158-160.
63 Manu IX-139.
64 Vasistha Chapter XVII.
65 Ibid XVII, 26, 27, 28, 30, 33, 36, 38.
66 Ibid XVII, 13, 14, 15, 18, 21, 24, 25.
67 Baudhayana II, 2, 3, 31-32. Refer also Gautma XXVII 31-33.
"They declare the son of an unmarried damsel (kanina) and the son received with the bride, (sahoda), the son bought (kritika), likewise the son of a twice married female (paunarbhava), the son self given (svaymdatta) and Nishada, to be members of his father's family."

Without going into the inclusion of the types of sons in Category I or Category II, the most important point in issue is the meaning of:-

(i) kinsmen and heir

(ii) only kinsmen.

G. Buhler\(^68\) has explained in the footnote itself that the first six inherit the family estate and offer the funeral oblations, the last six do not inherit but offer libations of water and so forth as remoter kinsmen, as based on the view of the commentators (Kulluka, Narayana, Raghavananda, Nandanakarya). Medatithi, Narayana, and Nandanakarya interpret "adayadabandhava" to mean "not heirs' nor kinsmen." But Kulluka rightly objects to this interpretation taking support from the parallel passage of Baudhayana and explains that 'bandhudayadah' 'heirs and kinsmen' as heirs to the kinsmen i.e. inheritors of the estate of kinsmen, such as paternal uncles, on failure of sons, wives and so forth.

Manu IX-159, & 160 speaks of two sets of sons, yet the duty that devolves upon them, as Sapindas or Sagotras devolves equally on all the twelve-such as the offering of water and so forth and if we refer to Parashramadhav\(^69\) it is said that as for inheriting the property of the father, the latter set also are entitled to it, in the absence of the former set. Thus, in short, all the twelve/thirteen sons have social right undisturbed, though there is a discrimination as to property rights.

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\(^69\) Parashramadhava (Prayastchitta, P. 37 and Vyavahara P. 349.)
Along with this, it is worth mentioning two slokas of Manu\textsuperscript{70}.

"The son of a Brahmana, a Kshatriya, and a Vaisya by a sudra (wife) receives no share of the inheritance; whatever his father may give to him, that shall be his property."

"A son who is begotten on a female slave or on the female slave of his slave may, if permitted (by his father) take a share (of the inheritance) thus the law is settled."

G. Buhler has explained sloka IX-155 thus that the son of a sudra wife receives no share of his father's estate in case the mother was not legally married. According to Medatithi and Narayana, "receives no share of the inheritance," means 'receives no (larger) share than one-tenth, except if his father himself has given more to him. So it indicates that the share of such a son is not fixed.

Yajnavalkya\textsuperscript{71} says:-

"Even a son begotten by a sudra on a female slave takes a share at his option."

"After the father is dead, let the brothers make him partaker of half a share. If brotherless, he shall take the whole, provided there are no daughter's sons.

The general result of the examination of various authorities, both juridical and forensic is, that among the three regenerate classes of Hindus illegitimate children are entitled to maintenance but cannot inherit but if there is any custom, the sudra class illegitimate children in certain cases at least, do inherit\textsuperscript{72}.

The Mitakshara referring to the heritable right of an illegitimate son of a sudra says "Even a son begotten by a sudra on a female slave (dasi) may take a share by the father's choice or at his pleasure.

\textsuperscript{70} Manu IX, 155, 179.
\textsuperscript{71} Yajn. II 133-134
\textsuperscript{72} Chutuaya Rammardan v Saheb Perlahad 97 Mad, 18.
Bombay High Court\textsuperscript{73} interpreted the words of Mitakshara that for the purpose of inheritance, the son of a concubine should be considered as a dasiputra or son of a female slave. Allahabad High Court\textsuperscript{74} followed this ruling of the Bombay High Court.

The Madras High Court\textsuperscript{75} takes the word ‘dasi’ in Mitakshara Chapter I, Section XII, to include a woman kept as a continuous concubine and considered as a substitute for wife though not legally married and thus she should be a continuous concubine and the son of such a dasi is entitled to inherit and Calcutta High Court\textsuperscript{76} held that if a sudra governed by the Mitakshara law has a permanent, continuous and exclusive concubine who lives as a member of his family, she is a dasi and his illegitimate son by her who is also brought up as a member of his family is a dasipura within the rule laid down by Mitakshara Law.

We have glanced through the various types of sons as mentioned in the Sastrik law, we have found out that a son has been socially accepted and legally recognized but there may be a discrimination in matter of property right and if we critically examine the slokas of the various smritis, the importance of the sons from spiritual point of view is highly extolled. No doubt the sages divided the sons as primary and secondary but this division is merely ranking so that in no case the man should die sonless and under no circumstances there should be any impediment in the performance of funeral rites and oblation of water etc.

This being the position, we should now have a comparative but in a synthesis form the views as per Sastrik law and the modern law to see as to where the element of heterogeneity lies.

Sastrik Law and Modern Hindu Law-Comparative Study

\textsuperscript{73} Rahi v Gobind 1 Bom. 97.

\textsuperscript{74} Saraswati v Mannu, 2 All., 134.

\textsuperscript{75} Sundram v Meenakshi 16 LC. 787 Mad.

\textsuperscript{76} Chaturbhuj v Krishna 16 C.L.J. Page 335.
(1) Under Sastrik law we had an "aurasa son" where as in the Modern Hindu Law he is a class I heir.

(2) **Putrikaputra** of the sastrik law was called "Between 77 a son's son and the son of a daughter there exists in this world no difference; for even the son of a daughter saves him (who has no sons) in the next world like the son's son." Putrikaputra under Modern Hindu Law is a class I heir.

(3) **Datrima, Kritrima, Apaviddha, Kritika, Svayamdatta** of the Sastrik law are now falling under one head called Datrima or Dattaka (Adopted son) under the modern Hindu law adopted son is deemed under law as if he is an aurasa son.

(4) **Paunarbhava** of the Sastrik law falls under II category who are only kinsmen but with the passing of the Hindu Widow's Remarriage Act, 1856, this impediment is completely removed and such a son now is an aurasa son.

(5) **Gudhotpanna** of the Sastrik law belonged to I Category 78 i.e. kinsmen and heir. Such a son now falls under section 112 of the Evidence Act 1872 "Birth during marriage, conclusive proof of legitimacy." Though the section includes the doctrine of "Non Access" to rebut the presumption, the heavily tilted legal tendency is towards legitimacy and such a child is presumed legitimate (pater est quem nuptiae demonstrant).

(6) **Kanina and Sahodha** of the Sastrik law now fall under section 12(1)(c) and 12(1)(d) of the Hindu Marriage Act, 1955. Section (1)(c) speaks of "Force" or Fraud. If it is not there the marriage is valid and the child is legitimate. Section 12(1)(d) speaks of pre-marital pregnancy and if it is due to the plaintiff, the marriage is valid and the child is legitimate under the implied doctrine of "subsequent marriage."

(7) **Kshetraga** of the Sastrik law is to be looked under modern Hindu law under L.P.C. and "Conception and Bioethics," Section 497 L.P.C. speaks of adultery. It is a sexual intercourse by a man with a wife of another man, **without the consent or connivance of that man.** If the consent or connivance of the husband of that woman is there, then it is not a case of

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77 Manu IX-139.  
78 Manu IX-159.
adultery. **Manu's Verse**\(^7^9\) IX-167 regarding Kshetraga is also quoted in Vivadaratnakara (Page 555) where the word "Vyadhitasayapva" is used and also the word "Svaharmena" is used which means "according to the rules laid down. It finds place in Parasharamadhava (Prayashchitta, P. 38), Nrsimhaparasada (Vyawahara 38a) and in Viramitrodhaya (Vyawahara 187b). If we look to the modern advancement in Medical technology, Heterogonous Artificial Insemination (AID) is a method of conception adopted where the semen is that of the donor and such a child is considered as legitimate if the consent of the husband is there. Thus even Kshetraga son, in the present set up is legitimate for all purposes.

(8) **Parasava or Nishada.** This is as per sloka IX-178 of Manu Smriti. This verse is quoted in Parasharamadhava (prayashchitta, P. 38), Vivadaratnakara, (P. 574). According to that scriptures such a son confers some benefits or conferring very little benefits. But the fact remains that he is recognized as a son. With the passing of the Caste Disabilities Removal Act, 1850, the concept of sudra is no more and this has found support under Article 17 of the Constitution. Even assuming that a Brahmana marries a sudra wife and begets a son, such a son is an aurasa son.

(9) Coming to the last Category of son called "dasiputra." Such a son is also recognized as son though there was discrimination as to property rights. Various decisions have defined 'dasi' as continuous, exclusive concubine, which in fact is a substitute of a wife, though not married. It is a case that falls under the doctrine of Factum Valet. It is \(^8^0\) a doctrine in which necessity compels the application of the maxim, "factum valet quoad fieri non debuit." Where the rule violated is directory and not mandatory, its infringement will not make the marriage void or voidable. The breach may be of a mere moral or ceremonial percept or it may be a breach of a legal rule which falls short of an imperative rule of law. Living \(^8^1\) together for a long period as man and wife and recognized as such is presumptive evidence of a valid marriage. It is a

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\(^7^9\) Ganganath Jha, *Manu Smriti*, p. 707.

\(^8^0\) Mayne's Hindu Law and Usage, Page. 137-138 (Ed. 13th, 1991).

\(^8^1\) Chavali Basarajji v Chavali Shamkararao 1989 Cited in Andhra Pradesh Law Journal Vol 2, Page 47.
Sonship and Modern Hindu Law

Modern Hindu law has divided son into four categories:

1. Son born in lawful wedlock. (It includes adopted son also)
2. Son born in void or voidable marriages.
3. Son born in invalid marriages
4. Son born out of wedlock.

Category (1) It needs no comments. He is a legitimate child and class 1 heir as per Section 8 and Schedule I of the Hindu Succession Act, 1956.

Category (2) Son born in void marriage is covered and the amended section 16 of the Hindu Marriage Act, 1955 which has completely superseded the Common law doctrine that the Offspring of a marriage which is null and void ipso jure is illegitimate. Firstly it has declared that the status of such a child is legitimate. Secondly; it recognizes his right in the property of the parents and not others. Thus though the provision is benevolent, it is still a bit discriminatory as, such a child is not vested with full property rights as the use of expression in section 16(3) of the Act, "other than the parents" limits his rights to property. Similar case is for voidable marriages and the son born in such marriage is legitimate and has a right to property (though limited) under section 16(3) of the Act.

Category (3) Children born in a wedlock, which is invalid, are not covered by a statutory provision. If there is a violation of section 5(iii) or section 7 or section 15 of the Hindu Marriage Act, 1955. The marriage is neither void nor voidable and as such is not covered.
by section 11 or 12 and consequently not covered by section 16 of the Hindu Marriage Act, 1955.

However judicial pronouncements had made the task easy. In Smt. Chamcha Mohini Srivastava82 v Avinash Parshad Srivastava the point agitated was that the marriage solemnized when the special leave petition was pending in the Supreme Court. against the High Court granting divorce; is void. The Supreme Court discussed the question of marriage in violation of section 15 of the Hindu Marriage Act is invalid and -not void.

However, the Supreme Court said:-

"We need not consider the question as to whether the child born to the new wife would be legitimate or not, except to say that in such a situation section 16 of the Act may come to the aid of the new child."

Thus according to this decision two points have come forth:-

(1) Marriage in violation of section 15 is invalid.

(2) Child born of such invalid marriage is also covered by section 16 of the Act.

In another case Smt. Lila Gupta83 v Laxmi Narain there was infringement of proviso to section 15 of Hindu Marriage Act wherein also section 5, 11, 12, 13 or 14 and 15 of the Hindu Marriage Act, 1955 were discussed and in particular Proviso to section 15 (now removed) and section 5(iii) of the said Act.

The Supreme Court drew two conclusions:-

(i) First, that there never appears to have been a decision where words in a statute relating to marriage have been held to infer a nullity unless such nullity was declared in the Act.

(ii) Secondly, that viewing the Successive Marriage Acts, it appears that prohibitory words, without a declaration of nullity, were not considered by the legislature to create a nullity.

The Supreme Court relied upon the ruling in *Marsh v Marsh*\(^{84}\) wherein it is said that marriage in violation of a statutory prohibition is not void and in such marriage she is considered to be entitled to the status of a wife. Thus in consequence the Supreme Court held that prohibition in Proviso to section 15 (since removed) and prohibition of section 15(iii) does not render the marriage void and consequently the child born out of such marriage is entitled to the aid of section 16 of the Hindu Marriage Act. In this case Supreme Court particularly referred to AIR 1967 S.C. 581.

Section 16 of the Hindu Marriage Act, 1955 was agitated in *P.E.K. Kalliani Amma v K. Devi*.\(^{85}\) Though the question pertained to the second marriage under Kerala Joint Hindu Family System (Abolition) Act 1976 and Marumakkattayam Act, 1933, arose, the provision of section 16 of the Hindu Marriage Act, 1955 was also discussed. The Supreme Court was of the view that section 16 of the Act by virtue of the use of the words "notwithstanding that a marriage is null and void under section 11," has made section 16 delinked from section 11 and that section 16 shall operate with full vigour inspite of section 11 and that section 16 stands on its own strength and operates independently of other sections. 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 is void or voidable.

By this ratio decidendi, violation of section 7 of the Hindu Marriage Act 1955, shall not turn the children born as illegitimate and as such shall have a legal shelter under section 16 of the Act.

\(^{84}\) AIR 1945 P.C. 188.
Category (4) The rights of illegitimate children to succeed to their mother's property has been preserved and recognized but not to the father's property. On the other hand, the illegitimate son of a person by a continuously kept concubine who had a right to inherit his father's property is now denied that right. This is covered by section 3(1)(j) of the Hindu Succession Act, 1956 wherein it is stated that illegitimate children shall be deemed to be related to their mother and to one another ... and in Gurbachan Singh v Khichar Singh it is said that though ordinarily illegitimate children are not considered as children, yet insofar as relationship with one's own mother is concerned, even illegitimate children are considered as her children by virtue of the proviso to section 3(1)(j).

Thus the present position of an illegitimate son is quite contrary to what Manu and Yajnavalkya have stated. In Dadoo v Raghunath, Pratap J. observed as follows:

"It is indeed unfortunate that an otherwise dynamic legislation should have extinguished the intestate succession rights of illegitimate sons of sudras here before 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 Parliament may take its earliest chance to review this by making a suitable amendment."

Critical Appraisal. As discussed earlier it is vividly clear that though the legitimate son (amasa) was desired both for spiritual benefit as well as for the continuation of the family, the Aryans recognized at the same time twelve or thirteen types of sons. Though different versions are given for the recognition of various kinds of sons, it is not malapropose to say that whatever may be the motive, the Aryans never wanted the man to die sonless.

It can be inferred from the Smritis prohibiting the adoption of an only son. Vasistha and Baudhayana say, "Let no man give or take an only son as he must remain for the

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86 AIR 1971 P&H 240.
87 Manu IX-17 9 and Yajn. II, 133-134. Mitakshara I, xii, 2.
88 AIR 1979 Bom. 176.
obsequies of this ancestor. Nanda Pandita\textsuperscript{90} says that the offence of extinction of lineage, denounced by Vasistha is incurred by both giver and receiver. To read it with Manu\textsuperscript{91} "To three (ancestors) water must be offered, to three the funeral cake is given." It is clear that a son is needed for spiritual merit. The Aryans\textsuperscript{92} in this regard used abundant caution to see that in case there is failure of a son as the son delivers (trayate) his father from the hell called Put, so the son was given a social status, religious and legal recognition. The basis was the spiritual merit and not the property right consideration.

In the present legal setup, clearly the law is framed with secular and materialistic approach where religious or spiritual merit is secondary and basis is the conferment of property right. The law now is materialistic in concept. Amasa son is class I heir and has full property rights. Legitimated son has right to property only of the parents and not of others. The illegitimate son shall inherit from mother only. So the present law is based on the theory of right to property and ignored the social status of the child. It has fragmented the child ignoring Hindu Social mores.

Let it be noted that Hindus call their religion Samatna Dharma, which literally means "Eternal law." The name in no ways suggest that the ethical ideas connected with this religion are eternal in the sense being fixed, static, unchanging substances. To the contrary, Hindu ethics, like the River Ganges, has been in the state of ceaseless flow down the ages, constantly changing its courses and currents relative to the hard, intervening realities of Indian History. All of its fundamental presuppositions of "karman," "samsara." "dharma" have evolved from streams of thought originating in earliest time. These elements have survived to the present day, not in spite of change, but because of change. Thus under the rubric of eternal, universal law, Hindu ethics combine continuity with dynamic diversity. The revolutionary character of Hindu ethics also gives it a contemporary relevance. Being open to change, its principles can be adopted to contemporary ethical situations. Primary literary sources are the Vedas, Brahmaanaas, Upanisads, Dharam Sutras, Dharm Sastras, Epics, Nyaya, Vaisesika,

\textsuperscript{89} Vas. XV 2, 4; Baudhayana VII 4-5.
\textsuperscript{90} Dattaka I\textit{limamsa} IV, 1-3.
\textsuperscript{91} Manu IX-186.
\textsuperscript{92} Manu IX-138.
sankaya, yoga, purva-mimamsa and the vedanta. All these sources are part of one tradition and are talking about the same subject but each views it from a particular stance creating unity through diversity of expression.

Because of the evolutionary factor in Hindu ethics, changing metaphysics give rise to changing ethics. Eternal circumstances and unusual situations also precipitate shifts in ethical position. So change in Hindu law is always absorbed due to its vastness and versatility. Ethics, in Hindu law, is the science that treats of the principles of human morality and duty. Hinduism does not have a science of morals fashioned after some Aristotelian or Thomistic model. However, it does have a moral philosophy which postulates a "summum Bonum" and specifies the proper means for achieving it.

Even today, the concept of 'Kama,' 'Artha,' 'Dharma' and 'Moksha' prevails in the Hindu society and its spiritualistic propensities are in no way lessened due to materialistic approach in every aspect of life. Law in its present form ignored the Hindu Ethical ideals which considered son as a divine gift as Manu says:-

"Through a son he conquers the worlds, through a son's son he obtains immortality; but through son's grandson he gains the world of the sun."

Dr. Paras Diwan relents and says that the recognition of so many secondary sons were the sons of the man only if he recognized them. But it seems that in the process of development and interpretation of Hindu law, this aspect of the matter never came to the fore and an opportunity to build up the Hindu law of legitimization was lost. It is never too late. A time has come for a change in outlook that the present must be built on the edifice of the past and not to sacrifice it. Our glorious traditions cannot be ignored. Do not fragmentize the child into legitimate child, legitimated child and illegitimate child, because so long as little children are stigmatized and allowed to suffer there is no true love in this world. We must have a pragmatic legal approach and adopt measures so that

94 Manu IX-137, Vas. XVII, S; Vis. XV 46; Yajn 1, 78.
95 Dr. Paras Diwan, Modern Hindu Law, 9th Ed. 1993 p. 216.
the bastardization of the child does not find place in any statute book. It is worth quoting Lord Ch. J. King96 (Marchioness of Annadale v Harris) :-

"If a man, says he, does mislead an innocent woman, it is both reason and justice that he should make her reparation. The case is stronger in respect of the innocent child, when the father has occasioned to be brought into the world in this shameful manner, and for whom, in justice, he ought to provide."

The researcher suggests as follows:-

1. We need an enactment on the pattern of Legitimacy Act, 1926 (English Law) keeping in mind the Hindu social ethics and the law should reconcile with the fact that mankind owes to the child the best it has to give.

2. It should contain provisions of legitimation by subsequent marriage, doctrine of acknowledgement of paternity and doctrine of legitimatio per adoptio consonant with the provisions of the Hindu Adoption & Maintenance Act so that such a provision is not derogatory to the Existing law of Adoption.

3. It should also contain a provision on the pattern of the Human Fertilization and Embryology Act 1990 (English Act) that the child so born has a father and a mother and the child is legitimate.

4. The law should be comprehensive in nature and all pervading so that the goal is attained that child born in wedlock or out of wedlock is a person and not a chattel.

The wise words of Khalil Gibran, the Prophet should be remembered while enacting the law.

"Your children are not your children. They are the sons and daughters of life's longing for itself."

96 Marchioness of Annadale v Harris 2.P. West Minister 432.
Aldous Huxley\textsuperscript{1} has said:
"A million million spermatozoa
All of them alive:
Out of their cataclysm but one poor
Noah Dare hope to survive
And among that billion minus one
Might have chanced to be
Shakespeare, another Newton, a new Donne
But the one was me."

This great personality has spoken very clearly but with brevity about the inherent and latent propensity of the child and to what extent of height it can take it. Simultaneously, he, in great desperation and despondency, also spoke about that one life, survived out of billions, if stigmatized will deprive the nation of its future. Can this rare survival be indicated as a bastard? Can such a child be deprived of the stable social order and be felt unworthy to have protection under the shelter of human rights? Can we ignore this creature of the Creator 'and clothe him with an igneous fabric hard to be washed to make it clean?'

The answer lies in law and society. The Constitution of India is a supreme law which was adopted on November 26, 1949 and came into force on January 26, 1950. Prior to its enforcement, U.N. charter had been adopted at San Francisco on June 25, 1945 and came into force on October 24, 1945 which was signed and ratified by India. The Universal Declaration of Human Rights was adopted by the General Assembly of the U.N. on December 10, 1948. The U.N. Commission on Human Rights had been established by the

\textsuperscript{1} Cited in AIR 1996 SC 414, Bom.
Economic and Social Council in February, 1946 and the Commission was directed to prepare, inter alia, recommendation and reports on an International Bill of Human Rights.

But it is really surprising that although there were some International Charters, Declarations and Commissions pertaining to Human Rights, there is no mention of this concept anywhere in the Indian Constitution. Though apparently it looks pitiable, in fact the Indian Constitution does have Part III and Part IV, which clearly speak the language of human rights.

To start with there is a Preamble. It is a key to open the lock of the Constitution. Amongst many expressions used therein, three expressions are punctuated with serenity. They are Justice, Social, economic and political, Equality of status and Dignity of Individual. These three expressions are the ingredients of Human Rights.

Part III of the Constitution deals with fundamental rights. Two Articles in Part III i.e. Article 14 along with Articles 15 & 16 and Article 21 have given a dazzling glitter to Part III and in fact to the concept of Human Right.

Article 14 speaks of equality before the law or the equal protection of the laws. This basically corresponds to the 14th Amendment of the American Constitution which also speaks of equal protection clause. However, in the beginning Art 14 was interpreted as that it forbids class legislation but does not forbid reasonable classification. In other words equality means the rule of law. It further means that not only no man is above the law, but every man is subject to the jurisdiction of the ordinary tribunal. Such law cannot be different for like people and equal protection of law means to provide protection to all under like circumstances in the enjoyment of their personal and civil rights and that all people should be equally entitled to pursue their happiness and should have like access to the courts of the country. It means that no impediment should be interposed to the pursuits of anyone except as applied under like circumstances.

However, it is a qualified proposition that it does not forbid reasonable classification. It means that a legislative or executive measure must pass the test of permissible classification. It must fulfil two conditions:

(i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others who are left out of the group and

(ii) that differentia must have a rational relation to the subject sought to be achieved by the Act. What is necessary is that there must be a nexus between the basis of classification and the object of the Act.

Now these two propositions give rise to further two propositions or interpretations or explanations:

(i) The expression used is "intelligible differentia," which means that the element, feature or factor that distinguishes one entity, state or class from another and such differentia is capable of being understood or comprehended. In other words the differentia should be self explanatory and appear to be clearly legally justified in itself and

(ii) Secondly, this intelligible differentia must have a connection or link with the object to be achieved for which a classification has been done.

Again to explain it, there can be two issues:

(i) Whether humanitarian ground permits that there should be discrimination against an illegitimate child on the ground of his birth which was beyond his control.

(ii) Whether this classification is necessary as the State, as the guardian of public morality, has the right to impose restrictions on adulterous or promiscuous intercourse out of wedlock.

There does not appear to be any rationale in such a classification in view of Universal Declaration 4 of Human Rights signed and ratified by India. Article 25(2) 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."

Even Article 15(3) of the Indian Constitution reflects the same sentiments when it is said that nothing in this Article shall prevent the State from making any special provision for women and children. This Article 15(3) to be read with Article 14 inherently speaks thus.

State is empowered to make any special provisions in respect of women and children as they are the weaker section of the society, socially neglected and economically dependent and any law made in this direction must be either to protect them on socio-economic basis or to reduce extensively the gap between equality and inequality, such law even if it is discriminatory, it is within the mandatory ambit of the Constitution because such discrimination wants to achieve some object.

The Supreme Court in Gaurav Jain v Union of India 5 while dealing with a petition under Article 32 pertaining to the fallen women and their progeny has categorically stated that the children have the rights to equality of opportunity, dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without pre-stigma affixed on them for no fault of his / her.

There is no law where the child can be socially degraded and deprived of his rights for the shameful act done by his parents. The child is child. He cannot be called otherwise by the use of adjectives as even the Constitution itself has used the word 'child' or person without any qualification. Any law which the legislature makes, is a law for the children. Any law classifying children into categories by which social degradation reflects, is out side the ambit of Constitutional mandate and is ultra vires.

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4 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
5 AIR 1997 S.C. 3021.
To make it more clear the Constitution in Article 16(2) has used the word "descent" which means a derivative from an ancestor, a fact or process of originating from an ancestral stock. Though this Article only pertains to equality of opportunity in matters of public appointments and is only one of the species of the genus, the fact remains that if there is no discrimination in the species, how there can be discrimination in the genus. So reading Article 14, 15, 16 together, it is very clear that the law which derogates the child is hit by Article 14 of the Constitution.

However, Article 14, in the expanding horizon of Constitutional interpretation, has taken a new stand. In 1979 Chandrachud C.J. said that as far back as 1960, it was said by this court in Kangshari Haldar that the propositions applicable to cases arising under Art. 14 have been repeated so many times that they now sound platitudinous.

**In Royappa's case**, Bhagwati J. for himself, Chandrachud and Krishna lyre J.J. dealt with the challenge under Art. 14 and made the claim to have laid down a new dimension of Art. 14. It was repeated in **Maneka Gandhi's cases** and R.D. Shetty v Airport Authority. In Ajai Hasia's case the claim was formulated thus:-

"That Art. 14 has highly activist magnitude and it embodies a guarantee against arbitrariness. Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. Equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a Republic and the other to the whim- and caprice of an absolute monarch."

So now the doctrine of equality, with the expanded and new definition gives rise to the absence of arbitrariness. It can be aptly said that arbitrariness stems out from extraneous

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6 AIR 1979 S.C. 478.
7 AIR 1974 S.C. 555
8 AIR 1978 S.C. 597.
9 AIR 1979 S.C. 1628.
reasons or irrelevant considerations and thus eclipses the benevolence of the Virtue of Equality; as its exercise will be with malafide intentions not caring for the permissible limits. So malafide exercise of power and arbitrariness are different lethal radiations emanating from the same vice, in fact the latter comprehends the former. Both are inhibited by Art. 14, 15 and 16. The exercise, legislative or executive should be legitimate and relevant and it should induce socio-economic stable social order, balancing the society and protecting it from the hitherto strife torn situations through which the society has undergone during the period of serfdom.

Let us not forget what Abraham Lincoln has said in his Gettysburg address:-

"Four score and seven years ago our fathers brought forth on this Continent a new nation conceived in liberty and dedicated to the proposition that all men are created equal; we are engaged in a great civil war, testing whether that nation so conceived and so dedicated can long endure."

By 13th Amendment slavery was removed in America. By Article 17 of the Constitution of India, untouchability was removed in India. Both slavery and untouchability were social horrors. Their removal paved the way for social tolerance. Is illegitimacy not like untouchability? The answer is that it is worse than untouchability. In untouchability it was a crisis between two classes with different notions on life. In illegitimacy it is a crisis of your own self and the expression of your own life's longing. Is it conceivable?

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

By way of contrast, the 5th and 14th amendments of the Constitution of United States of America say:-
**Fifth Amendment** "No person shall be deprived of life, liberty or property, without due process of law."

**Fourteenth Amendment** "....................... Nor shall any state deprive any person of life, liberty or property, without due process of law." *United Nations Declaration of Human Rights, Article 3* says:-

"Everyone has the right to life, liberty and security of persons."

This Article has both positive and negative aspects. From positive angle it enshrines the importance of the procedure established by law and negatively it enshrines that those who commit crime must suffer to safeguard the liberty of law abiding citizens and order in society\(^\text{12}\).  

Article 21 is generally read with Art 22 when the question of personal liberty is agitated before the courts. In the earlier stages Art. 21 was more concentrated on personal liberty and three important cases came before the Supreme Court:-

(i) A.K. Gopalan's Case \(^\text{13}\)
(ii) Bombay v Atmaram Sridhar Vaidya\(^\text{14}\)
(iii) Punjab v Ajaib Singh\(^\text{15}\)

But in these cases the stress was on personal liberty: The Supreme Court took a stand that the object of Art 21 is to prevent encroachment upon personal liberty by the executive save in accordance and in conformity with the provisions thereof and that before a person is deprived of his life or personal liberty, the procedure established by law must be strictly followed and must not be departed from to the disadvantage of the person affected but the court is not entitled to examine the reasonableness of a law which is validly made under Art. 21-22 and that Article 19 is not applicable to a law made under Art. 21-22.

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13 AIR 1950 S.C. 27.
Thus in A.K. Gopalan's case, per Patanjali Sastri L the right to life, though the most fundamental of all, is also one of the most difficult to define and its protection generally takes the form of a declaration that no person shall be deprived of it save by due process of law or by authority of law.

However, in *Kharak Singh v State of U.P*\(^{16}\) the Supreme Court gave a meaningful interpretation of life that the term life does not include individual status\(^{17}\) enjoyed by a person but it includes the right of every person to the possession of each of his organs. By the term 'life' something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed.

Thus Art. 21 crystallized the expression "life and personal liberty" into a variety of rights, though they are not enumerated in Part III of the Constitution, provided that they are necessary for the full development of the personality of the individual and can be included in the various aspects of the liberty of the individual\(^{18}\).

Now the emphasis is on life and Article 21 of the Constitution is of widest amplitude and several un-enumerated rights fall within it because life means to live with human dignity. The Supreme Court in *Sunil Batra v Delhi Administration*\(^{19}\) observed that though our constitution did not have a "due process" clause as in the American constitution, the same consequence ensued after the decision in the *Bank Nationalization*\(^{20}\) case and *Maneka Gandhi case*\(^{21}\).

The Supreme Court in *Mithu v State of Punjab*\(^{22}\), while striking down section 303 LP.C. as ultra vires of the Constitution has strikingly said that for what is punitively outrageous, scandalizing, unusual or cruel and rehabilitatively counter-productive is arguably

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16 AIR 1963 S.C. 1295
17 AIR 1970 A.P. 180
18 AIR 1978 Delhi 308 (314)
20 AIR 1970 S.C 54.
21 AIR 1978 S.C 59.
22 AIR 1983 S.C 473.
unreasonable and arbitrary and is shot down by Arts. 14&19 and if inflicted with procedural unfairness falls foul of Art. 21.

Now the Judicial dynamism has given dynamic vigour to Art. 21 and the expression "life" stated therein should be read as "dignified human life" and dignified human life includes the demolishing of all laws and procedures that inflict indignity on a person. Then only the expression of "Dignity of the individual" mentioned in the Preamble of the Indian Constitution can be achieved. In the light of this view of life, which is supreme, serene and significant, can we think of stigmatizing the child as illegitimate. Can this social stigma be hurled on it for no fault of it? Can we socially degrade the child? Can such a child have the shade of the umbrella of Art. 21? These are the questions that generally arise.

Kusum23. Research professor, Indian Law Institute, New Delhi, in one of her articles has cited an author about the status of a bastard" term of abuse and contempt in common parlance, as follows:-

"The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity and undesirable evidence of contra moral forces; in short, a problem—a problem as old and unsolved as human existence itself."

It is said that the wounds inflicted by weapons may close in time; scalds may heal gradually; but wounds inflicted by words remain painful as long as one lives. In the light of "wounds inflicted by words" we now look to the dignity of the child from firstly, psychopathic personality developed as a consequence, negating the human dignity.

Personality 24 is the total picture of that relatively persistent part of a person's feelings about behavioural reactions to his environment including himself, which have developed

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24 J. Murray Lee and Dorris May Lee—The child and his development.2 nd Edition Page 46.
through interaction with the environment as he sees it in pursuit of his goal of continuing self realization

It is universally accepted that there is a drive, a motivation, a purpose which causes or brings about all of man's actions and man's inherent trait of self preservation is also universally recognized. So also is that of an animal. Man does those things, which will preserve and maintain life. But man is different from an animal and so there must be some other further factor, which will explain the development which man has made since the prehistoric time of his origin.

Some interpreted this other further factor that humans could, think and reason and remember and communicate and animals could not do. Many thought of this, as a mind which distinguishes man from an animal.

The individual has an indivisible concept. His body and mind always interact. Physical changes are the basis of what we have attributed to the mind in thinking and feeling. An individual does not develop in vacuum. He lives and develops in his environment and environment also includes the social class which designates the level of social acceptance within a culture.

The child for the development, for self realization needs a basic drive and to satisfy this basic drive certain needs must be met with. Though they are many but one of the most important needs is "acceptance." This "acceptance" plays a greater role in developing the personality of the child because it has a direct connection with the mind. The child needs to know where he is placed. He wants to know the parameter of his interaction with reference to his "acceptance" in the family and the social environment i.e. "who he is." If this need is unmet, the mind is bound to get lost in such thoughts that tend to lead to "frustration." The first victim of frustration is the self-realization instinct of the child. Progress towards self-realization gets blocked because the dynamic force for growth and development gets stuck up. We call such a person in psychological terms as "maladjusted."
Frustration shows in various ways. These may be classified as "aggression," "submission," "withdrawal" or "self punishment" or there may be combinations or variations of these. "Aggression" is a sign of revolt in the mind. It is a fight for the satisfaction of his acceptance.

Sometimes his thinking leads him to indulge in intense, wild and often disorderly compulsive or agitated activity, commonly called "Frenzy" such a child is generally known as "uncontrollable child." He develops dislike or even hatred when in its climax, and his development of personality becomes erratic or develops a socially unhealthy personality. Thus a boon of God becomes a bane for the society.

"Submission" is another form of frustration. It is expressed usually in conformity and extreme obedience. It affects his behaviour. He develops signs of fear and anxiety due to which he develops abnormal slowness of thought or action. He retreats to the domain of dull, dullard and dunce. People start calling him idiot or stupid. He loses all his reflexes. His mind stops thinking and reasoning but starts behaving in subdued form following a pattern of stultification, becomes a victim of repressive influences and reduces to futility.

"Withdrawal" is another form of frustration. It indicates no will to fight. The child tries to get out of the frustration situation as a result of which he may become a day dreamer to satisfy his self realization propositions or ambitions or he may try to seek sanctuary in an unwanted and unwarranted area of recluse, reclusion or solitude where he can imagine the satisfaction of his mental and biological urges. He wants and remains to be cut off from the social environment which has almost become a taboo for him. He starts developing an undisturbed protective environment where he can breathe in imaginations, devoid of reality and fanciful atmosphere of unrestrained imagination divorced from reason. Thus he reaches the stage of "whimsical."

"Self-punishment," is another outcome of frustration. Feelings developed by the child in his mind must escape out in some form or the other if not then their escape does happen
but turn against the person himself. The escape goes into the inner echelon of his mind and the child may suffer from psychosomatic illness and may develop a psychopathic personality and may seek gratification in criminal acts, drug addiction or sexual perversion and in extreme form it may lead to self extinction and he may snuff out his life from the mortal frame. The suppressed feelings may burst out and the volcanic eruption may result in shattering of innocence leading to cataclysmic upheaval and demolition. The life is gone unheard and unsung. The bud is plucked before blossoming.

So the child is to be looked from two angles i.e. (i) status of child and (ii) nature of child and both the angles are important. The first angle is the status which you confer on a child. It is social acceptance under which he interacts with family and society. This is the basic drive and a motivation from which the dignity and personality of the child shines and develops. If there is any erratic oscillation, it will affect the nature of the child which is the second angle of vision through which we have to see the child and looking to the nature of the child so developed, means and measurers are to be adopted so that he is protected from neglect, desertion, abandonment and other forms of frustration. We have to provide a healing touch. However, the first vision of status if ignored, the second stage is bound to be disastrous from social justice angle and human right angle because the seeds of second stage are itself sown in the first stage. All our statutory provisions like the Children Act and the Juvenile Justice Act only deal with secondary stage.

The Supreme Court in Gaurav Jain v Union of India25, while dealing with writ petition under Art. 32 pertaining to the plight of prostitutes/fallen women and their progeny, spoke about the preamble of the Constitution and stated that it is an integral part of the Constitution and that pledges to secure 'socio-economic justice' to all its citizens with stated liberties, equality of status and of opportunity, assuring fraternity and dignity of the individual in a united and integrated Bharat and illegitimate children too are part of citizenry.

The Supreme Court further said that the children have the right to equality of opportunity;

25 AIR 1997 S.C. 3021.
dignity and care, protection and rehabilitation by the society with both hands open to bring them into the mainstream of social life without pre-stigma affixed on them for no fault of his I her.

The Supreme Court referred to the Convention on the right of the child, Fundamental rights in Part III of the Constitution, Universal Declaration of Human Rights, the Directive Principles of State policy in Part IV of the Constitution and said that they are equally made available and made meaningful instruments and means to ameliorate their condition by giving them the same opportunities which other children have. In fact the Supreme Court's view is very clear that the problem of illegitimate child needs solution in the light of constitutional perspectives, in the glow of human rights and in the glitter of social justice.

However, the Supreme Court in utter pain and agony has said that Law is a social engineer. The courts are part of the State steering by way of judicial review. Judicial statesmanship is required to help regaining social order and stability. Interpretation is effective armoury in its bow to steer clear the social malady, economic reorganization as effective instrument to remove disunity, and prevent frustration of the disadvantaged, deprived and denied social segments in the efficacy of law and pragmatic direction have way for social stability, peace and order. This process sustains faith of the people in rule of law and the democracy becomes useful means to the common man to realize his meaningful right to life guaranteed by Article 21.

The Supreme Court also gave a judicial message that children are innocent, vulnerable and dependent. They are all curious, active and full of hope. Their life should be full of joy and peace. Playing, learning and growing. Their childhood should mature as they broaden their propensities and gain new experience. Abandoning the children, excluding good foundation of life for them, is a crime against humanity. The children cannot wait till tomorrow. Tomorrow is no answer. The goal is of their present, care, protection, dignity.honour.
What Supreme Court has said, is spoken long back by a poet:

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,

"To morrow"

His name is "To-day" Dare we answer "Tomorrow"?

To reinforce the view taken by the supreme court in Gaurav Jain's case, it seems imperative to refer to the provisions pertaining to non-discrimination while dealing with the children as stipulated in the International Instruments.

(i) **Universal Declaration of Human Rights** Article 25(2) "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." Article 1 "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

(ii) European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950-Article 14 "The enjoyment of rights and freedoms set forth in this convention shall be secured without discrimination on any ground such as sex, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

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26 Gabriel Mistral, Children Poet, Yes we need to make a new world, Page 12.
28 Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.
(iii) Declaration of the Rights of the Child-Principle I "The child shall enjoy all the rights set forth in this Declaration. Every child without any exception what-so-ever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, whether of himself or of his family."

(iv) International Covenant on Economic, Social and Cultural Rights, 1966 Article 2(2) "The states parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(v) International Covenant on Civil and Political Rights Article 24(1) "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property, or birth, the right to such measures of protection as required by his status as a minor, on the part of his family, society and the state."

(vi) Convention on the Rights of the Child Article 2(2) "States parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions... ."

Art. 2(1)

"States parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of child's or his or parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin property, disability, birth or other status."

29 Proclaimed by the General Assembly of the United Nations on 20 November 1959 (General Assembly resolution 1386 XIV).
These International instruments are a fountain of Humanitarian law and their reflexes can be seen very vividly in Part III & Part IV of the Constitution of India. Even the Apex Court has put its judicial seal on the efficacy and applicability of the International instruments that their relevance lies in the domestic law. Various decisions of by stating the Supreme Court bear testimony to it.

In Sheela Barse v the Secretary Children Aid Society

The Supreme Court said that children are the citizens of the future era: On the proper bringing up of children and giving them the proper training to turn out to be good citizens depends the future of the country. The Children Act has made elaborate provisions to cover the International charters relating to the rights of the children. The Supreme Court referred to the Declaration of Rights of the child 1959., International Covenant on civil and political rights, 1966 and said that India as a party to these International charters having ratified the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same. Then the Supreme Court gave a clear and loud call that gerontocracy in silence manner indicated that like a young plant, a child takes roots in the environment where it is placed. Howsoever, good the breed be if the sapling is placed on a wrong setting or on unwarranted place, there would not be the desired growth.

Visakha v State of Rajasthan This case pertains to sexual harassment and Article 14 and Art. 21 were agitated. The Supreme Court categorically stated that it is now an accepted rule of Judicial Construction that regard must be had to International Conventions and norms for construing domestic law where there is no inconsistency between them and there is void in the domestic law. In the absence of domestic law occupying the field to formulate effective measurers, the contents of International conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with dignity.

31 AIR 1987 S.C 656.
32 AIR 1997 S.C 3011.
The Supreme Court further said that any International convention not inconsistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof to promote the object of the constitutional guarantees. This is implicit from Arl. 51(c)\(^{33}\) and enabling power of the Parliament to enact laws for implementing the International conventions and norms by virtue of Art 253\(^{34}\) read with Entry 14\(^{35}\) of Union List in Seventh Schedule of the Constitution.

The Supreme Court again in Apparel Export Promotion Council v A.K. Chopra\(^{36}\), while dealing with the case of sexual harassment again referred to the International Instruments and Art. 14 and 21 of the Constitution of India and said that the message of international instruments such as the Convention on the Elimination of all Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs of State Parties to take appropriate means to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. The Supreme Court further said that these International Instruments cast an obligation on the Indian State to gender sensitize its laws and the courts are under obligation to see that the message of the International Instruments is not allowed to be drowned. The courts are under obligation to give due regard to International Instruments and norms for construing domestic laws when there is no inconsistency between them and there is a void in domestic law.

The move is on. The drive is geared. Conscious efforts with clear conscience are taking shape. Homogenous blend of the awareness of inner mind and the perception of the outer act is in the melting pot. United Nations World Conference on Human Rights adopted Vienna Declaration and Programme of Action, on June 25, 1993, attended by representatives of 171 States, Principle 21 of the said Declaration says:-

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\(^{33}\) Arl. 51 (c)-foster respect for international law and treaty obligations in the dealings of organized peoples with one another, and

\(^{34}\) Art. 253-Legislation for giving effect to International agreements which includes any treaty, agreement or convention or any decision made at any international conference, association and other body.

\(^{35}\) Entry 14 of Union List-Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries

\(^{36}\) AIR 1999 S.C 625
The World Conference on human rights, welcoming the early ratification of the convention on the Rights of the child by a large number of states and noting the recognition of the human Rights of the children in the world Declaration on the survival, Protection and development of children and plan of action adopted by the world summit for children urges Universal ratification of the convention by 1995, and its effective implementation by state parties through the adoption of all the necessary legislative, administrative and other measures and the allocation to the maximum extent of the available resources. In all actions concerning children, non-discrimination and the best interest of the child should be primary consideration and the views of the child given due weight. .., International Cooperation and solidarity should be promoted to support the implementation of the convention and the rights of the child should be a priority in the United Nation's systemwide action on human rights.

In European Convention 37 on the Exercise of Children's Rights, in the preamble it is said that having regard to the United Nations Convention on the Rights of the Child and in particular Article 4 which requires states parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights in the said Convention. ...

The Convention adopted 26 Articles divided in five chapters. Chapter I deals with scope and object of the convention and definitions of Article I, three clauses are stipulated below.

Art. 1(1). This convention shall apply to children who have not reached the age of 18 years.

Art. 1(2). The object of the present convention is, in the best interest of the children, to promote their rights. ...

37 Adopted on January 25,1996.
Art. 1(6). Nothing in this convention shall prevent parties from applying rules more favourable to the promotion and the exercise of children's rights.

In the Hague Conference on Private International Law, the draft adopted contains seven chapters containing 63 Articles. Article 2 is significant.

Article 2. The convention applies to children from the moment of their birth until they reach the age of 18 years.

This Article has used the expression "from the moment of their birth," which is significant. This nips the evil in the bud. When the child comes out of the womb and sees the light of the world, some children are also thrown into the darkness of environment punctuated with social taunts, affixed with derogatory social stigma and afflicted with social indignity. They are called illegitimate. Such children too grow but in socially polluted atmosphere and instead of becoming intellectual giants, merely get reduced only to become idiotic dwarfs. This concept has to be given a go by because it snatches away the smiles of the child and instead gives it plentiful tears to weep life long till the cruel pangs of death give the relief.

However, more pragmatic approach with a touch of humanity has been depicted in the Declaration of the workshop on Family Laws and Human Rights of Women, Lahore on August 4&5, 1995, in which representatives from Bangladesh, India and Pakistan participated. In this Declaration, besides many other things, two significant declarations were made:–

(i) All children born in wedlock or out of it shall enjoy equal status and equal rights (ii) The law must recognize both parents as the natural guardians of the child.

We have scanned through the Articles of Part III of the Constitution which speak of equality and dignity of life and various International Instruments concerning the rights

38 Draft prepared by the Hague Conference at its 17th session in May 1993, was adopted on October, 1996.
and dignity of the child and we have also seen the judicial trend in this regard. However, it is still felt that something more by way of throwing light is needed to briefly discuss the provisions under Part IV to supplement the discussion and to supplement Part IV mandate.

In the Constitution of India, we find two expressions used therein, i.e. "Person" and "children." The word "person" is used in Article 14, 18, 20, 21, 22, 25 and 27, 226 and the word "children" is used in Article 15(3), 24, 39(c), 39(f) and 45.

"Person" has been defined in Section 3(42) of the General Clauses Act, 1897 as follows:-

"Person" shall include any company or association or body of individuals, whether incorporated or not."

Not only that the word "person" has been used in Order 33 Rule 1 and 3, Section 16(3) of the Income Tax Act 1922, section 4 and section 11 of the Companies Act etc. The Supreme Court has said that to have the meaning of person regard is to be had to the setting in which the word person is used. It can be a natural person or a judicial person.

Similarly the word "children" is used in the constitution. Child has been defined earlier in the Children Act, 1960 as follows:-

"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." However, in Juvenile Justice (Care and Protection of Children) Act, 2000, the child means a person who has not completed eighteen years of age.

There is another indirect definition of the "child" which says that the convention applies to children from the moment of their birth until they reach the age of 18 years.

40 Section 2(c).
41 Hague Conference on Private International Law, October 19, 1996, Art.(2),
There is another definition of the child:- "For the purpose of present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."

Reverting back to the Constitution of India, it can be said that when the word 'person' or 'child' is used without any qualification, it would include an illegitimate child, because he is a child and a person equally as a legitimate child. Thus when the Constitution of India, which is the supreme law, has not made any discrimination, it is legally futile to make discrimination in the statutes as such statutes will not stand the test of Constitutionality. To call a child illegitimate, is a crime against humanity and against the humane spirit of the constitution and no effort should be made to make the Constitution a mockery.

However, the above discussion has brought forth two other significant aspects through which we have to see the true reflection of the child as these two aspects act like a mirror and they are, "Human Right" and social justice. The whole superstructure of Part III and Part IV of the Constitution is built on the foundation of these two concepts that look to the child as human being and the future of the nation.

**Human Rights and Social Justice**

The Clarion Call of the Universal Declaration of Human Rights 1948 in a resonant tone awakened the slumbering conscience of the society and law directing it to adopt means and measures to achieve the goal of ideal of humanism. Though the Call was loud, it was not new as its roots may be, traced in antiquity. The pre-Socratic philosophers commonly entertained ideas that came to be known as laws of nature. That is, they believed in eternal, unchanging laws which were applicable everywhere at all times. This concept remains central to modern Human rights thinking, which proclaims such rights to be 'universal' and residing in the "inherent dignity" and inalienable rights of all members of the human family.

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Thus in popular conception of human rights, we talk of every such right which is rooted in humanity and personal dignity. Various International Instruments and a long line of judicial decisions gave it such a momentum that the distinction between civil and political rights on one side and social and economic rights on the other side got blended under the rubric44 "Human Rights." In a new assertive and demonstrative shape its definition appears in the Protection of Human45 Rights Act, 1993 as follows"-

" 'Human Rights' means the rights relating to life, liberty, equality and dignity of the Individual guaranteed by the Constitution or embodies in the International Covenants and enforceable by courts in India."

In fact this definition speaks of the Preamble of the Constitution.
Justice, social, economic and political;
Liberty; of thought, expression, belief, faith and worship;
Equality of status and of opportunity;
Fraternity assuring the dignity of individual. ...

However, when we talk of human rights, in fact we take into consideration those rights that can be derived from deprivation, privations, brutalities and atrocities. So even rights can be put into two categories i.e.

(i) Rights rooted in humanity and personal dignity (ii) Rights derived from disability, disgust and distress of the human being.

These Two types can be further put into two concepts such as (i) Humanism and (ii) Humanitarianism.

Humanism45 is a concept that flows out of heart. It is an affirmative duty and obligation to serve God's creation if one is to attain the highest level of spiritual attainment in being identified with divinity. It is a right of a person to be considered as a human being and

45 Section 2(d).
that all human beings are born free and equal in dignity and rights. Thus child has a natural right which is applicable everywhere at all times that he is equal in status and dignity. Any denial of this right is denial of human rights. Right of equality and dignity are the natural rights which can never be denied. If denied, it is an act against the divine order.

Humanitarianism is the quality or state of being humane. It promotes human welfare. It is a protection and preservation of the sustenance of life to live with equality and dignity. This is the second stage of rights which comes latter on. Right enshrined in Humanism comes first that child is a human being endowed with equality and dignity. So if the rights are "humane" then man (child) is the measure from its very birth.

Justice Krishna lyre speaking about human rights has said that the concept of human rights emerged out of mankind's reasoning capacity and sensitive conscience. In a rapid survey of human history in relation to human rights, we may state that the ambit of human rights encompasses every thing that makes man's existence dignified and free. Human rights, freedoms, fundamental rights and such expnissions are very much in vogue to-day in U.N. Instruments, charters, declarations, conventions and other documents as well as in constitutions of nations. The profound and inalienable character of human rights won through ages of struggle marks them out as a special category beyond ordinary legal rights. Both men and women have these rights equally without exception. The dignity of the human person reigns supreme in the realm of human rights and so the core of all human rights is respect for the individual. The society and the national systems should signify that the human person has the right to be respected (as a person); is subject of the rights and is in possession of human rights. That would make it essential for everyone to treat each other with respect-as an individual and as one having equal rights and without any discrimination.

Thus Justice Krishna lyre laid stress conclusively on humanism and the process of humanization, which is the need of the hour. Law is to be humanized and where

46 Universal Declaration of Human Rights-Article I.
47 Krishna lyre, Review of a Book ‘Human Rights’ by Prof. Raja Muthirul and Soorya Padhippagam Trichi Page 8
humanity is threatened there must be a deterrent law. Though Article 15(4) says that nothing in this Article or in clause (2) of Art, 29 shall prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

In pursuant to this provision many times the constitution was amended so that provisions concerning the Scheduled Castes and Scheduled Tribes remain in tact as provided in Art. 330, 332, 334, 335, 338, 339, 341, 342 of Part XVI and Art 46 of Part IV but their social status could not be raised and they were still considered socially down trodden and still indignities were hurled on them and the state had to enact a law called S.T /S.C (Prevention of Atrocities) Act, 1989 to remove the social stigma with which they still live and being treated as such.

In Pankaj D. Suthar v State of Gujrat, the Gujrat High Court considering the atrocities perpetrated on a Scheduled Caste person and abusive language used pertaining to his caste, spoke with agony that the Parliament in its utmost wisdom has rightly evinced great concern and anxiety over the atrocities which are going on unabatedly on S.C's and S.Ts by inserting the provisions under section 18 of the said Act disabling the accused from obtaining the anticipatory bail under section 438 of the Cr.P.c. This indeed is a welcome step and in accordance with the axiomatic truth i.e. "the disease grown desperately must be treated desperately." Taking inspiration from what is said in this case, desperate steps have to be taken by the legislature as affixing the stigma of illegitimacy in itself an act of atrocity on the innocent child born due to the shameful act of his parents. It is even against the ethics of criminal law that the offence is committed by one and the punishment is awarded to the other.

Social Justice. There is another aspect which is in fact a constituent of the Human right. Social Justice is a process that brings humanitarianism both by the society and the law. Society inculcates the spirit of rationality, tolerance, resistance to undesirable traditions, abandonment of practices derogatory to human values and respect for consideration that

48 Added by the constitution (First Amendment) Act 1951.
49 (1992) 1 Crimes 1123 Guj.
every person is a human being and law gives a push and thrust to such inculcations and statutory recognition eradicates the undesirability.

Then it is to be seen as to what is the concept and connotation of Social Justice because realization\(^{50}\) of Justice is the ultimate function of law. The concept of Justice varied from age to age. It is multidimensional. It is justice as preservation of rights; it is justice as descent and it is justice as equality. A particular form of justice as equality is that society be so structured that inequality disappears and such justice is sometimes called the notion of Social Justice\(^{51}\). Value of social justice demands the promotion of equality or the removal of inequality. Any legal inequality imposed on an individual that cannot be justified from the point of view of justice is unacceptable. No such disability should exist. Social justice is indeed a value that must be incorporated into the social structure. These formulations must respond to the human sentiments. Social values change and thus legal concepts receive new interpretations. In the last century slavery sanctified by law in the United State received judicial assent when the U.s. Supreme Court ruled in 1857 in Dred Scot v Sanford that blacks were not included and were "not intended to be included under the word 'citizen' in the Constitution. Franchise to British women was denied till 1871, with the march of time the conceptual horizons widened. The Constitution of India abolished "untouchability." Now no state can afford to refute social justice. Its essential features are incorporated in every legal system.

Manu\(^{52}\) has spoken thus:-

Justice, being violated, destroys; Justice being preserved, preserves; therefore Justice must not be violated, lest violated justice destroys us.

When Manu has spoken about Justice, he actually meant "Dharma" and Dharma also speaks of spirituality or divinity. In Bhagwadgita\(^{53}\) the true meaning of divinity is thus given. "He who sees the supreme Lord abiding equally in all beings, never perishing

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51 K.D. Irani, Values and Rights underlying Social Justice.
52 Manu VIII-5.
53 Bhagwadgita Ch. XIII, 27-28.
(i) To recapitulate it can be said that some measures have been taken. Regarding adoption, prior to the Hindu Adoptions and Maintenance Act, 1956 only sons could be adopted but an illegitimate son could not be adopted. The Act now imposes no such restriction though section 2 Explanation speaks of "any child legitimate or illegitimate." (ii) Under the Provisions of the Code of Criminal Procedure 1973, See. 125(1)(b) and (c), speaks of legitimate and illegitimate child though both are entitled to maintenance. Though both are mentioned but there is no discrimination so far as maintenance is concerned. However, there are certain other conditions attached but discrimination is absent.

(iii) In Hindu Minority and Guardianship Act, 1956, the distinction is maintained under section 6(a) and (b). However this distinction does not appear in the Guardians and Wards Act 1890. But there is one benevolent provision in the Hindu Minority and Guardianship Act, 1956 that welfare of the minor is of paramount consideration. Rather Section 13 of the Act can override section 6 of the said Act.

(iv) Under Hindu Adoptions and Maintenance Act, 1956, illegitimate child has the right of maintenance covered by section 20, 21, 22 of the said Act so long as he remains a minor.

(v) Section 16 of the Hindu Marriage Act 1955, has legitimated the children born out of void and voidable marriage and they have a right to inherit the property of their parents only. Though it is a benevolent provision, it is still clothed with some discrimination.

(vi) By Judicial pronouncements in Chandra Mohini Srivastva v Abinash Parshad Srivastava, Lila Gupta v Laxmi Narain and P.E.K. Kalliani Amma v K. Devi, the Supreme Court has taken a stand that children born of invalid marriage (invalid marriage means a marriage in violation of section 5(iii), section 7 and section 15 of the Hindu Marriage Act, 1955) can have the aid of section 16 of the Hindu Marriage Act, 1955. Such children should be

55 Section 13 of the Hindu Minority and Guardianship Act 1956, and Section 17 of the Guardians and Wards Act 1890.
56 AIR 1967 S.C. 58 1
considered as legitimated children, though statutory clarification is still wanting.

(vii) In Hindu Succession Act, 1956 the distinction is kept alive through section 3(1)(b), though by the proviso, the illegitimate child is entitled to the property of the mother.

(viii) Various provisions are there in Part III and Part IV of the constitution to safeguard the interests of the 'child.' The word "child" is without any qualification attached to it.

(ix) There are other enactments like The Children Act, 1960 and The Juvenile Justice Act 1986 and now the most benevolent The Juvenile Justice (Care and Protection of Children) Act, 2000 which provide protection to various types of children and these Acts are in consonance with the Constitutional mandate and International Instruments.

However, these all are second-generation measures, where attempts are made to give some humanitarian touch to the rights of the children keeping intact the distinction as clear as possible. But what about the first generation measure which is the real need.

It is the societal rejection and recognition of this rejection by law is the problem. The real problem is the social stigma that needs a solution. It is worth noting that if during infancy there is a plentitude of love and care, made possible, the child will grow inculcating deep rooted qualities of love and kindness. Its individual personality shall devolve around excellences. What will be of the individual who is thwarted in infancy, neglected and deprived of optimal mothering. Such a person is a candidate for misanthropy, for pessimism and for the sociopathic disturbances that we see in the neurotic delinquents and criminals of the person's later childhood and adulthood. Let us not kill the inner awareness of positive self-esteem which is present in every child which is to be awakened and is possible only if they are away from unsocialized uniqueness that always haunts the child. If our society deprives such child and breeds in alienation and inferiority feelings, then such society needs to be reconstituted or reconstructed.

It must be borne in mind that children are persons. Childhood is a stage of life itself, not just an apprenticeship. Until society can recognize this and actively give it expression, children will remain appendages, at the mercy of cruel fate or at the alter of social taunts and their development in an uncongenial social atmosphere will be coloured with stigma of social stains. Laws will only be changed when attitudes change, and attitudes will change only when a feeling of compassion springs in our heart profusely and profoundly and we consider that every child is the expression of your own manifestation before you through the consequence of your own passion.

Let us look to what Justice Douglas stated in 1968 that Illegitimate children are not "non-person." They are humans and have their being. They are clearly "persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.

Not only that the European Court has held that by reason of Art. 14 of the European Convention an illegitimate child is entitled to the enjoyment of the same rights as a legitimate child including rights of inheritance in father's property.

Thus courts have to act as courts of Equity and not to withhold from illegitimate children every favourable intendment which the lawful heir would have been entitled to. This is the Call which the International Instruments have given and the Indian Constitutional mandate without mentioning the name of Human Rights, has given to the courts as in the Constitution the word "children" only is used.

After all the whole concept of illegitimacy could be dispensed with if it were not for the notion that the child can only have an entity in relation to some one else, that a child must be the possession of someone. If the socially conceived notions that a child must carryon the family tradition were thrown over board and the concept that the child is a person in its own right is fully accepted, the distinction between legitimate and illegitimate would

60 Levy v Louisiana 39 U.s. 68 (1968).
62 Nan Berger, The Child, the Law and the State-an article in Children's Rights, Edited by Julian Hall Ed. 1971, Page 34.
disappear. There is nothing intrinsically different between a child born in a wedlock and one born out of it, only social attitudes make illegitimate children as inferior citizens.

The whole gambit of the problem lies when the concept is applied to inheritance. So child is looked from the angle of property rights ignoring that he is a human being, ignoring that God dwells in every human being. Lord Krishna in Bhagwadgita has said63.

30. yo māṁ paśyati sarvatra
    sarvam ca mayi paśyati
    tasyāḥ 'ham na praṇaśyami
    sa ca me na praṇaśyati

"He who sees Me everywhere and sees all in Me; I am not lost to him nor is he lost to Me."

The whole concept is that when we are one with the divine in us, we become one with the whole stream of life.

It is not to be forgotten that India's survival in spite of onslaughts of many centuries is only due to the faith in spiritualism and the country still believes in it, has faith in it and practises it whole heartedly.

Countries like New Zeeland, England, China, Norway and many states of U.S.A. have gone too far in the elimination of this discrimination; other countries are trying legally to reduce the gap between them; even there is some awakening in forward looking Muslim Countries. Let India awake, as discrimination is an antithesis to the tenet of spiritualism. Respect for human beings is the ultimate truth which when realized, will lead you on the path of spiritual glory.

63 Bhagwadgita Ch. VI-3D.
when they perish, he, verily, sees. He who sees the Universal spirit in all things, sees and becomes himself Universal." "For as he sees the Lord present equally every where, he does not injure his true self by the self and then he attains to the supreme goal."

Again in Bhagwadgita it is said:-

"By Me all this Universe is pervaded through my unmanifested form. All beings abide in Me but I don't abide in them." The whole concept in Hinduism is a way of life leading to Moksha. All are equal and believe in the eternal truth. But we are lost in the materialistic approach and believe in distinctions and discriminations. "As you born so you will die" is a simple lesson. You are born naked and you will die naked. Your life span from cradle to grave is punctuated with Artha based on Dharma. Thinking of mankind embraces every aspect of life. Man is working within a fixed, parameter to always think of the welfare of human beings in all his interactions with the society. Then where is the place for discrimination or socially degrading a person? Illegitimacy is a social degradation.

It is not question of inheritance. It is the question of social status. Do not look to the child from the angle of inheritance; look him from the angle of divinity that he is a human being, the creature of the Lord. There is an eye opener case, Bimla Bai v Shankar Lal54

Shankar Lal was only a dasiputra, of a Hindu Brahman by a Dasi, who was only entitled to maintenance and not to any share of inheritance as a son. But when the matrimonial alliance carne it was told that Shanker Lal is his son and thus concealed the real fact. The marriage took place and latter on when the fact carne to light, the matter took an ugly turn and the matter carne before the court pertaining to Divorce on the basis of misrepresentation. The court held that it is a case of fraud and dissolved the marriage.

Can it be imagined that the social stigma which was affixed from the time of birth followed him like a shadow? This is a social evil. It must come to an end if we talk of Human Rights and Social Justice.

54 AIR 1959 MP 8.
This fact is not to be forgotten that in spite of International and National Conventions, charters, policies, an illegitimate child is still exposed to enormous social deprivation. So it is basically a social malady and its solution is to be found in a socially structured society for which humanism should play a pivot role. Social attitude must change.

In a landmark verdict, the Supreme Court had said that no child can be labelled as illegitimate but certain relationships which might lead to a situation raising a question mark on individuality of the child could be illegitimate.

Moreover, on the question of paternity, no court could ever venture to side with a husband who feels that he did not father the child born by his wife. A court would be treading the forbidden path if he upholds the husband's view without tracing the child's real father. After all, a child must have parents, if the parents are estranged, the child still enjoys the right to their company-separately or together.

It is very hard to forget that indeliable three sentences of Justice Douglas with which he started in 1968 the Supreme Court's decade long attack against the traditional legal discrimination suffered by illegitimate children:

"Illegitimate children are not "non persons." They are humans, live and have their being. They are clearly 'persons' within the meaning of the Equal protection Clause of the Fourteenth Amendment."

But law must play its dynamic role as law enacted gives the desired push and thrust needed and a comprehensive law as earlier suggested on the pattern of Legitimacy Act (English Law) must be brought. It will impart dynamism.

The Supreme Court in various judicial pronouncements laid great stress on the children's right to live with dignity. Rakesh Bhatnagar from the The Times of India News Service under the column "Legal view" has described thus 63(a).

63(a) The Times of India, p. 9 dated 14-5-2001.
"We have the fond hope that the closing years of the 20th century would see us keeping the promise made to our children by our constitution about a half century ago," the supreme court had said some time ago as it vowed to uphold the children's right to live with dignity.

Children being dependent on elders can only speak through their eyes, laughter, smiles and tears. It is their language which must be understood by a sensitive society. If society itself becomes insensitive and inhuman, little can be expected from it. But if certain organs of the state like judiciary and executive, particularly the police, feel responsible for the welfare of the weak and the dependent such as children and aged, society has reason to hope for a better tomorrow, Ironically, unlike the judicially the other organs of the state seem to be unconcerned about their constitutional obligation to "give a helping hand to the children and the weak.

A bench of Justice Kuldip Singh, Justice B.L. Hansaria and Justice S.B. Majmudar once recalled poet Rabindra Nath Taogre's words and hoped-"Let the child of the 21th Century find himself into that heaven of freedom." Saying so, they ordered setting up a corpus fund for the welfare of the child labour engaged in hazardous industries like matchmaking and crackers. Tragically, the fund was never set up.

In its recent judgment, the Supreme Court again sought to strengthen the children's right to live with dignity when it held that no person can disown a child born from his wife because it might expose many children to the "peril of being illegitimate."

Let us not get bogged down that public morality is at stake and that the sanctity of marriage shall get shattered. Law will have its soothing impact and will be a remedy worth trying. It is hoped that stich a law will also bring a change in the attitudes. It is a joint effort of society, law and courts and each has to play its role. Let us do it as early as possible as:-
I expect to pass through life but once;
If therefore, there can be,
any kindness I can show,
or any good thing I can do,
to any fellow being,
let me do it now,
and not defer or neglect it,
I shall not pass this way again

Hinduism which has supreme cultural heritage and serene civilization lays emphasis on the deep rooted concept of love for all and hatred for none. How beautifully it is said.

He moves and is yet immobile
He is at once far off and near
He is within all and also
On the face of all that exist
Seeing this Supreme Being
As the beginning and end of
All beings and pervading all,
One can have hatred towards none.

64 Recited in a religious discourse.
65 Isa Upanishad verse 5, 6.