PROPERTY RIGHTS OF A HINDU ILLEGITIMATE CHILD

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"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, an undeniable evidence of contra-moral forces; in short, a problem-a problem as old and unsolved as human existence itself."[298]

-Kingsley Davis

I. A BACKWARD GLANCE

A peek into the era, where the *Mitakshara* system played a crucial role in harmonising the Hindu society, reveals that the Hindus chose to be administrated upon by a set of commandments that share a sharp divergence with the modern-dialects. Prior to the enactment of the Hindu Marriage Act in 1955, these rules came into force while dealing with cases pertaining to the property rights of illegitimate progenies under Hindu Law. In 1992, the finding of Rasala Surya Prakasarao v Rasala Venkateswararao enclosed a meticulous narrative of these guidelines. The text of the judgment read: "The illegitimate sons of the *Dwijas* are entitled to nothing but maintenance out of joint family funds. In fact, illegitimate sons in the three higher classes (i.e., *Brahmins, Kshatriyas* and *Vaishyas*) of the age-old *varna* system never take as heirs, but are only entitled to maintenance from the estate of the father. Such right is a personal right and not heritable."[299]

"The illegitimate son begotten by a *Shudra,* i.e., a person belonging to the lowest rung of the *varna* system, on a permanently kept concubine (*avarudhadasi*) enjoys the status of a son, and is looked upon as a member of the family. However, unlike his legitimate brethren, he does not acquire a joint interest with his father in the ancestral family property upon his birth, which disentitles him from enforcing a partition against his father during the lifetime of the father. If such a partition is, however, made during the father's lifetime, he shall be apportioned a share as per the father's discretion.[300] But, in the occasion of a partition administered consequent to the father's death, the brethren are bound by law to promote him to the station of a partaker of the moiety of a share."[301] However, in yet another

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Kingsley Davis, 'Illegitimacy And The Social Structure' (1939) 45 Am J Sociol <http://www.jstor.org/stable/2769810> accessed 27 August 2013.

[299] *Rasala Surya Prakasarao v Rasala Venkateswararao* AIR 1992 AP 234.

[300] *GurNarain Das v GurTahal Das* AIR 1952 SC 225.

[301] Mayne, *Treatise on Hindu Law and* Usage (15th edn, Bharat Law House 2003).

instance of discrimination, the law envisages that the illegitimate son is entitled only to half of what he would have taken if he were a legitimate son.[302] The inference is that – if a partition takes place during the lifetime of the father, the illegitimate son, in all probability, might be entitled to a share equal to his illegitimate brethren, the possibility of which is extinguished upon the bereavement of the father which leaves the illegitimate child with a share merely, and unfairly, half as that of his brothers who enjoy social sanction.[303] "He succeeds, therefore, to the father's estate as a coparcener with the legitimate son(s) on condition that on the death of the latter at any time preceding the partition, he becomes entitled to the whole estate by the doctrine of survivorship."[304]

Manu says, 'a son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted (by the other sons).' *Yagnavalkya* enumerates the same by reiterating that 'even a son begotten by a *Shudra* on a female slave (*dasiputra*) may take a share by the father's choice. But if the father be dead, the brethren should anoint him as a partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of the sons of a daughter'. Elaborating upon the latter fragment of the statement, the *Mitakshara* law states that 'in the scenario where no sons of the wedded wife are in existence, the son of the female slave takes the whole estate, provided that there are no daughters of the wife, nor sons of the daughters.' *Jimunthavahana* expounds the edition of Manu in the following way: 'The son of a *Shudra* by a female slave, or by another unmarried *Shudra* woman, may share, by the same token with as other sons, upon the assent of the father.'[305]

II. ILLEGITIMATE CHILDREN AND *STRIDHANA* PROPERTY

After exploring the gradations of the ancient Hindu laws, a consideration of the rights of illegitimate children over the *stridhana* property of their mothers is imminent. In *Meenakshi*v. *Muniandi Panikkan*, the Court ruled that "a legitimate son of a *Shudra* woman succeeded to the property acquired by his mother by prostitution, but that her illegitimate daughter was not an heir."[306] This judgment came under the radar of heavy criticism in the case of Yeditha Venkanna v Nakka Narayanamma and Ors wherein the Court indicated that, "Paternity is a matter governed by *jus civile* and maternity by *jus naturale*. Another way of putting this is that every child has a legal mother, but it may or may not have a legal father. Whatever doubt may prevail with respect to the paternity at the birth of the child, no such doubt exists as regards its maternity. The creative forces of nature have itself bound the mother to her issue, whether born in lawful or unlawful wedlock. This natural relationship and these inescapable facts are reflected in ancient Hindu law governing succession to the *stridhana* property of a woman."[307]

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[302] Paras Diwan, *Modern Hindu Law* (17th edn, Allahabad Law Agency 2006).
[303] Poonam Pradhan Saxena, *Family Law Lectures: Family Law II* (3rd edn, LexisNexis and Butterworths Wadhwa 2011).
[304] ibid 312.
[305] ibid.
[306] *Meenakshi v Muniandi Panikkan* AIR 1915 Mad 63.
[307] *Yeditha Venkanna v Nakka Narayanamma And Ors* AIR 1952 Mad 136.

The Court held that "neither the language of the *Mitakshara* text, nor the application of any reasonable rule of interpretation, justifies the exclusion of the illegitimate children of a Hindu married woman from succeeding to their mother's estate. Even if a legitimate daughter survived, she would not disentitle the illegitimate daughter from inheriting the *stridhana* property of the mother, but would only be entitled to share equally with her. Therefore, illegitimacy is no bar to succession to woman's *stridhana*. In so far as illegitimate *stridhana* heirs are concerned, either daughter, or daughter's daughter, or son, or son's son, they would be entitled to succeed to their mother's estate in preference to the other heirs."[308] The *Smriti chandrika* ordains that the "property of a woman married according to the *Brahma*, the *Daiva*, the *Arsha*, the *Gandharva*, or the *Prajapatya* rite shall belong to her husband alone, if she dies without issue."[309] Gour has also stated that, "illegitimacy would not disqualify an heir to *stridhana*, and that there is no authority against the existence of heritable blood between the woman and her offspring."[310]

In Angammal v Venkatareddi, the Court laid down that "a daughter's illegitimate children were entitled to succeed to her mother's *stridhana* property, and that the degradation of the daughter on account of un-chastity does not put an end to her right to inherit the *stridhana* property of her mother."[311]

III. A NASCENT STEP TOWARDS EGALITARIANISM

In order to ensure that justice is done to the subject, this paper cannot ignore to elucidate the category of children born out of marriages that are considered void[312] or voidable[313] under the Hindu Marriage Act, 1955.

Legitimacy is nothing but a privileged social status granted to preserve the sanctity of marriages and uphold its institution. Illegitimate children, on the other hand, are the unfortunate counterparts of their socially-advantaged brethren. Their plights may be attributed to a plethora of factors like them being born outside a lawful wedlock, or beyond the sanctioned time after its determination as an unlawful/void wedlock. Therefore, it is merely on grounds of the kind of marriage, i.e., either valid or void, that the branding of innocent children is practiced. In other words, the social status of children is determined by the act of their parents. If the parents enter into a valid marriage, the children are deemed legitimate; but if the parents commit a 'folly', as a result of which a child is conceived, such a child is labelled as illegitimate notwithstanding the fact that he is but a blameless soul. And this is a social stigma that the child is tormented by to the day he carries it to his grave. Realising the

[308] ibid.
[309] Max Müller, *Sacred Books of the East* (25, OUP 1886).
[310] Hari Singh Gour and others, *The Hindu Code* (6th edn, Law Publishers 1994).
[311] *Angammal* v *Venkatareddi* 26 Mad 509.
[312] Hindu Marriage Act 1955,s 11.
[313] Hindu Marriage Act 1955, s 12.

unfairness in the equation thus set by the society, and not willing to entertain a similar discrimination in law, the Parliament enacted a legislation to protect the legitimacy of such children.[314] This forward step taken by the Parliament came in the form of Section 16 of the Hindu Marriage Act, 1955.

Under the amendment that was brought into the Hindu Marriage Act in 1955, Section 16 came to confer legitimacy on children resulting from void marriages under Section 16(1), and on children of voidable marriages under Section 16(2), who would otherwise have been legitimate if, at the date of the decree, it had been dissolved instead of being annulled.

To quote the High Court of Karnataka, "Sub-sections (1) and (2) of the above section (Section 16) makes it abundantly clear that, even in cases of a marriage void or voidable under the Act, the children born of such a marriage shall have the status of legitimate children. Such children will be regarded in law as legitimate children of the parents for all purposes, including succession. But, as laid down by the provisions, such children cannot by relying on the status conferred on them by sub-sections (1) and (2) claim any right in or to the property of any person other than the parents."[315]

III. THE DYNAMICS OF THE ENSUING POLEMICS

Upon a methodical scrutiny of Section 16 of the Hindu Marriage Act, it surfaced before the venerated Division Bench of the Bombay High Court that "a child who is conceived as a consequence of a marriage which is void under the provisions of the Hindu Marriage Act, whether a decree of nullity is passed or not, is a legitimate child. However, such a child does not acquire the right to property to which a child would be entitled. But, the legitimacy granted to him/her under the Act, confers upon him a right to the property of his/her parents on condition that the property to which such a child can lay claim must be a separate property of the parents and not the co-parcenary property in which the parent(s) have share."[316] While deciding the case of Perumal Gounder v Pachayappan, the Madras High Court observed that regardless of being treated as legitimate under Section 16, a the status of a child is not escalated to that of a coparcener, and hence, he continues to be dispossessed of the authority to claim partition.[317]

In conjunction with the afore-mentioned judgments, an in-depth analysis of the much-debated Section 16(3) of the act in question, yields that the property to which a child from a void, or voidable, marriage can succeed should be the exclusive property of the parents, and irrespective of the new-found legitimacy bestowed upon him by the law, he is not entitled to any right in the co-parcenary property wherein his father enjoys a share.

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[314] Murali Mohan, 'Section 16, Hindu Marriage Act' (advocatemmmohan- Just Another Law Knowledge Bank 2011)<http://advocatemmmohan.wordpress.com/2011/12/10/hindu-law-hindu-marriage-act-1955-section-16-void-marriage-children-legitimacy-of-second-marriage-contract-of-during-subsistence-of-first-marriage-prior-to-commencement-of-act-void-under-s-5/> accessed 25 August 2013.

[315] *Chikkamma and Ors v N Suresh and Ors* 2000 (4) KarLJ 468 ;
Sivagnanavadivu Nachiar v Krishna Kanthan ILR 1977 MAD 216.;

[316] *Jinia Keotin v Kumar Sitaram Manjhi* (2003) 1 SCC 730.

[317] *Shantaram Tukaram Patil and Anr v Smt Dagubai Tukaram Patil and Ors* AIR 1987 Bom 182 .
Perumal Gounder and Anrv.Pachayappan and Ors AIR 1989 Mad 110.

However, the esteemed judges of Chikkamma and Ors v N. Suresh explored the nuances of the prevailing laws with an incisive approach and deduced that "at the time of his death, if the father of a child of a void marriage was the sole coparcener of a joint family property, who could have dealt with the property as his own, and in any manner he wished, subject to the rights of the female members of the joint family, the co-parcenary property in possession of such a sole coparcener would be held to be his separate, or exclusive property, and that would therefore, entitle the child, who was the outcome of his void marriage, to such property by virtue of Section 16(3) of the Hindu Marriage Act".[318] In the same case, the High Court also asserted that the children from void marriages can succeed to the property of their parents only in accordance with Section 8 or Section 15 of the Hindu Succession Act, 1955. The rationale behind this assertion is that no child, either legitimate or illegitimate, acquires a right in the separate property of his/her mother or father by birth. The judgment also alludes to commentaries in order to corroborate the stance adopted by the revered judges.[319]

Section 16 of the Hindu Marriage Act, whose reformist nature was lauded for bequeathing property rights on illegitimate children, was, however, ridden with an error of epic proportions prior to its 1976 amendment. As pointed out by the single judge bench of the High Court in Goverdhan Singh v Hiraman Singh, Section 16, as it stood before the amendment, dealt with legitimacy of children of void and voidable marriages that were annulled at the instance of either party under Section 11 or 12. "This legal fiction thus created, placed a limitation on the applicability of the benefit to children of marriages annulled under Section 11 or 12. In other words, it was the decree of nullity that entitled the children to the stamp of legitimacy, and if that decree was not obtained, and the marriage was never annulled, the children would not cease to be illegitimate."[320] Expressing his earnest adulations to the amendment, Justice Chennakesav Reddy went on to state that, "This amendment was made to remove certain anomalies and handicaps that had come to light after the passing of the Hindu Marriage Act, 1955. The Legislature amended the Section to see that in no case the children of persons whose marriage is solemnized, but is void or voidable under Section 11 or 12 of the Act, will be regarded as illegitimate children irrespective of whether it has been annulled or not."

[318] *GurNarain Das v GurTahal Das* AIR 1952 SC 225.
[319] Mulla, *Principles of Hindu Law* (16th edn, Lexis Nexis 2001).
[320] *Goverdhan Singh v Hiraman Singh* [1980] 2 LT 213 (Andh).

IV. INDIA TODAY

"If we were so emancipated from the mores as to sanction contraception and abortion, why should we worry about illegitimacy? The attitudes toward the illegal mother, father, and child, though understandable, are as irrational as any."[321]

-Kingsley Davis

More recently, in their oft-cited case of Revanasiddappa v Mallikarjun, the apex court chose to diverge from the diktats enumerated by judgments listed above, which permit illegitimate children a claim in the exclusive property of their parents, but bars them from laying a claim over the joint family property of the father. Setting aside the decrees of the trial court, the appellate court and the High Court, Justices G.S. Singhvi and A.K. Ganguly ruled that children from a second wife i.e., illegitimate children, had rights to the property of their parents, both self-acquired and ancestral, when they heard the case under a Special Leave Petition (SLP). The judges collectively noted that this advancement in the law is intended "to serve the socially beneficial purpose of removing the stigma of illegitimacy on such children, who are as innocent as the others. The birth of a child in a relationship that is not sanctioned by law has to be viewed independent of the relationship of the parents."[322] The two-judge bench also envisaged the setting up of a Constitutional bench to examine the issue in greater depth.

Winding up the discussion on the radical approach of the temples of justice towards illegitimacy, this paper shall now advance to deal with the fate sealed by the Indian legal system for the children born out of the recently-evolved trend of live-in relationships.

V. KEEPING PACE WITH CHANGING MORALITIES

A live-in relationship is a social arrangement that has gained momentum in India over the last decade, thus leading to a sporadic number of cases relating to the rights of illegitimate children born to a couple united by the bonds such a relationship.

In the case of Bala Subramanyam v Sruttayan, the apex court stated in its judgment that, "If a man and woman are living under the same roof and cohabiting for a number of years, there will be a presumption under Section 114 of the Evidence Act, that they live as husband and wife and the children born to them will not be illegitimate."[323] In the case of Velusamy v Patchaiammal, the two-judge bench constituted by Justice Markandey Katju and Justice T.S. Thakur laid down four crucial

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[321] Kingsley Davis, 'Illegitimacy And The Social Structure' (1939) 45 Am J Sociol <http://www.jstor.org/stable/2769810> accessed 27 August 2013.

[322] *Revanasiddappa and Anr v Mallikarjun and Ors* [2011] Special Leave Petition (C) No. 12639/09 of 2011 (SC) (Unreported).

[323] *S P S Bala Subramanyam v Sruttayan* AIR 1992 SC 756.

pre-conditions that require fulfillment for a live-in relationship to be recognised as a relationship in the nature of marriage. The conditions listed below have been derived the Ruling of a California Court where similar relief had been ordered by invoking the doctrine of a "Palimony".[324]

1. "A live-in couple must hold themselves out to the society as being akin to spouses.
2. They must be of legal age to marry.
3. They must be unmarried or be otherwise qualified to enter into a legal marriage.
4. They must have voluntarily cohabited and held themselves out to world as being akin to spouses for a significant period of time."[325]

In another path-breaking verdict that was pronounced in the same year, the Court made it clear that a walk-in and walk-out relationship shall not be considered a live-in relationship.[326] Also, one-night stands, or spending weekends/vacations together are not considered live-in relationships, nor is the case of a man's relationship with a keep, which he maintains financially, and uses primarily for sexual purpose(s) and/or as a servant.[327]

The position of the law as regards the rights of children born out of live-in relationships to succeed/inherit the parents' property, however, is still not clear.[328] The property rights of children born out of a walk-in and walk-out relationship, where a relationship between a father and son can be biologically proved, also stands undecided at the moment.[329] Even the latest decision on the issue which came in the form of a Madras High Court judgment in 2013[330] by Justice CS Karnan elaborates on the aspect of alimony and maintenance claimed by the estranged partner, but does not lay down a definite rule regarding the property rights of children born out of live-in relationships.

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[324] Om S Verma, 'Editorial: Live-in Relationship' (2010) 26 Journal of Extension Systems <http://www.jesonline.org/2010dec.htm#Verma> accessed 25 August 2010.
[325] ibid.
[326] *Madan Mohan Singh and Ors v Rajni Kant and Anr* [2010] Civil Appeal No 6466 of 2004 (SC) (Unreported).
[327] *D Velusamy v D Patchaiammal* [2010] Criminal Appeal Nos 2028-2029 of 2010 (SC) (Unreported).
[328] *GurNarain Das v GurTahal Das* AIR 1952 SC 225.
[329] Dhananjay Mahapatra, 'How legitimate is an illegitimate child's right to property?' *The Times of India* (India, 27 August 2012) <http://articles.timesofindia.indiatimes.com/2012-08-27/india/33423599_1_hindu-marriage-act-inheritance-dna-test> accessed 25 August 2013.
[330] FP Staff, 'Misreading the Madras HC ruling: Premarital sex is not marriage' *Firstpost Life* (India, 18 June 2013) <http://www.firstpost.com/living/misreading-the-madras-hc-ruling-premarital-sex-is-not-marriage-883429.html> accessed 28 August 2013.

V.CONCLUSION

"It is said that the sins of parents ought not to be visited on their offspring."[331]

In this paper, the property rights of illegitimate children have been subjected to scrutiny under four principal conditions. In one picture, the case laws pertaining to children born of void/voidable marriages were sketched, and contrasted with the 2011 Supreme Court judgment, which took a completely different stand. On a related note, the 1976-amendment to Section 16 of the Hindu Marriage act, 1955, was critically appraised. Subsequent to the presentation of a brief study on the ancient Hindu texts which pronounce their verdicts placing reliance on the much-criticised the *varna* of an individual, a deliberation upon the right of illegitimate children over the *stridhana* property of their mothers was witnessed. Lastly, the focus shifted upon the children born outside the wedlock in live-in relationships. Based upon the stand being adopted by the legal system, which reflects the social trends at any given point of time, one can conclude that India is taking progressive strides into the 21st century.

On the basis of study of the property rights of illegitimate children presented above, the rejoinder to the following question unbound by the shackles of time now surfaces in clearer print: Is law as biased against illegitimate children as the traditional Indian society is? The answer is both yes and no. Yes, because the law is undergoing a transformation that is causing the Courts as well as the Legislature to gradually cease to discriminate between the legitimate and illegitimate children in matters of property rights as is evinced by the 2011-judgment of the apex court, and by the amendment brought about to the Hindu Marriage Act, 1955, in 1976. And no, because most of the cultural practices and customs like bigamy, polygamy, concubinage, live-in relationships, and the likes already have social sanction, while the battle for absolute legal sanction remains to be won.

The law, however, is speedily rolling *en route* to augmented liberalisation. The Courts are steering away from attaching any stigma of "bastardization" to illegitimate children. Apart from the judgment delivered by Justice Singhvi and Justice Ganguly, two other recent judgments of the Supreme Court- one by Justice Markandey Katju guaranteeing legal safeguards to live-in partners,[332] and the other allowing maintenance and property rights to second wives[333] bear testimony to this.

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[331] Kingsley Davis, 'Illegitimacy And The Social Structure' (1939) 45 Am J Sociol <http://www.jstor.org/stable/2769810> accessed 27 August 2013.

[332] *Goverdhan Singh v Hiraman Singh* [1980] 2 LT 213 (Andh).

[333] *Smt Narinder Pal Kaur Chawla* v *Shri Manjeet Singh Chawla* AIR 2007 Del 7.

The question that Manjula Sen puts forward in her article is: "If illegitimate wives and children enjoy the same rights and privileges as the legitimate ones, does that mean that the institution of marriage as we know it is getting diluted?"[334] It seems unlikely. This shift in the attitude of the law simply intends to dispose of the bias and stigmas persisting in society that discriminates against illegitimate children, who are born as innocent as a legitimate child, and for no fault of their own, are denied rights in the property of their progenitors.

Author Flavia Agnes, who is also a distinguished lawyer and an authority on the subject, feels that these advances in the area of granting property rights to illegitimate children is "not just progressive but is also more in tune with the historical and cultural realities that continue to be widely prevalent in India".[335]

[334] Kingsley Davis, 'Illegitimacy And The Social Structure' (1939) 45 Am J Sociol <http://www.jstor.org/stable/2769810> accessed 27 August 2013.
[335] ibid.