

disposition and for any alienation including partition prior to 20th December, 2004, the daughter of a coparcener would not be entitled to claim her interest in the coparcenary property.

That the Hon'ble Karnataka High Court has held in the case of *Miss R. Kautha v. Union of India*, reported in AIR 2010 Karn. 27, that the Central Amendment Act No.39 of 2009 [Hindu Succession (Amendment) Act of 2005] prevails over the State Act No.23/1994 [Hindu Succession (Karnataka Amendment) Act]. That with the passing of the Amendment Act of 2005, the concept of survivorship is given a go by once and for all.

Sub-section (5) of the Amended Section 6 provides that nothing in this Amended Section 6 shall apply to a partition which has been effected before the 20th day of December, 2004. The explanation appended to this sub-section says that partition for the purposes of this section means any partition made by execution of a deed of partition

duly registered under the Registration Act, 1908, and it also means Partition effected by a decree of a Court.

It may be seen that among Hindus, partition of properties can be effected orally also; Partition can be inferred by Family arrangement/settlement which has been acted upon by the parties, in addition to, of course, effected by registered partition deed or by decree of Court. So it is suggested that the Explanation needs to be deleted. This explanation is, therefore not in keeping with the tenets of Hindu Law with regard to partition of properties which can be by oral partition as stated supra.

As per sub-section (2) of Amended Section 6, the property held by female Hindu with the incidents of a coparcenary ownership and she will be capable of disposing it by will. So, by virtue of sub-section (2) of Section 6, equality is achieved with a male coparcener, who is vested with the power to make a Will by virtue of Section 30 of the Hindu Succession Act, 1956.

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## ACCOSTING LEGITIMACY IN FAMILY RELATIONS

By

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### ***Introduction:***

Though law is not a panacea for all the maladies, it is certainly a consoling consortium for all the needy living beings. It is the last resort and hope of crying kittens. Law stands above the assumptions and presumptions of individuals and groups for its jurisdiction are wholesome. Unfortunately, in the realm of legal literature, certain pseudo terms entered into family law to defile the

sanctity of family jurisprudence. Terms like 'illegitimate child' and 'bastard' created confusion in the minds of neutral thinkers and started questioning the jurisprudential rationale. Should the brunt of mischief or recklessness of matured adults be borne by the innocent offspring? When a man and woman unite without complying with the social or legal norms and give birth to a child, should that child be cursed with the crown of thorns? It took centuries of

wisdom for the judicial reasoning to realize that it is not the child to be credited with 'illegitimacy' but the parents who caused the birth of the sinless child<sup>1</sup>. That reiterated the piety of Hindu marital institution in consonance with the cherished ideals of Hindu philosophy.

### ***Conceptual Significance of Legitimacy:***

Family which is construed to be the fundamental and basic unit of an organized, civilized and peaceful society throughout the globe, in fact, is the species of our glorious 'joint family.' A family is envisioned with a strong foundation of 'marriage'. "APUTRASYA GATIRNAASTI" is the central motive for marriage and our sages idealized the marriage as a "SAMSKARA". Marriage was the last of the ten 'samskaras' or purificatory ceremonies enjoined by Hindu Religion for purifying the body from the inherited taint. *Sundaribai v. Shivanarayana*<sup>2</sup>. Consequently, the concept of legitimacy is understood as an acknowledgment of the compliance of the principles proclaimed in Hindu Law.

We recognize eight forms of marriages since the consent of the parties was not needed and Hindu marriage is not a contract. We also attribute sanctity to the offspring of 'Rakshasa marriage' also even though the woman is impregnated without her consent, and the consent of her parents. When times change, traditions and customs also change both in substantive and procedural forms. Marriage has become more optional today. Eventually, one may be inclined to analyze the sequences and consequences of 'Legitimacy'.

### ***Is Law Equal For All?***

Theoretically, law may be equal for all but factually all are not treated equally before law. It sounds that classification of 'children'

into 'legitimate' and 'illegitimate' should be found to be inconsistent with the ideology of Article 14 of our Constitution since the classification is based on the 'circumstances or conditions' of the union of male and female, and such classification is not reasonable and gives rise to two kinds of justice, say "Legitimate Justice" and "Illegitimate Justice" which is unthinkable.

'Legitimacy' is a fluid term. Take the case of English Law Legitimacy has been a key concept of Western family law for hundreds of years. The test of legitimacy determined who belonged to a family and who did not. In principle, legitimacy entitled children to maintenance and inheritance from both parental sides. Illegitimacy did not unconditionally do so. Legitimacy appeared as a significant part of the ecclesiastical policy and legislation from the mid-twelfth century onwards, but could not remain so after the second half of the nineteenth century<sup>3</sup>.

Similarly, the Encyclopedia Britannica states that by the common law of England, an "Illegitimate" child was a *filius nullius* (child of none or without relatives). There may have been two main reasons for this former, discriminatory attitude. First, certain unions between the sexes were designated as lawful marriages, and a man of importance, agreeing to his daughter's marriage, would insist on her having the status of legal wife. Second, paternity, in the legal sense, was easier to establish in the case of a lawful marriage than in its absence. The common law of England, for example, presumes in favour of legitimacy when the child is born in lawful relationship.

Is legitimacy applied only to common people and not elite and privileged sections?

1. Look at the judgment given by the Karnataka High Court at 2008 (6) AIR Kar. R. 267
2. (1908) ILR 32 Bom. 81

3. Rolf Nygren – Faculty of Law, Uppsala University  
<http://jfh.sagepub.com/content/28/1/149.abstract>(<http://www.britannica.com/EBchecked/topic/201326/family-law/22417/Legitimacy>)

History is replete with innumerable episodes. A TV programme suggested that the Queen isn't in fact a direct legitimate descendant of the original Plantagenet family. They tracked down a man from Australia called *Michael*, who they claim to be the true Monarch.

That one of the 'Tudor kings' father was out of the country for more than a year before he was born. This strikes as odd, that such a greatly overdue birth was never recorded as overdue. Also, *Elizabeth II* is a direct descendant of Queen Victoria, who carried the gene responsible for haemophilia. Why wasn't there a recorded case of a Monarch prior to Victoria suffering from the disease? There is an interesting by Mr. *Asker*.

The "King of England "who was supposed to be out of the country for a year before the birth of his son *Edward*, was in fact *Richard Duke* of York, in the early 15th century. *Richard's* son *Edward* was tall, blond and handsome, unlike his rather weedy father - but *Edward's* mother was the tall, blonde and beautiful *Cecily Neville*. *Edward's* brother *George*, the Duke of Clarence, claimed that his mother had betrayed his father with an archer called *Blayborne*, who was, you guessed it, tall, blond and handsome. You can figure what uproar resulted from that - *Cecily* was known as extremely religious and loved *Richard* deeply; they travelled together always and had 13 children in all. So probably, someone got their dates mixed up<sup>4</sup>.

Similarly, we are also not lacking in such episodes. Be it east or west, human nature is one. So, legitimacy is a concept which should not be kept as static and untouchable and it should be allowed to live with the liberty of time.

### *Judicial Grace and Legislative lethargy:*

Though prior to the Hindu Marriage Act, 1955, there was no prohibition for a Hindu to have more than one wife, all the children born to the wives were treated as legitimate children and members of joint family or coparcenary. Only a child born to concubine was treated as an illegitimate child. Each one of these legitimate children had a right to maintain a suit against their father for partition and separate possession of their legitimate share either in the joint family property or in the coparcenary property. After the passing of the Hindu Marriage Act, 1955, a prohibition was imposed on the Hindus to enter into second marriage during the lifetime of the spouse. The Personal Law of Hindus to that extent ceases to have effect.

A son born to the said void marriage was deprived of a right under the Traditional Hindu Law because the provisions of the Act, excluded the application of personal law in this regard and under the Hindu Succession Act, 1956, because he was not a legitimate son. The Parliament after noticing this injustice done to an illegitimate child for a folly of its parents thought of introducing Section 16 of the Act.

Though slavery is extinct now, but when slavery was prevalent, a female slave would be permanently attached to a family as a dependent member thereof, and a son begotten on her by male members would likewise be an inferior member. There are instances that such dependents female slaves were called concubines and living as members of the family of the man keeping them. Thus Colebrook has spoken of "son by a female slave or by a sudra woman," mean the son by a concubine. There appears to be some misconception when we refer to the right of an illegitimate son.

*Brihaspati* says: "The virtuous and obedient son, born by a Sudra woman to a man

4. (<http://uk.answers.yahoo.com/question/index?qid=20080827000325AAnHIVtu>)

who has no other offspring should obtain maintenance and let the kinsmen take the residue of the estate". Manus says: "A son begotten by a Sudra or on a female slave or on a female slave of a slave, may take a share (on partition) if permitted (by the father), this is a settled law". *Yajnavalkya* has said: "Even a son begotten by a sudra on a female slave may get a share by the father's choice, but if the father be dead, the (legitimate) brother should make him partaker of half a share, one who has no (legitimate) brother may take the whole, in default of (heirs down to) the son of daughters".

These texts are cited in Dayabhaga in Sanskrit Language which is translated by *Colebrook* as follows:

But of a Sudra a-son-by-a-not-married-female-slave or-the-like-sudra-woman, may share equally with other sons, by the father's permission alternatively we can also infer as follows:

- (i) The illegitimate son of a Sudra is the son (putra) of a dasi that is a Hindu concubine in the continuous and exclusive keeping of his father at the time of his birth.
- (ii) He is not the fruit of an adulterous or incestuous intercourse.
- (iii) It is not necessary that his mother should remain a permanent concubine till the day of his father's death.
- (iv) A Brahman mistress of a Sudra does not become a Sudra herself and their son is not a dasiputra.

- (v) It is not necessary that to constitute a woman a dasi that she should have not been a married woman.
- (vi) She may be a widow when the illicit connection begins.
- (vii) She may even be a married woman when such connection begins, provided that in this case the connection ceased to be adulterous when the son is conceived as where the husband dies before conception.

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 the bastardization of the child does not find place in any statute book<sup>5</sup>.

### ***Fine – Tuning the Facts:***

The time has come when law cannot remain complacent with the normal pace of time. It has to travel along with the vibrant and volatile situations. We are now facing the legal intricacies in case of the surrogate children and their rights. Concomitantly, law may have to provide legal entrenchment to neo-spousal relations and the offspring of 'Living-In' partners. This new stream is neither amazing, nor scary to the present generation; moreover it has become a wishful union in life.

### ***Live-in and Life-out***