

**LEGAL STATUS OF ILLEGITIMATE CHILDREN:  
A CRITICAL ANALYSIS OF PERSONAL LAWS IN INDIA VIS-À-VIS  
RIGHTS OF THE CHILD**

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*What is against the law is considered to be illegitimate or illegal. Such was the status of the illegitimate child until recently when the laws underwent a change due to social and political evolution and a shift in the thoughts of the people. In the present post- modern world, there is considerably less stigma attached to such terms. In progressive nations like the United States of America society is generally receptive to such children and the laws imposed also ensure that their rights are protected. Off late in countries like India there has been a change in the personal laws to incorporate this development, the most recent being the amendment of Section 16 of the Hindu Marriage Act and several judicial decisions. This paper attempts to track these changes among the three major personal laws in our country i.e. Hindu, Muslim and Christian.*

### **Introduction**

Throughout history, there is probably no other word associated with such contempt as bastard or bastardry. Early common law treatment of the same is without regard to the social implications of the same. They were not recognised in polite society and were granted no rights. As early as 1235, the Earls and Barons refused to accept their illegitimate offspring. Rights over property were an unachievable dream, when they were not even granted maintenance.<sup>1</sup> This treatment of illegitimate children has been uniform throughout the world, with a few inconsistencies. It is not possible to ignore certain notable bastards who changed the course of history. But notwithstanding these exceptions, there has always been a social stigma associated with illegitimate children. Society has always ostracized such children, who through no fault of their own were treated as unacceptable among other members of society.

Very often a dominant group loses its primacy over other groups in view of the ever changing socioeconomic scenario and the consequential vicissitudes in human relationship. Law takes its own time to articulate such social changes through a process of amendment. That is why in a changing society law cannot afford to remain static. And hence, we observe that various personal laws have undergone a change.

In the late 20<sup>th</sup> century, with the progression of society, there was an attitudinal and behavioral change towards the illegitimate issue. This change was ushered in with social and political changes along with society's transformation from a primitive agrarian society

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<sup>1</sup>Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 Fla.L.Rev 345 (2011). Available at: <http://scholarship.law.ufl.edu/flr/vol63/iss2/2>

to a modern urbanized, industrial nation. With the change in society's behavior, the laws were amended to incorporate the same. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role. In several countries, laws have been implemented and the legal position of illegitimate children has vastly improved.

## 1. India

In India, until recently, the law did not recognize the rights of illegitimate children over the property of their parents. With the amendment of Section 16 of the Hindu Marriage Act, the law now recognises an illegitimate child's right over the property of its parents. Children born out of wedlock in live-in-relationships also acquire a right over the property of their parents.

### Hindu Law

The rights of illegitimate children under Hindu Law have undergone a drastic change due to the Marriage Laws (Amendment) Act, 1976 which amended Section 16 of the Hindu Marriage Act, 1955. Prior to this amendment only certain rights relating to Sudras had been recognised. With regard to maintenance, Section 20 of the Hindu Adoptions and Maintenance Act, 1956 states that a Hindu is bound to maintain his/her illegitimate children.

### Illegitimate sons of a Sudra

The illegitimate son of a Sudra by a permanently kept concubine has the status of a son and is a member of the family. But he does not acquire on his birth a joint interest with his father in the ancestral family property.<sup>2</sup> He also cannot enforce partition against his father during his lifetime.<sup>3</sup> If a partition is made during the father's lifetime, he may be allotted a share "by the father's choice".<sup>4</sup> But if a partition is made after the father's death, the 'brethren should make him a partner of the moiety of a share'.<sup>5</sup>

Thus regarding the illegitimate sons of the Sudras, the Court's view can be summarized as follows. The illegitimate son cannot enforce partition during father's lifetime. If there is a partition during the father's lifetime then he 'may' be allotted a share. But if there is a partition after the father's death then the legitimate sons should give him share of the property.

When a legitimate son and an illegitimate son succeed to their father's separate estate, they take as coparceners with mutual rights of survivorship.<sup>6</sup> But the illegitimate son of a Sudra is not a coparcener with his father, though he may be a coparcener with his father's

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<sup>2</sup> Vellayappa v. Natarajan, (1931) 58 IA 402: 55 Mad 1

<sup>3</sup> Munnuswami v. Swaminathan, AIR 1953 Mad 25

<sup>4</sup> Karupapannan v. Bulokam, (1990) 23 Mad 16

<sup>5</sup> Gurunarayandas v. Guruthaldas, AIR 1952 SC 225

<sup>6</sup> Gopalakrishna v. Dorai Babu, (1984) 2 MLJ 221, 225

legitimate son,<sup>7</sup> and he is entitled to demand partition against the legitimate son.<sup>8</sup> This position is not affected by the Hindu Succession Act.<sup>9</sup>

### **Inheritance law post amendment to Section 16 of the Hindu Marriage Act**

The Amendment Act of 1976 (Act 68 of 1976) amended Section 16 of the Hindu Marriage Act, 1955. By this amendment, irrespective of whether marriage is null and void under Section 11, any child of such marriage whether born before or after the commencement of the Amendment Act shall be legitimate. Sub section 3 of this section also grants a right to property of the parents, to such illegitimate children.

By the use of the word 'property' the section has kept the meaning general and broad.

The amendment to Section 16 has been introduced and was brought about with the obvious purpose of removing the stigma of illegitimacy on children born in void or voidable marriage.<sup>10</sup>

The issues relating to the extent of property rights conferred on such children under Section 16(3) of the amended Act were first discussed in detail in the case of *Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors.*<sup>11</sup> The main contention in this case was whether the term property in Section 16(3) included self acquired property as well as ancestral property of the parents. The Supreme Court, repelling such contentions held that in the light of the express mandate of the legislature there is no room for according upon such illegitimate children more rights than envisaged. Doing so would amount to violence of the provision and would attempt to the court re-legislating on the subject under the guise of interpretation. This view of the Supreme Court was followed in several other cases.<sup>12</sup>

Thus the Supreme Court by its narrow interpretation limited the scope of the section. Fortunately, successive decisions of the same court held the view to be narrow and even provided reasons to justify the same. In the case of *Revansiddappa & Ors v. Mallikarjuna & Ors*<sup>13</sup> the Supreme Court stated that the section restricted the rights of such illegitimate children with respect to property other than that of their parents. However, the said prohibition does not apply to the property of the parents. Clauses (1) and (2) of Section 16 expressly declare that such children shall be legitimate. If they have been declared legitimate, then they cannot be discriminated against and they will be at par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral.

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<sup>7</sup> Thangavelu v. Court of Wards, Madras, (1946) 2 MLJ 143

<sup>8</sup> Gur Narain Das v. Gur Tahal Das, (1952) 2 MLJ 251, 254 (SC): AIR 1952 SC 225

<sup>9</sup> Suryaprakasa Rao (R.) v. Venkateswarlu (R.), AIR 1992 AP 234 (DB)

<sup>10</sup> Revansiddappa & Ors v. Mallikarjuna & Ors, (2011) 4 SCR 675

<sup>11</sup> Jinia Keotin and Ors. v. Kumar Sitaram Manjhi and Ors, (2003) 1 SCC 730

<sup>12</sup> Neelamma and Ors. v. Sarojamma and Ors. (2006) 9 SCC 612, Bharatha Matha and Anr. v. R. Vijaya Renganathan and Ors., AIR 2010 SC 2685

<sup>13</sup> Revansiddappa & Ors v. Mallikarjuna & Ors, (2011) 4 SCR 675

The constitutional validity of Section 16(3) of Hindu Marriage Act was challenged before this Court and upholding the law, this Court in *Parayankandiyal Eravath Kanapraavan Kalliani Amma (Smt.) and Ors. v. K. Devi and Ors.*<sup>14</sup>, held that Hindu Marriage Act, a beneficial legislation, has to be interpreted in a manner which advances the object of the legislation. The Court also recognized that the said Act intends to bring about social reforms and further held that conferment of social status of legitimacy on innocent children is the obvious purpose of Section 16. Thus through a series of legislations the Supreme Court interpreted the section in the light of its true object which is to protect innocent children from the status conferred to them by society thereby promoting their interests.

In the case of *Revansiddappa & Ors v. Mallikarjuna & Ors*<sup>15</sup> the Supreme Court elaborated on the crux of the amendment in Section 16(3), “The Court has to remember that relationship between the parents may not be sanctioned by law but the birth of a child in such relationship has to be viewed independently of the relationship of the parents. A child born in such relationship is innocent and is entitled to all the rights which are given to other children born in valid marriage.”

Thus, under Hindu Law the illegitimate children are deemed to be legitimate and are granted a right to inherit the property of their parents. This is the current legal position on right to inheritance as upheld in the above mentioned case and has been followed in several other decisions.<sup>16</sup>

### Muslim Law

In the Muslim law, as in other systems of law, parentage involves certain rights and obligations. By and large there are two modes of filiation known to the law: as a rule the law treats the natural father as the father of the child; sometimes, however, adoption leads to the result that someone who is not the father of the child acquires rights similar to those of the father.<sup>17</sup> Adoption is not recognised in Islam<sup>18</sup>, as it was disapproved by the Quran. In addition to filiation the other form is ‘acknowledgement of paternity’. The peculiarity of Muslim law is that in certain cases where it is doubtful whether a person is the child of another, the acknowledgment of the father confers on the child the status of legitimacy.<sup>19</sup>

What is important to know is the difference between legitimacy and the process of legitimation. Legitimacy is the status which results from certain facts. Legitimation is a proceeding which creates the status of legitimacy which did not exist before and in the proper sense of term, there is no legitimation in Muslim law.<sup>20</sup>

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<sup>14</sup>Parayankandiyal Eravath Kanapraavan Kalliani Amma (Smt.) and Ors. v. K. Devi and Ors. (1996) 4 SCC 76

<sup>15</sup> Revansiddappa & Ors v. Mallikarjuna & Ors, (2011) 4 SCR 675

<sup>16</sup> Kanthamma v. K. Shettappa and Ors, 2014(1)RCR(Civil)573

<sup>17</sup> Mulla, Principles of Mahomedan Law, (20<sup>th</sup> ed., Lexis Nexis Butterworths Wadhwa, 2013)

<sup>18</sup> Muhammad Allahdad v. Muhammad Ismail, (1888) 10 All 289

<sup>19</sup> Kutty, Faisal, Islamic Law and Adoptions (June 20, 2014)

<sup>20</sup> Syed Habibur Rahman v. Syed Altaf Ali, AIR 1922 PC 159

Acknowledgement of paternity or Iqar is a kind of legal evidence. It is practically the most conclusive and un-controvertible means of creating an obligation on the person who makes it. In *Muhammad Allahdad v. Muhammad Ismail*,<sup>21</sup> the Court observed-

“Where the paternity of the child that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents and at the time of his conception of birth, Muslim Law recognized ‘acknowledgement’ and legitimate descent can be established as a matter of substantive law for purposes of inheritance.”

The doctrine of acknowledgement or iqar confers a status of legitimacy on a child whether son or a daughter. Mulla explains the same in Section 342 of Principle of Mohamedan Law. The much followed case on the doctrine of acknowledgement is the decision of the Privy Council in *Sadik Hussain Khan v. Hashim Ali Khan*,<sup>22</sup> wherein it was established that in cases of uncertainty of legitimate descent, an acknowledgement by the father raises the presumption of legitimacy unless the other side can prove that the child whose paternity was acknowledged was of illegitimate descent.

This doctrine can be invoked only where the factum of marriage or the exact time of marriage has not been proved. It is based on the assumption of a lawful union between the parties of the acknowledged child.<sup>23</sup> The doctrine of acknowledgement however cannot be where the lawful union between the parents of the child is not possible as in the case of incestuous intercourse or adulterous connection. The doctrine is also not applicable where the marriage necessary to render the child legitimate is disproved.<sup>24</sup> An acknowledgement need not necessarily be express. It may be presumed from the treatment and conduct leading to an inference of acknowledgement.<sup>25</sup> It is an essential condition to the validity of an acknowledgement that the physical relation of father and child should not be a matter of impossibility. The presumption of paternity arising from acknowledgement can be rebutted by proof that physical relationship is a matter of impossibility.<sup>26</sup>

In a decision by the Privy Council<sup>27</sup> it stated that where there is a question of the existence of a marriage between the parents, something more than the acknowledgement of paternity is required. This principle has also been utilized in the case, *Abdool Razack v. AGA Mohomed Jaffer Bindaneem*<sup>28</sup>, where Lord Macnaghten states the following-

“On the other hand, where no marriage is shown to exist or where the concubine is not a slave concubine, the mere admission of paternity is not enough for the purpose of affording

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<sup>21</sup> Muhammad Allahdad v. Muhammad Ismail, (1888) 10 All 289

<sup>22</sup> Sadik Hussain Khan v. Hashim Ali Khan, AIR 1916 PC 27

<sup>23</sup> Dr. H.D.Kohli, Muslim Law Cases & Materials ( Universal Law Publishing Co., 2012)

<sup>24</sup> Mohommad Khan Sahib v. Ali Khan Sahib, AIR 1981 Mad 209

<sup>25</sup> Golstaun v. Mirza Abid Hussain, AIR 1924 Oudh 19

<sup>26</sup> Zakir Ali v. Sograbi, Indian Cases 883

<sup>27</sup> Fatima Binti Hafidh v. The Administrator-General, Zanzibar Protectorate, AIR 1949 PC 254

<sup>28</sup> Abdool Razack v. AGA Mohomed Jaffer Bindaneem, (1894) 21 Ind App 56

proof of legitimacy; the treatment must be such as to convey the fact that the child is acknowledged not merely as the off-spring of the father but as his legitimate offspring.”

Thus where there is a doubt regarding the existence of marriage then mere acknowledgement of paternity is not sufficient. But in cases where the marriage is irregular or voidable, the acknowledgement of paternity by the father, provided the same is valid, is sufficient proof for the legitimation of the child's status. Under Muslim law illegitimate child has no right of inheritance from either of the parents under both Shia and Sunni schools though such children can claim maintenance from mother only under Sunni law upto the age of seven years.

### **Right to Inherit Property**

Under Muslim Law, the illegitimate child has no right to inherit property from the father. Under the Hanafi law the mother and her illegitimate children have mutual rights of inheritance. The illegitimate child inherits not only the property of its mother but also the property of all other relations with whom it is related through the mother. In *Pavitri v. Katheesumma*<sup>29</sup>Vaidiaalingam J. held, "Mohammadan law appears to impose no burden upon the natural father of an illegitimate child.."

Muslim Law also does not confer any right to maintenance to the illegitimate child, though the Hanafis recognize the obligation to nurture the child till age 7. But such children can seek remedy under Section 125 of the Cr.PC which should ensure that all such illegitimate children are maintained by their parents. The same has been recognized by the Courts in several cases.<sup>30</sup>

### **Christian Law**

Under Christian Law, an illegitimate child is recognized as 'fillius nullius' which means child of no one. Unlike Hindu Law, which creates a status of legitimacy on the child (Section 16 of HMA, 1955) there is no provision in Christian Law which corresponds to the same.<sup>31</sup> The property rights of Christians are covered under the Indian Succession Act, 1925.

The term 'child' as used in this Act, does not include illegitimate children. Section 37 of the Act specifically precludes illegitimate children from inheriting property of the father. But this does not restrict such children from claiming maintenance under Section 125 of the Cr.PC. Similar to Hindu and Muslim Law, the custody of the child is solely with the mother and her relations.<sup>32</sup> The putative father has no say in this matter. This is provided in Section 8 of the Indian Succession Act. Through several decisions of the Court, we can observe that if the two parents have co habited for a long period or if the man treats the

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<sup>29</sup> Pavitri v. Katheesumma, AIR 1959 Ker 319

<sup>30</sup> Sukha v. Ninni, AIR 1960 Raj 163; Pavitri v. Katheesumma, AIR 1959 Ker 319

<sup>31</sup> Law Commission of India, Report on the Indian Succession Act, 1925 (110<sup>th</sup> Report, 1985)

<sup>32</sup> Mishra Archana, Adopted and Illegitimate Child Under Indian Christian Law: Revisiting Inheritance Rights (January 17, 2015). Available at SSRN: <http://ssrn.com/abstract=2551287>

woman as his wife, then the children are considered legitimate. This was held in the case of *Rameshwari Devi v. State of Bihar*<sup>33</sup> and *Vidhyadhari and others v. Sukhrana Bai*<sup>34</sup> and several other cases.

Thus under Christian Law, illegitimate children are excluded from right to inherit property of the parents but are granted a right to maintenance under the secular law i.e. Section 125 of the Cr.PC.

### Conclusion

Children born illegitimate, irrespective of the current progressive society suffer social stigma and this has an impact on their status in society. Society, in countries like ours, still discriminates against such children. Even with the changes in the law, due to the influence of deep set religious thinking and prejudices that influence our behavior, the Indian society is not very accepting towards such illegitimate issue. Added to such trauma it seems unfair that such children are not granted the right to succeed to their parents' property. Fortunately, the Courts through their decisions have expressed concern and sufficiently spoken about how they should not be unfairly punished for the acts of their parents. In the case of *Revansidappa v. Mallikarjuna & Ors* the Supreme Court expressed its sympathy for such children.

The Hindu Law provides sufficient protection for the rights of such children. But other personal laws like Muslim Law or Christian Law are not so elaborate. As observed earlier, Muslim Law restricts it to property of the mother and Christian Law does not give any such rights. It was considered that debarring the illegitimate child from inheriting the property of its parents would deter further generations from entering into a sexual relationship outside marriage and would enforce a strict regime of proper sexual mores in society. However, trends and statistics have shown that the problem of illegitimate births in the country has been increasing at an alarming rate; hence the above argument to justify the exclusion of illegitimate children from inheriting property of parents cannot be bought and falls flat.

This issue requires immediate attention and proper legislation to remedy the anomalies in law and something must be done to solve the problem of illegitimacy in India by conferring rights of property and maintenance on them. It is, therefore, an urgent need to analyze the various provisions relating to the position of illegitimate children - their right to property and their right to maintenance - under various personal laws in India in order to avoid confusion regarding the same. A viable remedy in this situation could be provision of secular laws relating to inheritance to avoid confusion between the personal laws. The implementation of a uniform secular law to protect the rights of such children will ensure that there is no discrimination against such persons, legally as well as socially. This will correct the various differences in the personal laws.

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<sup>33</sup> *Rameshwari Devi v. State of Bihar*, 2000 (2) SCC 431

<sup>34</sup> *Vidhyadhari and others v. Sukhrana Bai*, 2008 (2) SCC 238