
RIGHTS OF ILLEGITIMATE CHILDREN IN INDIA

Kritika Kalra, Verendra Kalra & Co.

“There are no illegitimate children- only illegitimate parents.”

- Leon R. Yankwich.

ABSTRACT

Despite the ever dynamic evolution of humanity, there still remain certain social concepts that carry with them issues of the past. Illegitimacy, stands as one such concern that has been unable to shed the negative connotations attached to it. It is no novel fact that illegitimate children are treated like pariahs in our society. In this paper, fore mostly, I will shed light on the destructive understanding of Illegitimacy and the traumas endured by the victims of such societal perception. Subsequently, I will study the legal mechanisms prevalent in India with respect to the rights of illegitimate children, followed by the parallel understanding of the same concept and its legal protection in USA and Europe.

INTRODUCTION

Illegitimacy has been one of the most contentious terms in the history of humanity. It has been used liberally and in often negative connotations that has caused great conflict amongst families worldwide. The importance of legitimacy has been considered time and again in tandem with the evolution of our societies.

Just the mere stamp of illegitimacy on its own triggers an immeasurable amount of stigma for the child and the mother that are a part of such circumstances. These children are often referred to as “*bastards*”, a derogatory term for the child’s circumstance and are often identified in the strata of “*irreputable social types*” among thieves.¹ A child is simply branded as a *bastard* because his or her birth took place out of a wedlock. India, has always, at its root followed the archaic customs and traditions and even today societies tend to rely primarily on the properness of these customs. If today, a young woman was raising a child on her own, there would be malicious whispers and rumours following her footsteps and her child would be treated beneath others just because the society deems this to be the norm. There are many circumstances owing to which the situation of illegitimacy arises, for example:

1. When the marriage is not valid due to some legal flaw.
2. When there are adulterous circumstances involved.
3. When the mother is the victim of a sexual assault or is a sex worker and the father’s identity is unknown.
4. Where the marriage takes place after the birth of the child.

Children in the first three categories are treated much more harshly in comparison to the first one. Even within the broad scope of illegitimacy itself, there are various degrees of discrimination that are often overlooked. In a similar way, Hindu law considers the aforementioned first category of circumstances legitimate in comparison to the other three scenarios, which are undoubtedly treated as illegitimate, in other words when illegitimacy takes place due to some legal flaw in the marriage it is still considered less illegitimate in degree than any other circumstance borne illegitimacy.

It is always argued that there must exist a rationale behind such a classification. Generally, the fact that if an illegitimate child is treated the same as a legitimate one, it may unfavourably affect the position of the legal child and the wife of the man, often arises as justification for

¹ Harry D Krause, “Equal protection for the illegitimate”, 65(3) *Michigan Law Review* 477(1967).

this discrimination. Another rationale is that it is easier to identify the father if the child is born in wedlock. But are such defences enough to justify the mistreatment of the innocent child of an unfortunate circumstance? Although these reasons may be valid in their own capacity, they contribute greatly to the unfair treatment that shadows illegitimacy.

As such, law plays an important role in mitigating the negativity surrounding the concept of illegitimacy. It calls for the legal understanding of statutes and precedents that can provide such affected persons with a modicum of equality in this harsh society.

ILLEGITIMACY RIGHTS AND THEIR EVOLUTION

Under Hindu Law

It is a well-known fact that under the faith of Hinduism, marriage is not just merely a contractual union, rather it stands as a sacred or sacramental union.² It is through this marriage that each child in India is afforded the brand of legitimacy. It has been a longstanding belief that the aim of marriage³ is to be able to procure legally.⁴ When a marriage is not valid, then the child born is considered to be illegitimate.

As per Hindu laws, section 5 of the Hindu Marriage Act, 1955 asserts the conditions that must be fulfilled in order for the marriage to be considered as valid. Only the children born of such marriages are considered legitimate. Any marriage that takes place in contravention to such conditions is declared void or voidable under Section 12 and 11 of this act, moreover even marriages that contradict section 7 were not recognised as valid.⁵ It is upon the decree of such nullity that illegitimacy arises. When it comes to the case of valid marriages, a child is assumed to be legitimate. This is under the Presumption of illegitimacy under the Indian Evidence Act.⁶

In the early years, children borne of such void or voidable marriages were considered illegitimate, however, that is no longer the situation under section 16 of HMA⁷, which

² "The intention of the sacrament is to make the husband and wife one, physically for secular and spiritual purposes for this life and for after lives." Such was observed by J. Derrett in his study of Hindu laws. Furthermore Manu Smriti defines the sanctity of such union.

³ This is not the only aim of marriage, though it falls under the objective of *Kama*, this objective deals with love and procreation. The other objectives include *dharma* (Duty according to religion as well as law), *Arth* (economic achievement and efforts.) also.

According to *Manu Smriti*, a man can only practice Dharma together with wife.

⁴ Nori Venkata Somayajulu, "Mana Vivah Vyavastha" *Kranthi press* p-5 (1990).

⁵ Ceremonies of a Hindu marriage.

⁶ In *Goutam Kundu v. State of West Bengal*, [1993] AIR 2295 it was held that birth of a child during marriage is conclusive proof of the child's legitimacy.

⁷ Hindu Marriage Act, 1955.

acknowledges these children to be regarded as legitimate for the purposes of inheritance matters.

Guardianship

In the case of illegitimate children, it is the mother who is considered the natural guardian. It is the mother who has a preferential guardianship here, whereas in the case of legitimate children, it is the father who is deemed the natural guardian and mothers in turn were only regarded as natural guardians in certain circumstances such as the absence of the father. Even now section 6 of HMGA⁸ states that in the case of an illegitimate boy or an unmarried girl, the mother is to be the guardian and then the father and in the case of a married girl, it is the husband.

Maintenance

As per the provisions under the HAMA⁹, section 20 states that a Hindu must maintain his/her illegitimate child¹⁰. This duty is applicable to both the parents and the child must be maintained till the majority age is reached. However, an illegitimate child does not need to be necessarily maintained if he/she has ceased to be Hindu by conversion.

Despite the aforementioned practice, he/she can they can apply for maintenance from the father under the CrPC¹¹.

Joint Family Partition and Partnership

In the past an illegitimate son could be granted a share in the property equivalent to that of the legitimate sons upon the father's wish. But, after the passing of HSA¹², an illegitimate child has no relationship with the father and consequently cannot therefore succeed as a coparcenary to the property.

Inheritance

Under the HAS, illegitimate children can only inherit from their mothers. This is as per Section

⁸ Hindu Minority and Guardianship Act, 1956.

⁹ Hindu Adoptions and Maintenance Act, 1956.

¹⁰ *K. M. Adam v. Gopala Krishnan* (1974) Mad 232. The court held that if the child is of Hindu, then he is entitled to claim maintenance from the mother or father irrespective of the fact that such parent is Hindu or not. Sec 20. HAMA is to be read from the child's point of view.

¹¹ Code of Criminal Procedure, 1973.

¹² Hindu Succession act, 1956, s. 3 (1) (j).

3(1) (j), which provides the definition for the term 'related'. Here 'related' means related by legitimate kinship. As per the proviso under this section, illegitimate children are deemed to be related only to the mother and no else besides her. Therefore under HSA a relationship between an illegitimate child and the father is not recognised.

The Amendment Act of 1976, brought a positive change in section 16 of HMA. Under this amendment any child who is born, irrespective of the fact that marriage being null and void under HMA, shall be deemed to be legitimate. The same was further reiterated in *Shanta Ram v. Smt. Dargubai*¹³. This step took place to protect the children who would otherwise unjustly suffer due to no reason but their circumstances.¹⁴ Previously, the courts would interpret Section 16 differently. Section 16(3) was restricted only to separate property owing to the belief that if property included separate as well as joint family property then the illegitimate child would get more than he should.¹⁵ Furthermore at that time according to the courts, this section was applicable only if a decree of nullity was granted, in other words, if there was to be no such decree of nullity then the children would remain illegitimate.¹⁶ This challenging understanding has now been rectified as per the Marriage Laws Amendment Act, 1976 with the support of appropriate judicial decrees. These illegitimate children are now legitimate, only to the extent of inheriting from their parents. They cannot inherit from the relatives of their parents.

In *Revanasidappa v. Mallikarajun*¹⁷, a crucial judgement in the Indian jurisprudence, the court had discussed the objective of section 16 and held it liberal as compared to in the past to impart more justice in such cases. Furthermore, it was held that these children are entitled to both ancestral and self-acquired property of their parents. The Court referenced Article 39 (f) of the Constitution, the entitlement of healthy upbringing of every child in our country, in order to validate their reasoning. The position of illegitimate children of other circumstances than such flawed marriages still remains restricted to the mother's share.

¹³ (1987) 89 BOMLR 51

Section 16 HMA must be read together with section 3 (1) (j) to get the best result.

¹⁴ In *Revanasidappa v. Mallikarajun*, [2011] 4 SCR 675 it was observed by the court that the introduction of section 16, HMA also served the purpose of preventing such children from the social stigma they endured before.

In *Parayankandiyal Eravath & Ors v. K. Devi & Ors*, [1996]4 SC 76, the court held that HMA should be read in a manner that enhances the objective of the legislation.

¹⁵ *Jinia Keotin and Ors v. Kumar Sitaram Manjhi and Ors* [2003] 1 SCC 730, in this judgement, the court limited the rights in case of illegitimacy; that view has been rectified by the Supreme Court due to its narrow interpretation.

¹⁶ *Thulasi Ammal v. Gowri*, [1964] AIR Mad 118.

¹⁷ 2011 4 SCR 675

Under Muslim Law

In both sects Muslim laws, there is no obligation upon the natural father to maintain the illegitimate child. Although under Sunni law, Unlike the Shia law where an illegitimate child cannot inherit property from either of his or her parents, Hanafi School states that the child should be maintained till reaching the age of seven. Here the child is also entitled to inherit the property of the mother and her relatives.

In Muslim law child has no right to inherit the father's property Muslim law does not have any concept of legitimization, but upon acknowledgement a child can inherit the father's property. Acknowledgement of the child can be granted in this law but there is no as such legitimization that takes place in Muslim law.¹⁸

The doctrine of *iqrar* explained by Mulla in sec. 342 of Principles of Mohammedan Law describes the acknowledgement of father upon son or daughter was confirmed by the Court in *Sadiq Hussain Khan v. Hashim Ali Khan*.¹⁹ There it was noted that when there is no proof of illegitimacy then an acknowledgment by a father of the son can be considered as substantive evidence of the legitimacy provided the same is possible.

Maintenance

An illegitimate child does not necessarily have to be maintained under Muslim laws as there is no obligation of the father to do so. However, this maintenance can be availed through section 125 of the CrPC.

Under Christian Law

Christian law follows the well-known doctrine of *filius nullius*, which translates to child of no one. The property rights of such children are governed under the Indian Succession Act that confers no legitimacy unlike Hindu Law.

They can claim maintenance under the Code of Criminal Procedure²⁰ however by virtue of section 37 of ISA are expressly excluded from inheriting the property of the father.

¹⁸ *Syed Habibur Rahman v. Syed Altaf Ali*, (1992) AIR PC 159.

¹⁹ (1916) ILR 38 All 627

²⁰ The Code of Criminal Procedure. 1973, s. 125.

ILLEGITIMACY ABROAD

In order to understand India's perception on illegitimacy, it is important to consider this concern worldwide.

The United States of America

In the United States the common law rule of '*filius nullius*' was abandoned earlier in comparison to the other Common Law countries. Under this doctrine, an illegitimate child had no rights or support from either of the parents. There were no guardianship rights to the child. Even the subsequent marriage of the parents did not legitimize the child.²¹

From 1968 onwards the U.S. Supreme Court started applying the Equal Protection clause of the American Constitution to cases of illegitimacy. The landmark judgement to this date remains *Levy v. Louisiana*²², where the court first struck down a Louisiana statute. The court had held that the statute was discriminatory in denying the illegitimate children the right to recover damages in the event of the wrongful death of the mother. This discrimination was against the purpose of the statute. Justice Powell stated that to put the vicarious burden on an innocent child for its parents' discretions is illogical and unjust. Following this between 1968 and 1980 there had been a substantive number of decisions that had gradually started questioning the discrimination in illegitimacy cases.²³

Though *Labine v. Vincent*, restricted the decision of *Levy*, it was probably the last attempt made to stop the social reforms in favour of equality among all children. *Weber v. Aetna Casualty Insurance Co.*²⁴ and the subsequent case of *Trimble v. Gordon*,²⁵ changed the tide in favour of illegitimate children.

In Texas the law which denied the illegitimate child the right to parental support was held unconstitutional in *Gomez v. Pervez*.²⁶

²¹ Such was in the case of children born from adulterous or incestuous relationships, this idea was incorporated in the Code Napoleon in 1804 and for the next 170 years the treatment of illegitimacy remained constant.

²² 391 U.S. 68 (1968)

²³ *Riviera v. Minnich*, 483 U.S. 574 (1987); *Clark v. Jeter* 486 U.S.456 (1988)

²⁴ Justice Powell set a test that applied immediate scrutiny. The importance of state interest was to be the balance against the personal rights involved.

²⁵ In *Trimble*, the court confirmed the *Levy* and *Weber* precedents as *per curiam* opinions. This case also substantially overruled the interruption made in *Labine*.

²⁶ 409 U.S. 535 (1973). The Illinois statute was struck down due to its discriminatory nature.

The last major case discussed was *Lalli v. Lalli*.²⁷ The court distinguished the issues between the Illinois statute and New York Statute. It held that the statute in question is not discriminatory as the question was evidentiary in nature. (Proof of Paternity) It said that *Lalli* and *Trimble* are complementary in nature and not contradictory.

Since then many states in the U.S. have amended the inheritance rights in favour of illegitimate children.

EUROPE

The legal status of illegitimacy was impressively influenced by the ECHR.²⁸ Two fundamental judgements in this field cemented the improved status of illegitimate children.

In Belgium no relationship was established between the mother and illegitimate child upon the birth unless there was acknowledgement or some judicial proceeding involved. Only the concept of legitimation or legitimation by adoption could create somewhat of an equal status between legitimate and illegitimate children. To improve their legal situations Belgium introduced art. 334 of Belgium Civil Code for equality among all children.

In the landmark *Marckx*²⁹ case the Court ruled in favour of the mother following the maxim '*mater semper certa est*',³⁰ Here the court rejected the government's defence of public morals and stated that by virtue of Article 8 an illegitimate family enjoys the same rights as a legitimate family. The Court adopted the view that family life is not solely restricted to social, moral and cultural interests but also material interests such as inheritance rights.

Even legitimation by way of adoption is discriminatory and only depends on the parents' initiative to do so.

Similarly in the *Johnston*³¹ case, in Ireland the court held that an illegitimate child must be placed in a position akin to a legitimate one. The court considered it a fault in Ireland's legal system that article 8 was not being aptly interpreted and applied. Although Judge De Meyer dissented that it is not enough to just place the child in a position akin to an illegitimate one.

²⁷ 439 U.S. 259 (1978)

²⁸ European Court of Human Rights. The Court's interpretation of arts 8 and 14 is very similar to the American Supreme Court's interpretation of the Equal Protection Clause.

²⁹ [1979] ECHR 2.

³⁰ The mother is always certain. This is a Roman law principle stating that the mother of the child has been conclusively established by birth, from the moment of birth, by the mother's role in the birth.

³¹ *Johnston & Ors v. Ireland* [1986] series A, n. 112

He believed that the court should have stated that “*the legal situation of a child born out of wedlock must be identical to that of a child born to a married couple.*”

Ireland adopted the Status of Children Act, 1987 to better the law.

Both America and Europe believe in providing equal substantial rights to all children.³²

CONCLUSION

Upon evaluating India within the lens of other countries it can be easily read that India has always been more progressive with respect to illegitimate children. A Hindu dominated country there has always been the recognition of a mother and child's relationship, unlike the Common Law³³. Even in cases of Muslim and Christian laws, India provides for secular protections.³⁴

India too evolved in matters of illegitimacy alongside the other countries. There is no express influence of such countries' regime upon ours, but it seems that such a change came about due to socially changing times. Involving sensitivity to discrimination and different perspectives of values and traditions. But India's obligation under the UDHR³⁵ have played a substantial role in such elimination.

Similar to the Constitution ideals upheld by the U.S. and the humane rights by Europe, India's pledge of equality under Articles 14 and 15 of the Constitution have played a major role in reducing discrimination for the children. In spite of containing different religions, India has served to protect each person in India by sheltering them under the blanket of secular laws that triumph over personal laws. Laws such as CrPC, SMA³⁶ give opportunities to those inconvenienced under their personal laws.

India provides legitimacy via section 16 or otherwise grants rights to mother's property. This approach is different from the American and European jurisprudence of equal substantial rights.

³² The two countries, though unanimous in providing substantial rights to all children, still believe in some qualification of rights due to the general interest of the community.

“*The illegitimate child must have the same substantial patrimonial rights as the legitimate child; procedural qualifications of these rights are permitted in those cases where difficulties of proving paternity are involved.*” John Meeusen, *The American Journal of Comparative Law*, No.1 Vol. 43, p 144 (Winter, 1995).

In *Trimble* the court admitted that proving paternity in case of illegitimate children requires a higher standard of scrutiny. This is not within the umbrella of substantive rights.

³³ In the U.S. and America, the concept of *filius nullius* reigned whereas Hindu classical law established a relationship between mother and child.

³⁴ The Code of Criminal Procedure, s. 125. (maintenance)

³⁵ Universal Declaration of Human Rights.

³⁶ Special Marriage Act, 1954.

The western world believes in providing some basic rights equally to all children, but there are still tests an illegitimate child must go through to be really considered equal.

Upon question of paternity, the western world relies on medical advancements and so is ordered by their statutes. India on the other hand has no such express provision instead it bases its presumption on section 112 of the Indian Evidence Act. “*Pater est quem nuptiae demonstrant*” (he is the father whom the marriage indicates).³⁷ Hence where there is doubt in case of paternity the burden to prove such lies on the person who wishes to refute such presumption. It reads as a conclusive proof. Even if a marriage dissolves and the child is born within 280 days of such dissolution, section 112 reigns. Furthermore no one can be compelled to give a blood test for such a purpose.

There have been valiant efforts made by India to create a warm environment for all children. Despite this there is still a long way to go before India can accept illegitimacy freely. Though section 16 has bettered the position, those that fall outside the roof of such still remain at a less advantageous position than the rest of the children. Specifically when adultery or incest has resulted in the birth of a child there is surmountable disdain accompanying such birth. Even an acknowledgment by father in such cases sometimes does not create a better position, because of the pariah-like qualities surrounded in the society.

These restricted advantages bar the growth that every innocent child is entitled and so he grows up with less awareness and remains in a precarious position all through life. And isn't it the object of our Constitution to protect all people and treat them equally. This involves protecting them from themselves and their own as well.

It is not just the child discriminated against but also the mothers. The idea that a mother is solely responsible for an illegitimate child while the father recuses himself of the possibility and responsibility of his child is glaringly evident in cases of sexual assaults and prostitution. Just like the traditions of sati and female infanticide were abolished in India, illegitimacy is another such problem that must also be vanquished for the progress of India.

³⁷ *Bhartiraj v. Sumesh Sachdeo* [1986] AIR All 259.

This presumption is herculean in nature and can only be doubted by a strong preponderance of evidence and not a mere balance of probabilities.

Section 114 of Indian evidence Act is applicable in cases of live-in relationships, its effect being the same as s. 112

Marriage has always been one of the reasons that legitimacy has remained such a dilemma. The belief that sexual relations would not be entered into frivolously and there will be responsibility among the youth has been one aim of such penalisation. But many scholars critique the institution of marriage. Compelling arguments have been made by them. A child could get better recognition in the father's rights due to marriage between the same sexes. Here custody would remain solely based on the best interest of the child rather than the guardianship due to a child's status. In today's world, there has been a substantial change of perspective with regards to the meaning of marriage. The justification for influencing people into proper married relationships has never been and can never be a good enough excuse to cast an unfair burden on someone else's life.

It is evident through the study of this subject that though India doesn't consider illegitimate children to be of a "*lesser*" status, they are still not the same as legitimate children. It is important to remember that anyone can be born under unsavoury conditions and that every child must be considered free of all the negativity surrounding his/her birth.