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A Study on Illegitimate Children and Their Rights in India Under Various Personal Laws

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Abstract: This research study examines the illegitimate children's property rights in relation to their parents' assets including ancestral and separate property under various personal laws in India and other rights such as maintenance, guardianship etc. The researcher seeks to understand what rights illegitimate children have when it comes to receiving their parents' assets, since there is no particular law regulating property rights of an illegitimate child and right of maintenance and guardianship, it is vitally necessary to establish a single regulatory framework.

Introduction:

The term '**illegitimate**' derives from the Latin word '*illegitimus*' means 'Something which is contrary to the law or not in accordance with law' and the term illegitimate children refers for such children's who are not born out of lawful wedlock or children born out of illicit relationship or children's born out of annulled/voidable marriage or children's born through concubinage, whereas legitimate child is born from lawful wedlock and in India not just society discriminated against them but even the law also discriminate them, since time immemorial such children's have faced discrimination in all communities. A child born to parents who are not lawfully wedded or married is stigmatised in society now a days also, the children who were not born legally never shared the same status along with legitimate children and under almost all personal laws in India the rights of inheritance of legitimate children and illegitimate children are not similar, in India illegitimacy carries strong stigma among all religions and community, a child who is born out of parents who are not lawfully married to each other and pre-marital sexual relationship and extra marital relationship are consider to be a sin and a child from such offensive relationship also kept in state of sin and such child also consider illegitimate.

The rights of 'illegitimate' children have evolved significantly over the centuries in view of changing socioeconomic scenario and the consequential vicissitudes in human relationship. However, from 20th century we observe that various personal laws have undergone a change to ensure that illegitimate children are treated at par with legitimate children and are not discriminated against for no fault of theirs. As well as the effort to end discrimination against

illegitimate children is also reflected in international law and various international conventions such as Article 25(2) of the Universal Declaration of Humans Rights categorically states that all children, whether born in or out of wedlock, shall enjoy the same social protection.¹Further, the United Nations Convention of the Rights of Child, 1989 states that all child, irrespective of their 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, shall face any kind of discrimination and that children are protected against all forms of discrimination or punishment on the basis of the status, activities etc.²

¹Art 25 Universal Declaration of Human Rights,1948 expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

² United Nations Convention of the Rights of Child, 1989.

Hence, it is observed that various personal laws have undergone a change and, in several countries, including India in addition judiciary also plays an important role and the legal position of illegitimate children has vastly improved.

Illegitimacy of Children and their rights under different personal laws:

In India there are various acts that govern the legitimacy and illegitimacy of children and their parents. All these acts are almost based on religion.

In Hindu Law, in general, the illegitimate child belongs to his/her mother. But, in Muslim Law, the child is considered as the child of nobody, neither the father nor the mother. The Christian Law of inheritance in India only recognizes kinship, therefore adopted and illegitimate children are excluded from the ambit of the Act.³ So, now, here we will discuss the rights of illegitimate children under personal laws.

A) Illegitimacy of children and their rights under Hindu Law:

1. Illegitimacy and right of inheritance:

The rule of inheritance is complicated in the matter of illegitimate child under Hindu law, the legitimacy of a child under Hindu law depends on the relationship of parents but as per changing – societal structure Hindu personal law has undergone change to ensure rights of illegitimate children, here we will study illegitimate children's inheritance right under three heads as follows:

- i) Mitakshara School of law**
- ii) Dayabhaga School of law**
- iii) After enactment of Hindu Succession Act, 1956**

i) Mitakshara School of law:

Under Mitakshara School of law illegitimate sons fall under two categories:

- 1) Dasiputra or son born to a concubine exclusively and permanently kept by a Hindu and
- 2) An illegitimate son born of a woman who is not a dasi. Their position is as under
 - i) An illegitimate son of both categories is not entitled to partition and to a share on partition among the three first classes as he is not coparcener. He is entitled only to maintenance.
 - ii) Among the Sudras, the dasiputra has somewhat superior position and the position of dasiputra of sudra is as under:
 - a) The dasiputra does not acquire by birth any interest in the joint family property, hence he is not coparcener and has no right to partition against father. However, the father has power to give him a share during his lifetime and even he may give equal share to the share of a legitimate son.
 - b) If father dies leaving behind joint property with his own father or collaterals in that case also dasiputra has no right to ask partition or share. After his father's death he is entitled to maintenance out of joint family estate, in case his father has left no separate property.
 - c) On the death of Sudra male, the dasiputra and legitimate sons succeed his separate and hold it as coparcenary property. The dasiputra will also share the joint family property obtained by partition with collaterals by the legitimate son of his putative father. An illegitimate son is also reversioner to his putative father's widow that means he has right to get property after the death of putative father's widow. However as to the dasiputra's right of succession in his father's separate property the law stands changed by Hindu Succession Act, 1956, as an illegitimate son is not recognised as his putative father's heir. This rule, therefore is not valid after the enforcement of Hindu Succession Act, 1956, i.e. June 17, 1956.
 - d) If the joint family consists of the father, his legitimate son and dasiputra, after the death of the father, the dasiputra becomes coparcener along with the legitimate son of his putative father and he has right of survivorship. However partition takes place, either at his instance or at the instance of legitimate child of his father, he is not entitled to equal share but he is entitled to one half share of legitimate son.⁴

ii) Dayabhaga School of law:

It should be noted that the general rule of Dayabhaga School is that the sons have no right to partition including legitimate and illegitimate. However, under Dayabhaga school there is no discrimination among the inheritance right of illegitimate and legitimate son, under Dayabhaga School of law Sudra becomes a coparcener with them.

³ Nimisha Srivastava, What Are The Rights of Illegitimate Children Under Hindu Law, (April, 8, 2016), <https://blog.ipleaders.in/rights-illegitimate-children-hindu-law/>

⁴ Dr. Prasad Diwan, A Text Book on Family Law (2013) P.435-436

inherit the property after death of father.⁵

iii) After Hindu Succession Act,1956:

The Hindu Succession Act,1956 came in to force on June 17,1956 and after coming in to force of the Hindu Succession Act,an illegitimate children are deemed to be related by illegitimate kinship to their mother and to one another, and their legitimate descendants are deemed to be related by legitimate kinship to them and one another, and can therefore inherit from each other under the said Act. An illegitimate child can inherit the property of his or her mother or of his or her illegitimate brother or sister. A mother also can inherit the property of her illegitimate child. The father has no right to inherit the property of his illegitimate child. But the dasiputra's right to become coparcener with the legitimate son of his putative father lost both under Mitakshara and Dayabhaga School. Under Mitakshara this right remains in respect of coparcenary property of Sudra which his son take by survivorship. In *Rasala v.Rasala* (AIR 1992 AP 234), The Andhra Pradesh High Court held that in view of Sec 16, Hindu Marriage act,1955 makes the Sudra's son of void marriage his legitimate and therefore he can become coparcener.⁶

Now, after the enactment of Hindu Succession Act,1956 legitimacy of child and their inheritance rights determine and regulated on the basis of validity of marriage provided under Hindu Marriage Act,1955. The prerequisite for valid marriage is provided under sec 5 and 7 and a children's who born out of such marriage are considered legitimate and If the conditions provided under the Section 5 and 7 are not met, the marriage would be either void or voidable as provided under Section 11 and 12 respectively.

The inheritance rights of illegitimate children's are governed by Section 16 Hindu Marriage Act, 1955 and after amendment made in the year 1976, Sec 16 (3) of the Hindu Marriage Act, 1955, which provides that 'the children born of void and voidable marriage are only entitled to the property of their parents and not of any other relation'. This implies that an illegitimate child would only have the right to his father's self-acquired property, not his ancestral property and over the property of other relation. However, in *Revansiddappa & Ors v. Mallikarjuna & Ors*, (2011) 4 SCR 675, The Supreme Court has held that under the Hindu Marriage Act (HMA), illegitimate children are entitled to all rights in the property of their parents, both self-acquired and ancestral. A Bench of Justices G.S. Singhvi and A.K. Ganguly, hearing an appeal by *Revansiddappa*, differed with earlier judgments in interpreting Section 16 (3) of the HMA that "such children are only entitled to the property of their parents and not of any other relation."⁷

Writing the judgment, Justice Ganguly said that under Section 16 (1) and 16 (2), it was expressly declared that children born in a void or voidable marriage, (like second marriage) should be legitimate "If they were declared legitimate, then they cannot be discriminated against and they will be on a par with other legitimate children and be entitled to all the rights in the property of their parents, both self-acquired and ancestral." The Bench said: "the prohibition contained in Section 16 (3) will apply to such children with respect to property of any person other than their parents. We find it interesting to note that the legislature has advisedly used the word 'property' and has not qualified it with either self-acquired property or ancestral property. It has been kept broad and general." Underlining the need for a liberal interpretation of Section 16 (3), the Bench said: "with changing social norms of legitimacy in every society, including ours, what was illegitimate in the past may be legitimate today. The concept of legitimacy stems from social consensus, in the shaping of which various social groups play a vital role." Quoting an earlier judgment, the Bench said: "the HMA intends to bring about social reforms and conferment of social status of legitimacy on innocent children is the obvious purpose of Section 16. This is a law to advance the socially beneficial purpose of removing the stigma of illegitimacy on such children who are as innocent as any other children." "However, one thing must be made clear that the benefit given under the amended Section 16 is available only in cases where there is a marriage but such marriage is void or voidable. In the case of joint family property, such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. Logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property."

Further Bench quoted Article 39 (f) of the Constitution which says "that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Right to property is no longer

⁵ Dr.Prasad Diwan ,A Text Book on Family Law (20130 P.436

⁶ Dr.Prasad Diwan ,A Text Book on Family Law (20130 P.436-437

⁷ *Revansiddappa & Ors v. Mallikarjuna & Ors*, (2011) 4 SCR 675

fundamental but it is a constitutional right and Article 300A contains a guarantee against deprivation of property right by authority of law.” Since there was no restriction imposed in Section 16 (3), such children would have a right to whatever “becomes the property of their parents whether self-acquired or ancestral,” the Bench said. Thus, under Hindu Law the illegitimate children born out of void and voidable marriage 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.

But, while considering the civil appeal the Supreme Court bench headed by Justice **Sanjay Kishan Kaul and KM Joseph** noted that the reference on the issue of illegitimate children's right in father's ancestral property in the case of *Revanasiddappa vs. Mallikarjun* (2011) 11 SCC 1 is still pending consideration of larger bench and called upon the Registrar to look into this issue so that the papers can be placed before the Hon'ble Chief Justice of India for reference to a larger Bench.⁸ and recently on 1st Sept 2023 a three judge bench comprising by CJI D.Y. Chandrachud Justices JB Pardiwala and Manoj Misra was hearing a reference against the two-judge bench judgment in *Revanasiddappa vs. Mallikarjun* (2011), recognizing the rights of children born out of invalid marriages in their parents' share in Hindu joint family property held that, that children born out of void/voidable marriages are entitled to inherit their parents' properties, whether self-acquired or ancestral governed by Mitakshara law but such a child cannot be treated as coparcener by birth in the HUF. However, such children are not entitled to the properties of any coparcener other than their parents.⁹

2. Illegitimacy and right of Maintenance:

Prior to the coming into force of the Hindu Adoptions and Maintenance Act, 1956, Under Mitakshara and Dayabhaga law an illegitimate son of a Hindu was entitled to maintenance out of his father's coparcenary property and his self-acquired property. Under the Hindu Adoptions and Maintenance Act, 1956, a Hindu is bound, during his or her life-time, to maintain his or her illegitimate children. According to sec 21 of Hindu Adoptions and Maintenance Act, the minor illegitimate son and unmarried daughter are dependents of Hindu male and female, now the obligation to maintain illegitimate children is upon both, the father as well as the mother. Not only the illegitimate son, but also an illegitimate daughter, is entitled to be maintained by her father and mother. The right to be maintained, however, extends only upto the period of minority. An illegitimate child is not entitled to be maintained by his or her parents after attaining majority. Such a child will also not be entitled to be maintained if he or she has ceased to be a Hindu by conversion to another religion. Moreover, under the Hindu Adoptions and Maintenance Act, an illegitimate son of a deceased Hindu, so long as he is a minor, and an illegitimate daughter of a deceased Hindu, so long as she remains unmarried, are entitled to be maintained by the heirs of the deceased out of the estate inherited by them or by the persons who take the estate of the deceased. Such a son or daughter, however, will not be entitled to maintenance under the said Act if he or she has ceased to be a Hindu by conversion to another religion. But an illegitimate child converts himself/herself into another religion in that case right of maintenance become subject to provision of s.125(1)(b) and (c) of Cr.P.C, as they can still claim for maintenance from father if they are suffering from mental/mental abnormality or if the minor child is incompetent to maintain himself or herself.

3. Illegitimacy and right over joint family property and partition:

Basically, law of inheritance is very complicated in this matter and the reason behind is that, if the child is born out of void and voidable marriage shall be treated as legitimate as per s.16 of HMA, 1956 and such child form coparcenary with father and such child has coparcenary rights over fathers' property only and can file partition suit over fathers' property after his death.

And a child not belonging to above category, their rights are governed through the principles of Mitakshara School, which state that the illegitimate child has no right over parents' property because they are not related through the legitimate kinship. But on the other hand, HAS, 1956 recognises the rights of illegitimate child over her mother's property, such child can file partition suit over mothers' property.

The law relating to rights of illegitimate child has changed during last several years as above.

4. Illegitimacy and right of guardianship:

As per sec 6 (b) of Minority and Guardianship Act, 1956 a mother has preferential right of guardianship then father. The mother is considered the natural guardian of illegitimate child.¹⁰

⁸ [Reference On 'Illegitimate Children's Right In Father's Ancestral Property' Pending For 11 Years : SC Directs Registry To Place Matter Before CJI \(livelaw.in\)](#) (Visited on 05/05/2023)

⁹. *Revanasiddappa vs. Mallikarjun* C.A. No. 2844/2011, 202 3 LiveLaw (SC) 737; 2023INSC783

¹⁰. Minority and Guardianship Act, 1956. Sec.6

B) Illegitimacy of children and their rights under Muslim Law:

In Non-testamentary succession, the Muslim Personal Law (Shariat) Application Act, 1937 gets applied. Under Mahomedan Law of inheritance there is no distinction between movable or immovable properties or between ancestral and self-acquired property.

According to the Muslim Law, an illegitimate offspring is a *filius nullius* (a son of nobody, illegitimate) and owes no *nasab* (lineage) to either of the parents. Under Muslim law there are no explicit laws or procedures for determining a child's legitimacy, there are different approach amongst the different schools under Muslim law as Shia school does not recognise paternity or maternity of child born out of void marriage but a child can become legitimate through acknowledgement (*Ikrar*).¹¹ The doctrine of *Ikar* confers the status of legitimacy on child whether son/daughter, Mulla explain the same in section 342 of Principles of Mohamedan law and another method of proving the legality of child proving validity of marriage giving direct evidence. Furthermore Muslim law bestows strong presumption on legitimacy on child, these are:¹²

- 1.If a child is born before six months from the date of valid marriage, such child is considered as illegitimate, however through the acknowledgement of father make that child legitimate under Muslim law.
- 2.If a child is born after six months from the date of marriage, such child is legitimate unless the father disclaims that the child by accusing the wife to be a part of an adulterous relationship with someone else.
- 3.If a child is born after dissolution of marriage before 10 moths such child is considered legitimate under Shia law or 2 yrs under Hanifi law or 4 moths under Malaki/shafi law.

1. Illegitimacy and Right of Inheritance:

Under Muslim law different school follows different rights concerning inheritance of illegitimate child. In Shia law as well as in Sunni law and their sub-sects an illegitimate child doesn't have inheritance right over the property of putative father but it varies in case of claim over mother's property, in Hanafi law illegitimate child has inheritance right over mothers property and the mother can also inherit the property of her illegitimate children and illegitimate children inherit not merely property of mother but also the property of all other relations with whom the child is related through mother. But under Shia law, the illegitimate child has no right of inheritance on his or her parent's property as they are treated as the son of 'Zina/Haram' that means child born out of illegitimate relationship. Under Ithna Ashri School an illegitimate child is treated as *nullius filius* and cannot inherit the property any one of its parents or any other person through its parents.

2. Illegitimacy and Right of Maintenance:

Under Muslim law there is no obligation either of the parents regarding the maintenance of illegitimate child, but in Hanafi child such child can claim maintenance till the age of 7 yrs. However, illegitimate child can claim for maintenance from his/her father under S.125 (1)(b)(c) of Cr.P.C. In *Sukha v Nini* Honorable apex court held that Mohammedan law no make provision for maintenance of illegitimate child. As matter of fact maintenance of children has been statutorily recognised under sec 125 of Cr.P.C. in our country and it is in consonance with this wholesome policy that the off-springs born under such circumstances are to be provided for and should not be left to the misfortunes of vagrancy and its attendant social consequences.¹³

3. Illegitimacy and right of guardianship:

An illegitimate child under Muslim law treated as child of nobody but in case of guardianship mother holds custodial rights. However, it has been held through judicial adjudication that the mother is natural guardian and it can extend up to a limit that she can even file a writ of habeas corpus if someone is withholding the child from the custody of his/her mother.¹⁴ Thus, an illegitimate child has limited right to have natural guardian under Muslim law.

¹¹.Sadiq Hussain V Hashim Ali (1916) ILR38 All 627

¹².Supra note 10 at 3

13.Sukha v Nini 1965 AIR SC 314

14.Gohar Begum v Suggi alias Nazma Begum 1960 AIR SC 93

C) Illegitimacy of children and their rights under Christian Law:

An illegitimate child has no status or legitimacy under Christian law, as there are no codified religious or legal laws in India that grant rights to illegitimate children born to Christian parents. Property rights under the Christian Law is dealt with under the Indian Succession Act, 1925 under this act, children born under a valid marriage are recognized and does not include illegitimate children under the definition of the word Children but a children born from void and voidable marriages have also been conferred with a legitimacy in some cases in Christian Law under the IDA. 1869.

1. Illegitimacy and Right of Inheritance:

The law relating to right over property under the Christian law is so clear that in the case of Jane Anthony v. V.M Siyath, the court held that under law of succession children means legitimate children and does not include illegitimate children which does not entitled them of right over any property of the parents. Therefore, such a child has no share in the property of the parents. But in Jane Anthony Vs. Siyath 2008 (4) KLT 1002 recognized the right of illegitimate child under Indian Succession Act.¹⁵

2. Illegitimacy and right of Maintenance:

The personal law of Christian also does not confer any obligation on the parents to maintain their illegitimate child though such child can claim maintenance under the secular law provisions of Code of Criminal Procedure, 1973. A minor child whether legitimate or illegitimate has no right to claim separate maintenance as per the decision of the court in Chacko v. Daniel.¹⁶

3. Illegitimacy and right of guardianship:

In Christian Law, since illegitimate children are awarded nominal rights, an illegitimate child does not have a natural guardian as prescribed by law. However, in the case of **ABC vs State (NCT of Delhi)**¹⁷, the Supreme Court, dealt with the question of whether an unwed (in this case Christian) mother is to notify the putative father of the birth of the child. With respect to custody and guardianship of a minor child born to an unwed Christian mother, the Supreme is not conferred with an equal position merely by virtue of his having fathered the child. Further, the Supreme Court recognised that unwed Christian mothers are not awarded with guardianship rights in the same manner as unwed Hindu mothers are awarded. Therefore, it can be said, by applying this precedent, that the natural guardian of an illegitimate child whose mother is a Christian or has been raised a Christian is the mother and she does not need to inform the putative father about the birth of the child for the purpose of obtaining a guardianship order from any concerned court.

Conclusion:

Thus, it can be concludes that personal laws of parent of illegitimate children plays very important role while deciding rights of inheritance, maintenance, guardianship, where as personal laws don't have uniformity over these subject matter, somewhere some rights has been recognised and somewhere its denied due to religious belief and personal laws of the parents, illegitimate children's have tarnished image position in the society due to societal stigma and they are still subject to being victims without having their fault. Since there is no legal framework which could save the interest and rights of such children's and to remove discrimination against them. Supreme court through its judgement tries to save their interest but now as per changing societal structure the revision of laws really needed for bringing the uniformity and protecting the interest of illegitimate children's from various religion and if proposed Uniform civil code passed by the parliament, I think it will start new age and eliminate conflicting layouts in different personal laws in relation to rights of illegitimate children's and brings equality.

15. Succession under Indian succession act, 1925 in respect of Christians paper prepared by Sri S. VASU DEV, Junior Civil Judge, Yemmiganur.

16. Chacko Daniel v. Daniel Joshua, 1952 KLT 595

17. [ABC vs State \(NCT of Delhi\)](#) (2015) 10 SCC 1