

Legitimacy of Bastardisation Law — A Critical Overview

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Cite as: (2011) PL November S-8 This article looks into the legitimacy of the provisions of personal laws, particularly, Hindu Law bastardising children born outside legal wedlock. This article suggests that: stigmatising children as illegitimate for no fault of theirs and clothing them with legal disabilities is unreasonable and unfair. It suggests for reform in the existing legal framework to remove such disabilities and to remove the unreasonable classification of children as legitimate and illegitimate under the personal laws of the Hindus and other personal laws.

Under all societies in the world, the status of a child i.e. whether it is born legitimate or illegitimate has great consequence. Both in the contemporary society and in the historical society there is classification of children as legitimate and illegitimate. The illegitimate children never enjoyed equal status with the legitimate children. The society always discriminated the illegitimate children in many ways. Not only the society discriminated them, even law has discriminated them. Law has not given the illegitimate children the same legal rights as the legitimate ones are given. Under almost all the personal laws the right to inheritance of the legitimate children and the illegitimate children are not the similar. Illegitimacy carried a strong social stigma among all religions practised in the world.

Premarital sexual relationship and extramarital sexual relationship are considered to be a sin in almost all the societies. So the resultant child of such offensive relationship is also kept in a state of sin. It is considered illegitimate. Many religions also view premarital or extramarital sexual relationship as an offensive relationship. Almost all the personal laws in India are religion-based and so even under law, the children born out of such offensive relationship are not given equal status with the children born out of a lawful wedlock.

Who is a legitimate/illegitimate child? The courts in India decide¹ a child to be legitimate or illegitimate depending on the following criteria:

A child born within lawful wedlock is a legitimate child

At the time of the birth of the child, if the father and mother of the child are legally married to each other, the child is a legitimate child.

A child born outside the lawful wedlock is an illegitimate child

At the time of the birth of the child, if the father and mother of the child are not legally married to each other, the child is an illegitimate child.

This conventional way of looking at a child has undergone a change under almost all the laws of the countries. This is because of the recent trend of conferring legitimacy on certain illegitimate children. In most of the countries of the world currently there is a tendency to blur the distinction between legitimate and illegitimate children.

How does law in other countries deal with this issue? In the beginning, English common law declared an illegitimate child as *filius nullius*². Then gradually it modified its stand on illegitimate children. In 1969 the Family Law Reform Act³ was passed. It eroded the distinction between legitimate and illegitimate children. The illegitimate child was put almost on a par with legitimate child in respect of property rights. Then in 1989, the Children Act, 1989 was enacted. The concept of illegitimacy was effectively abolished by the Act. It introduced the concept of parental responsibility⁴ which ensures that a child may have a legal father even if the parents were not married.

In United States of America, the distinction between the legitimate and illegitimate children is totally blurred. For example in United States, an Arizonian law passed in 1921 provides: "Every child is hereby declared to be the legitimate child of its natural parents. It is entitled to support and education to the same extent as if it has been born in lawful wedlock."

In the end of the 20th century, in the United States, all the States had adopted uniform laws that codify the responsibility of both parents to provide support and care to a child, regardless of the parents' marital status. Illegitimate children and adopted children are also given the same rights to inherit their parents' property as anyone else.

Now in England, there are no bastard children but there are only "bastard parents". People in United States have taken to stigmatising the parents, rather than the child, because it is the parents who are ultimately responsible for the actions that caused an out-of-wedlock pregnancy.

What International Human Rights Instruments has to say? The Universal Declaration of Human Rights⁵ says that "all human beings have equal rights and should be treated with equal dignity"⁶. It also says that same social protection should be given to all children whether born in or out of wedlock⁷.

The European Convention for the Protection of Human Rights and Fundamental Freedoms⁸ and the UN Convention on the Rights of the Child⁹ also insist that children should not be discriminated.

What is their status under Indian Law? In India the law of legitimacy depends on the personal laws of the person concerned.

Muslim law subscribes that an illegitimate child is *filius nullius*. According to Shia School of law, a child born outside the lawful wedlock is related neither to the father nor to the mother. "A bastard child belongs, legally speaking to neither of the parents and is in every sense *filius nullius*"¹⁰. The Hanafi School of law shows little leniency towards the illegitimate child. It says the mother of an illegitimate child has an obligation to nurture the child till it attains the age of seven.¹¹ Shias do not recognise even this obligation. Tyabji says, "Mohammadan law appears to impose no burden upon the natural father of an illegitimate child." It would, therefore, be seen that an illegitimate child is not entitled to maintenance from either parent under Shia law; and only from its mother under Hanafi law.¹²

Under no school of Muslim law an illegitimate child has any right of inheritance in the property of his putative father.¹³ Even if the father of the child admits that he is the father of the child, if a child is proved to be illegitimate then there is no process to recognise him as legitimate. The Privy Council in *Sadik Husain Khan v. Hashim Ali Khan*¹⁴ laid down a rule that:

"No statement made by one man that another (proved to be illegitimate) is his son can make other legitimate, but where no proof of that kind has been given such a statement or acknowledgement is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy be possible."

Again in *Habibur Rehman Chowdhury v. Altaf Ali Chowdhury*¹⁵, the Court has said that there is no process recognised under Muslim law by which a status of legitimacy may be conferred on an illegitimate child. But, it seems that one of the reasons for permitting polygamy and temporary forms of marriages under Muslim law is that under no circumstances the child born to them shall be illegitimate.

The property right of the Christian children is governed by the Indian Succession Act. Various provisions of the Indian Succession Act discriminate the illegitimate children. Section 37 of the Indian Succession Act¹⁶ uses the term "child". But it is without any qualification. Hence it is not clear whether it will include illegitimate children too. Section 100 of the Act¹⁷ which deals with the testamentary succession to property discriminates illegitimate children. It says that if the intention of the testator to give the property to the illegitimate children is not clearly mentioned in the will, then the term child will refer only to legitimate child.

Under the Hindu Law, if a marriage fulfils all the conditions laid down in Section 7 and Section 5 of the Hindu Marriage Act, 1955¹⁸ it is considered to be a valid marriage. Children born of such a valid marriage are alone considered legitimate. If the conditions lay down under Section 5 of the Act, are not satisfied, the resultant marriage may be void or voidable marriage as per Sections 11 and 12 of the Act.

Void marriage Section 11 of the Hindu Marriage Act, 1955¹⁹ defines a void marriage. It says, if the marriage is in contravention of any of the conditions specified in clauses (i), (iv) and (v) of Section 5 it shall be null and void. The children born of such a marriage are considered to be illegitimate children.

Voidable marriage Section 12 of the Hindu Marriage Act, 1955²¹ lays down the grounds of voidable marriages. If the marriage is annulled under anyone of the grounds under Section 12, then the children born of such a marriage are considered to be illegitimate children.

Apart from the above, if proper ceremonies are not performed at the time of marriage as per Section 7 of the Hindu Marriage Act, the resultant marriage is not a valid marriage. Children born of such marriage will also fall under the category of illegitimate children. Hence, children who will fall under the category of the illegitimate children under Hindu Law may be summed up as follows:

1. Children born of void marriage;
2. Children born of annulled/voidable marriage;
3. Children born of illicit relationship;
4. Children born through concubinage; and 5. Children born of a marriage which is not valid for want of proper ceremonies.

In essence, under Hindu law the rule of legitimacy is dependent upon the marriage. The social status of children is determined by the act of their parents. If they have entered into a valid marriage, the children are legitimate; but if the parents committed a folly and entered recklessly into an invalid marriage or a child is conceived even without entering into a relationship of marriage the resultant innocent child are labelled as illegitimate. The innocent child without having any hold or control over the act of its parents has to suffer the consequence of it.

Can legitimacy be conferred by law? To provide some relief to such innocent and unfortunate children, Section 1622 of the Hindu Marriage Act, 1955, confers certain rights on them. It confers legitimacy on those children by a legal fiction. It is a rule of *fictio juris* that the legislature has provided that children, though illegitimate, shall nevertheless, be treated as

legitimate notwithstanding that the marriage was void or voidable. But they are not conferred with absolutely legitimacy. They are not considered equal to legitimate children for all purposes. For example, they can inherit only to their parents. As far as other relatives (like grandfather) are concerned, the disability continues. Moreover, this legitimacy by fiction is not conferred on all illegitimate children, but only on children who are born of marriages that are hit by Section 11 or Section 12 of the Hindu Marriage Act. Though the object of Section 16 was to remove the distinction between legitimate children and illegitimate children it has instead created another category of illegitimate children i.e. illegitimate children conferred with legitimacy.

Children under Hindu law Legitimate children Illegitimate children conferred with legitimacy by Section 16 of HMA Illegitimacy children 1 2 3

- Children born of a valid marriage satisfying the conditions laid down under the Hindu Marriage Act fall under the first category of the legitimate children.
- If the marriage is hit by Section 11 or 12 of the Act, they are conferred with legitimacy with certain restrictions under Section 16 of the Act and they fall under the second category of illegitimate children conferred with legitimacy.
- Children born of illicit relationship, children born through concubine, children born of a marriage which is not valid for want of proper ceremonies, will fall under the third category of illegitimate children. Apart from this, one of the conditions laid down under Section 5 of the Hindu Marriage Act is regarding age of the parties to the marriage. Section 5 clause (iii) says that the bridegroom must have completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage. A Hindu marriage in contravention of this provision is punishable under Section 18 of the Hindu Marriage Act²³ and also under the Prohibition of the Child Marriage Act,²⁰⁰⁶²⁴. The legal principle regarding the validity of such marriage prior to the enactment and enforcement of the Prohibition of Child Marriage Act, 2006 was that it is neither void nor voidable but a valid marriage. But after repealing the Child Marriage Restraint Act, 1929 and enactment of the Prohibition of Child Marriage Act, 2006 the legal status of such marriages has changed as declared by the Delhi High Court in *Jitender Kumar Sharma v. State*²⁵. Now the status of such marriages is that it is not ipso facto void but could be void if any of the circumstances enumerated in Section 12 of the Prohibition of Child Marriage Act, 2006²⁶ is triggered. It is voidable at the instance of the party who was a child at the time of contracting the marriage.²⁷

If the marriage is annulled under Section 3 of the Prohibition of Child Marriage Act, 2006, Section⁶²⁸ of that Act provides that the children born of such a marriage shall be deemed to be legitimate for all purposes. It is not very clear whether "legitimate for all purposes" means, that those children will be treated on a par with the legitimate children who fall under the first category in the above diagram. The Act is also silent about the children born of the marriage which is void as per Section 12 of the Act.

Conclusion and suggestion Conferment of social status of legitimacy on innocent children, who are otherwise treated as bastards, is the prime object of Section 16 of the Hindu Marriage Act, 1955. But Section 16 confers the benefits only on the children who were born of marriages hit by Section 11 or Section 12 and ignores other children born of illicit relationship, children born through concubinage, children born of a marriage which is not valid for want of proper ceremonies, children born to parents who live in a "live-in relationship" without entering into a lawful wedlock, etc.

At present in our society a large number of illegal relationships prevail. The number of illegitimate children is increasing in alarming proportions because of these kinds of relationships outside marriage. Several men and women live together in a live-in (walk-in and walk-out) relationship without incurring marital obligations. Slowly the society is changing and has started accepting these kinds of relationships because of the western influence. The judiciary is not attributing immorality and instead tries to protect such women under the Domestic Violence Act. The courts have observed in numerous instances that there is no law to prohibit such kinds of relationship.

Innocent children born of these kinds of relationship should not be penalised for the wrong committed by their parents. Under Hindu law the noble object of Section 16 should be given full effect. While conferring legitimacy it should not make any classification. It should completely blur the distinction between legitimate children and illegitimate children for all purposes. To attain this object, necessary changes have to be made in the Hindu Marriage Act, 1955 to declare that each and every child born is a legitimate child and will have equal rights irrespective of the status of the marriage of its parents.

Recently the Supreme Court of India in *Revanasiddappa v. Mallikarjun*²⁹ opined that:

39. "the constitutional values enshrined in the Preamble of our Constitution which focuses on the concept of equality of status and opportunity and also on individual dignity. 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. (emphasis supplied)

No child is born in this world without a father and a mother. As said earlier the child has no role to play in his/her birth. Hence, law should recognise the fact that "there can be "illegitimate parents" but no "illegitimate children".

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- In *Jinia Keotin v. Kumar Sitaram Manjhi*, (2003) 1 SCC 730, 733, para 4, the Supreme Court has said:
 4. Under the ordinary law, a child for being treated as legitimate must be born in lawful wedlock. If the marriage itself is void on account of contravention of the statutory prescriptions, any child born of such marriage would have the effect, per se, or on being so declared or annulled, as the case may be, of bastardising the children born of the parties to such marriage.
- *Filius nullius* means "a son of nobody".
- The Act amended the law relating to the property rights of illegitimate children and of other persons whose relationship is traced through an illegitimate link.
- The Children Act, 1989, Section 3(1):

"parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child have in relation to the child and his property.
- On 10-12-1948 the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights. It sets a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping the Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.
- Article 1, Universal Declaration of Human Rights, 1948.
- Article 25(2), Universal Declaration of Human Rights, 1948:

25. (2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.
- The European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, Article 14:

14. Prohibition of discrimination. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
- The UN Convention on the Rights of the Child (1989), UN General Assembly Document A/RES/44/25, Article 2(1):

2. (1) States parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her 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.
- Paras Diwan and Peeyushi Diwan, *Muslim Law in Modern India* (2004 Edn.) 123.
- *Ibid.*
- Tyabji, *Mohammadan Law* (3rd Edn.) 512.
- Baillie, 1, 10.
- ILR (1916) 38 All 627, 661.
- (1920-21) 48 IA 114 : ILR (1921) 48 Cal 856.
- Section 37:

37. Where intestate has left child or children only. "Where the intestate has left surviving him a child or children, but no more remote lineal descendant through a deceased child, the property shall belong to his surviving child, if there is only one, or shall be equally divided among all his surviving children.
- Section 100:

100. Words expressing relationship denote only legitimate relatives or failing such relatives reputed legitimate. "In the absence of any intimation to the contrary in a will, the word "child", the word "son", the word "daughter", or any other word which expresses relationship, is to be understood as denoting only a legitimate relative, or, where there is no such legitimate relative, a person who has acquired, at the date of the will, the reputation of being such relative.
- The Hindu Marriage Act, 1955, Section 5:

5. Conditions for a Hindu marriage. "A marriage may be solemnised between any two Hindus, if the following conditions are fulfilled, namely: (i) neither party has a spouse living at the time of the marriage;

 - (ii) at the time of the marriage, neither party
 - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity or epilepsy;
 - (iii) the bridegroom has completed the age of twenty-one years and the bride the age of eighteen years at the time of the marriage;
 - (iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
 - (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;
- The Hindu Marriage Act, 1955, Section 11:

11. Void marriages. "Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, be so declared by a decree of nullity if it contravenes any one of the conditions specified in clauses (i), (iv) and (v) of Section 5.
- Section 5:
 5. (i) neither party has a spouse living at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;

- The Hindu Marriage Act, 1955, Section 12:

12. Voidable marriages.â€“(1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namelyâ€”

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or

(b) that the marriage is in contravention of the condition specified in clause (ii) of Section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under Section 5, the consent of such guardian was obtained by force or fraud; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriageâ€”

(a) on the ground specified in clause (c) of sub-section (1), shall be entertained ifâ€”

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be the fraud had been discovered;

(b) on the ground specified in clause (d) of sub-section (1) shall be entertained unless the court is satisfiedâ€”

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds for a decree.

- The Hindu Marriage Act, 1955, Section 16:

16. Legitimacy of children of void and voidable marriages.â€”

(2) Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity shall be deemed to be their legitimate child notwithstanding the decree of nullity:

Provided that nothing contained in this section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

- The Hindu Marriage Act, 1955, Section 18:

18. Punishment for contravention of certain other conditions for a Hindu marriage.â€”Every person who procures a marriage of himself or herself to be solemnised under this Act in contravention of the conditions specified in clauses (iii), (iv) and (v) of Section 5 shall be punishableâ€”

(a) in the case of a contravention of the condition specified in clause (iii) of Section 5, with simple imprisonment which may extend to fifteen days, or with fine which may extend to one thousand rupees, or with both;

(b) in the case of a contravention of the condition specified in clause (iv) or clause (v) of Section 5, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both;

- The Prohibition of the Child Marriage Act, 2006, Section 10:

10. Punishment for solemnising a child marriage.â€”Whoever performs, conducts, directs or abets any child marriage shall be punishable with rigorous imprisonment which may extend to two years and shall be liable to fine which may extend to one lakh rupees unless he proves that he had reasons to believe that the marriage was not a child marriage.

- (2010) 171 DLT 543.

- Section 12:

12. Marriage of a minor child to be void in certain circumstances.â€”Where a child, being a minorâ€”

(a) is taken or enticed out of the keeping of the lawful guardian; or

(b) by force compelled, or by any deceitful means induced to go from any place; or

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

- The Prohibition of the Child Marriage Act, 2006, Section 3:

3. Child marriages to be voidable at the option of contracting party being a child.â€”(1) Every child marriage, whether solemnised before or after the commencement of this Act, shall be voidable at the option of the contracting party who was a child at the time of the marriage:

Provided that a petition for annulling a child marriage by a decree of nullity may be filed in the District Court only by a contracting party to the marriage who was a child at the time of the marriage.

- Section 6:

6. Legitimacy of children born of child marriages.â€”Notwithstanding that a child marriage has been annulled by a decree of

nullity under Section 3, every child begotten or conceived of such marriage before the decree is made, whether born before or after the commencement of this Act, shall be deemed to be a legitimate child for all purposes.

- (2011) 11 SCC 1, 11, para 39 : (2011) 3 SCC (Civ) 581.