

## LAW, STIGMA, AND THE COURTS: REASSESSING COPARCENARY RIGHTS OF ILLEGITIMATE CHILDREN

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### ABSTRACT

The evolving family structure in modern India, shaped by surrogacy, live-in relationships, and assisted reproductive technologies, is proving to be a challenge to the conventional notions of legitimacy in India. The modern concept of ‘best interest of the child’ weakens the social construct of illegitimacy. Despite social changes, the personal laws, including Hindu law, restrict the inheritance rights of illegitimate children. This paper examines the continued non-recognition of inheritance rights to all illegitimate children born from void marriages under Hindu law, except those granted statutory legitimacy under s. 11 and s. 12 of the Hindu Marriage Act, 1955. Even for statutorily legitimate children, the law limits inheritance to the ‘property’ of their parents, without clarifying whether it includes coparcenary property, creating ambiguity and leaving it open for divergent judicial interpretations. The paper focuses on the statutory provisions, judicial interpretations, and evaluates whether the laws in force remove the historic inequities suffered by illegitimate children. It concludes by suggesting reforms to Hindu law to bring the inheritance rights of all illegitimate children on par with those of legitimate children, thereby fulfilling the constitutional mandate of equality.

**Keywords:** *Illegitimate Children, Coparcenary Rights, Hindu Law, Legitimacy*

The Supreme Court's 2023 ruling in *Revanasiddappa v. Mallikarjun*<sup>1</sup> underscores the intricate legal and societal factors involved in the rights of illegitimate children in coparcenary property or joint family property under Hindu law. Hindu law continues the discrimination between legitimate and illegitimate children, especially with respect to inheritance rights. Procreation is an accepted norm within legally or socially recognised relationships, and those born outside of wedlock have been universally disapproved. A child born outside of marriage, being labeled under the common law of England as *nullius filius*, or nobody's son, is generally perceived as being outside the family structure and, as such, typically has no legal claims against their parents<sup>2</sup>. Under old English common law, the child had no inheritance rights from either parent; only the issue of its body

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<sup>1</sup> 2023 INSC 783.

<sup>2</sup> Horace H. Robbins, Francis Deák. “The Familial Property Rights of Illegitimate Children: A Comparative Study” 30(3) *Columbia Law Review* 316 (1930).

could inherit from it.<sup>3</sup> A child is deemed illegitimate when the parents are not validly married or when paternity is uncertain, or when the child is born from a prohibited or invalid union. As the legal framework regarding illegitimate children evolved, a presumption emerged that favored the mother of such a child.<sup>4</sup> While all children require specialised care and protection due to their physical and mental susceptibility, certain children, particularly those born to parents whose relationship is not recognised legally, termed as illegitimate children, are more vulnerable and endure social and legal discrimination due to their socio-economic circumstances.<sup>5</sup>

Historically, an illegitimate child has been viewed as inferior, often resented yet consistently tolerated by society.<sup>6</sup> Society values marriage, and marital families derive numerous tangible and intangible benefits, including psychological benefits from the legal and societal approval of their family structure.<sup>7</sup> A child born outside legally recognised unions faces discrimination and is not accorded the same status as a child born within wedlock. The form and degree of discrimination towards such a child depends upon society, form, and the kind of illegitimacy. The stigma of illegitimacy dwarfs the personality of the child, and the child is made to suffer from psychological and social handicaps throughout their lives for no fault of theirs.<sup>8</sup> Along with social stigma, illegitimate children also face loss of inheritance rights and, in some cases, no protection against being disinherited, leaving them unfairly punished for something they are not responsible for.<sup>9</sup> Those born of invalid marriages have traditionally been denied property rights that have caused their social and economic deprivation.

Illegitimacy brings three problems: poor economic prospects, unknown paternity, and social stigma, of which only the first two can be improved by law, and fixing them would also ease the burden of stigma.<sup>10</sup> Therefore, the Hindu Marriage Act, 1955 (hereinafter referred to as ‘HMA, 1955’), under s. 16 (1) and 16 (2) confer legitimacy to children born from void marriage and annulled voidable marriage and s. 16 (3) expressly grants the right of property to such statutory

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<sup>3</sup> Major Robert W. Martin, “Legal Rights of the Illegitimate Child” 102 *Military Law Review* 68 (1983).

<sup>4</sup> Frances Patricia Solari, “Custody of the Illegitimate Child” 18(1) *North Carolina Central Law Review* 18 (1989).

<sup>5</sup> Kusum, “Rights and Status of Illegitimate Children” 40(1/4) *Journal of the Indian Law Institute* 296 (1998).

<sup>6</sup> Kingsley Davis, “Illegitimacy and the Social Structure” 45(2) *American Journal of Sociology* 215 (1939).

<sup>7</sup> Solangel Maldonado, “Illegitimate Harm: Law, Stigma, and Discrimination against Non-marital Children” 63 (2) *Florida Law Review* 373 (2001).

<sup>8</sup> Parliamentary Debates Official Report 2933 (Volume IX, 1951) dated 20<sup>th</sup> September 1951 available at: [https://eparlib.sansad.in/bitstream/123456789/760699/1/ppd\\_20-09-1951.pdf#search=illegitimacy](https://eparlib.sansad.in/bitstream/123456789/760699/1/ppd_20-09-1951.pdf#search=illegitimacy) (last visited on 6/8/25).

<sup>9</sup> J. Duncan M. Derrett, “Illegitimates: A Test for Modern Hindu Family Law” 81(3) *Journal of the American Oriental Society*, 252 (1961).

<sup>10</sup> Katherine Anthony, *Feminism in Germany and Scandinavia* 143 (Henry Holt and Company, New York 1915).

legitimate children, but limits it only to the ‘property’ of parents and no one else. Property under Hindu law is either separate property or coparcenary property, also called joint family property. The father has exclusive rights over his separate property but in coparcenary property all the coparceners have joint ownership and joint possession. The Act does not define the term ‘property’, therefore, it has been the source of confusion, both in courts and in scholarship. Courts have mainly taken two views - while some have taken a broad view that the term ‘property’ covers all assets of the parents, including coparcenary property through the father, others have adopted a restrictive view that it refers only to the parents’ separate property and excludes coparcenary property. By undefining the term ‘property’ in s. 16 (3) of the HMA, 1955, did the legislature intend to grant statutory legitimate children rights in all kinds of property of Hindus, or limit them only to the parents’ property in order to preserve the sanctity of joint family property? Was the purpose of s. 16(3) to clarify that the right was restricted for separate property, but did not extend to coparcenary property, as that would disrupt and affect extended families? In attempting to strike a balance between social justice and property rights, did the legislature, perhaps unintentionally, perpetuate discrimination against illegitimate children? The latest Supreme Court decision in *Revanasiddappa*, continuing with the discriminatory rights given to illegitimate children and denying them rights in coparcenary property, has revived debate over the relevance of conferring legitimacy to illegitimate children.

The objective of this paper is to critically examine the legal and judicial approach in protecting the inheritance rights of illegitimate children under Hindu law, with particular focus on their rights in coparcenary property. It seeks to analyse the legislative intent behind s. 16 of HMA, 1955, particularly s. 16(3), where the use of the expression ‘property’ has brought ambiguity regarding the inclusion of coparcenary property, leaving it open for judicial interpretation. The paper also considers relevant provisions of the international conventions that address the rights and legitimacy of children, together with the constitutional protection given to children in India. Further, it deals with the concept of illegitimacy and the inheritance rights of illegitimate children across different personal laws, examines their position under classical Hindu law, and analyses statutory provisions under the present codified Hindu laws. In addition to reviewing case laws, the paper evaluates whether the current legal framework and judicial stance align with constitutional principles of equality and non-discrimination and, finally, proposes reforms necessary to remove the disadvantages faced by illegitimate children.

## International and Constitutional Dimensions of Child Rights

The Geneva Declaration of the Rights of the Child, 1924, directs that the requisite means be given to all children for their material and spiritual development. The Universal Declaration of Human Rights, 1948, envisages inherent dignity and equal and inalienable rights of all members of the human family to be the foundation of freedom, justice, and peace in the world and entitles all children, whether born in or out of wedlock, to enjoy the same social protection.<sup>11</sup> The International Covenant on Civil and Political Rights, 1966, lays down special provisions for a child to be registered immediately after birth, have a name, the right to acquire nationality, and also provides for the protection of every child from discrimination on the basis of race, colour, sex, property, or birth.<sup>12</sup> However, The United Nations Convention on the Rights of the Child (UNCRC), 1989, ratified by almost all countries (including India), is the most comprehensive treaty on human rights of child. It prohibits discrimination of any kind including discrimination based on a child's birth status, which refers to whether a child was born in or out of wedlock. Children must be protected against all forms of discrimination and punishment on the basis of the status, activities, expressed opinions, or beliefs of their parents or legal guardians.<sup>13</sup> The directives clearly convey that the child cannot be discriminated against because his parents were not legally married. Further, the Convention recognises the inherent right to life of every child<sup>14</sup>, irrespective of his illegitimacy, and obligates the states to ensure maximum support for the survival and development of the child.<sup>15</sup> Every child, irrespective of the circumstances at the time of his birth, has to be registered immediately after his birth and has the right from birth to a name, the right to acquire nationality, and the right to know and be cared for by his or her parents.<sup>16</sup> It provides for clear identity protections for every child. The State has to respect the right of the child irrespective of his parents' marital status, preserve his or her identity, including nationality, name, and family relations without unlawful interference, and if the child is illegally deprived of the same, it is the duty of the State to provide assistance and protection to reestablish his or her identity.<sup>17</sup> The child has the right to protection of law against unlawful interference with his or her privacy, family, home, or correspondence, or unlawful attacks

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<sup>11</sup> Universal Declaration of Human Rights, 1948, art. 15(2).

<sup>12</sup> International Covenant on Civil and Political Rights, 1966, art. 24.

<sup>13</sup> United Nations Convention on the Rights of the Child, 1989, art. 2(2).

<sup>14</sup> *Id.*, art. 6(1).

<sup>15</sup> *Id.*, art. 6(2).

<sup>16</sup> *Id.*, art. 7(1).

<sup>17</sup> *Id.*, art. 8.

on his or her honour and reputation,<sup>18</sup> which also include protection from stigmatising a child for illegitimacy. Every child must be treated equally and have the right to a standard of living adequate for his or her physical, mental, spiritual, moral, and social development, and the parents have the primary responsibility to secure living conditions necessary for the child's development.<sup>19</sup>

Apart from international conventions protecting the rights of child, independent of its legitimacy, several provisions of the Indian Constitution also support the welfare and protection of children's rights. Article 14 of the Constitution guarantees equality before law and equal protection of law to every person including children. Art. 23 prohibits trafficking of human beings and forced labour and art. 24 prohibits the employment of children under the age of 14 in any factory, mine or hazardous employment i.e., this fundamental right protects children from exploitation and safeguards their health and development. Art. 39(e) directs the state to formulate policies to ensure that the tender age of children is not abused and that they are not forced by economic necessity to enter avocations unsuited to their age or strength, and under art. 39(f) the children are to be given opportunities and facilities to develop in a healthy, dignified, and free environment, protecting them from exploitation and neglect. Art. 45 directs the state to provide for early childhood care and education for all children until they complete the age of six years. Besides the Constitution protecting children's rights, s. 116 of the *Bhartiya Sakshya Adhiniyam, 2023* (earlier s. 114 of Indian Evidence Act, 1872) creates a strong presumption in favour of legitimacy of a child if born during a valid marriage or within 280 days after the marriage dissolves (as long as the mother is not remarried), unless it could be shown that the parents had no chance to be together when the child could have been conceived. This shifts the burden of proof on one who challenges legitimacy making it much harder to brand a child as 'illegitimate'. The Prohibition of Child Marriage Act, 2006 legitimises every child conceived or born before the decree of nullity.

### **Illegitimacy in India: Divergent Approaches under Personal Laws**

In India, personal laws which are structured around religious affiliation, have marginalised the rights of children who are not in conformity with law, especially regarding property inheritance. Different religious communities in India, such as Hindus, Muslims, Christians, Parsis, and others have their own distinct sets of personal laws. The illegitimate child continue to face discrimination under diverse personal laws in India. Though the Constitution protects the rights of all children

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<sup>18</sup> Id., art. 16.

<sup>19</sup> Id., arts. 2, 26.

irrespective of their legitimacy, the fact remains that all religions in India have looked down upon the illegitimate children.

The Hindu laws under the HMA, 1955, the Hindu Minority and Guardianship Act, 1956, the Hindu Adoptions and Maintenance Act, 1956, and the Hindu Succession Act, 1956 protect the right of illegitimate children. The Hindu law recognises the religion of a child to be Hindu despite his illegitimacy,<sup>20</sup> prohibits marriage between prohibited and sapinda relations which relations include both legitimate as well as illegitimate relationship,<sup>21</sup> recognises mother to be the natural guardian of an illegitimate child<sup>22</sup> and grants mother right also to appoint testamentary guardian for such child for his/her person or property or both,<sup>23</sup> grants illegitimate child the right to be maintained by both parents till minority.<sup>24</sup> Further, such a child is included within the meaning of dependents<sup>25</sup> to be maintained out of the deceased Hindu male's estate by his heirs<sup>26</sup> and entitles such child to the right to inherit from the mother.<sup>27</sup> The Hindu personal laws have significantly widened the scope of persons who would be deemed to be Hindu for the application of the laws. It has harmonised diverse sects and developments within the fold of Hindu law by bringing within its ambit all its forms or developments, including a Virashaiva, a Lingayat, as well as those professing Buddhism, Jainism, or Sikhism and also includes any person domiciled in India not governed by Muslim, Christian, Parsi or Jewish law<sup>28</sup> except the Scheduled tribes. Under the expanded inclusion of persons to be Hindu under codified Hindu laws, irrespective of child's legitimacy, child is deemed to be Hindu if both of his/her parents are Hindu or if one parent is Hindu and other non-Hindu but brought up as Hindu i.e., legitimacy does not constitute a barrier in ascribing the child a Hindu identity. Also, by enlarging the scope of who is to be considered Hindu, the legislation has extended legitimacy and protection to children born outside of wedlock among such offshoots who otherwise would have been stigmatised as illegitimate.

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<sup>20</sup> Hindu Marriage Act, 1955 (Act 25 of 1955), s. 2 (1) Explanation (a), (b); The Hindu Minority and Guardianship Act (Act 32 of 1956), 1956, s. 3 (1) Explanation (a), (b); The Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956) s. 2 (1) Explanation (a), (b); and The Hindu Succession Act, 1956 (Act 30 of 1956), s. 2 (1) Explanation (a), (b).

<sup>21</sup> Hindu Marriage Act, 1955 (Act 25 of 1955), s. 3 (f), (g) Explanation (ii).

<sup>22</sup> The Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), s. 6 (b).

<sup>23</sup> *Id.*, s. 9 (4)

<sup>24</sup> Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956) s. 20 (1), (2)

<sup>25</sup> *Id.*, s. 21 (viii), (ix).

<sup>26</sup> *Id.*, s. 22 (1).

<sup>27</sup> Hindu Succession Act, 1956 (Act 30 of 1956), s. 3 (1) (j) Proviso.

<sup>28</sup> The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 2 (1) (a), (b), (c); The Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956), s. 3 (1) (a), (b), (c) The Hindu Adoptions and Maintenance Act, 1956 (Act 78 of 1956), s. 2 (1) (a), (b), (c) and The Hindu Succession Act, 1956 (Act 30 of 1956), s. 2 (1) (a), (b), (c).

The Muslims are governed largely by uncodified laws as laid down in the Quaran and Sunnah and also by the codified laws under the Muslim Personal Law (Shariat) Application Act, 1937, which mandates the application of Muslim personal law (Shariat) for marriage, divorce, inheritance, and related issues. The Muslims are divided into two sects, namely, the Sunnis and the Shias. The Sunnis in India are governed by the Hanafi law. Under the Hanafi law, the marriage could be (i) valid (*shahi nikah*) when marriage meets all legal requirements i.e., proposal (*ijab*) from one party and acceptance (*qubul*) by other party, presence of competent witnesses, free consent of the parties and absence of all legal prohibitions or, (ii) void (*batil nikah*) when marriage is between prohibited degrees of relationship, or when woman is already married or when marriage has been performed without free consent or, (iii) irregular (*fasid nikah*) when marriage is not completely void but defective which could be rectified by removing the defect e.g., marriage without witnesses, or marriage during woman's *iddat*, or marrying more than four wives. Shia recognises marriage as either valid (*shahi*) or void (*batil*). Children from a valid (*shahi*) marriage are legitimate and entitled to inherit from both parents. Under Hanafi law the children of an invalid (*fasid*) marriage are classified as legitimate and inherit from both the parents but those born from void (*batil*) marriage are illegitimate and have no right to inherit from father, but inherits from mother.<sup>29</sup> An illegitimate child as well as a child of curse or imprecation inherits only from its mother and mother's relations, and is inherited by them.<sup>30</sup> He does not inherit from his putative father or his relations, nor do they inherit from such child.<sup>31</sup> Among Shias, the illegitimate child does not inherit from both father and mother nor do they inherit from him<sup>32</sup> thus, he does not inherit from his parents at all, not even from his mother or her relations, nor do they inherit from him.<sup>33</sup> When a child's paternity cannot be established through proof of the parents' marriage, the Hanafi law recognises 'acknowledgment' as a method whereby such marriage and legitimate descent could be established as a matter of substantive law for the purposes of inheritance,<sup>34</sup> but the Shia law does not recognise acknowledgment. Similar to Bhartiya Shakshya Adhiniyam, 2023,

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<sup>29</sup> Lucy Carroll, "The Hanafi Law of Intestate Succession: A Simplified Approach" 17(4) *Modern Asian Studies* 667 (1983).

<sup>30</sup> Shama Churan Sircar, *Tagore Law Lectures -The Muhammadan Law: Being A Digest of the Law Applicable especially to the Sunnis of India* 123 (Thacker, Spink and Co. Calcutta 1873).

<sup>31</sup> Sir Dinshaw Fardunji Mulla, *Mulla Principles of Mohamedan Law*, (rev.) Iqbal Ali Khan 109 (LexisNexis, India Updated 20<sup>th</sup> Ed. 2014).

<sup>32</sup> Lucy Carroll, "The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia" 19(1) *Modern Asian Studies* 120 (1985).

<sup>33</sup> *Supra* note 31 at 131.

<sup>34</sup> *Supra* note 31 at 425.

Muslim law also favours the presumption of legitimacy. Under the Hanafi law, child born within less than six months after marriage is illegitimate but if born after six months from the date of marriage, it is presumed to be legitimate, unless putative father disclaims the child by *li'an* and under the Shia law the child is presumed to be legitimate if born after six months of marriage or before ten months of dissolution of marriage.

The Indian Succession Act, 1925 (hereinafter referred to as 'ISA, 1925') is the law of India as regards intestacy and applies to all except Hindus and Muslims. It also excludes Scheduled Tribes who continue to be governed by their customary laws. Therefore, Christians, Parsis, and others, including those married under the Special Marriage Act, 1954, fall under the ambit of the ISA, 1925. Under the Christian Marriage Act, 1872, which regulates the marriage among Christians, the marriage is void if it has not been solemnized and registered under it, or if the marriage is not solemnized within two months after notice, or if any party has a spouse living at the time of marriage, or if the marriage is solemnized in contravention of its mandatory provisions. Under the Divorce Act, 1869 which deals with the divorce of persons professing the Christian religion, a marriage may be declared null and void if the respondent was impotent at the time of marriage and at the institution of the suit, or parties are within prohibited degree of consanguinity or affinity, or either party was lunatic or idiot at the time of marriage, or if spouse of either party was living at the time of marriage, or the consent of either party was obtained by force or fraud.<sup>35</sup> The Divorce Act, 1869, grants selective legitimacy on annulment of marriage only to children born to parties (i) when one party had contracted second marriage in good faith believing the former spouse to have died and (ii) when one party to marriage was suffering from insanity. Such statutory legitimate children are entitled to succeed the property of the parent in same manner as legitimate children.<sup>36</sup> The Divorce Act, 1869 does not grant legitimacy to children born from marriage that has been annulled on other grounds viz., impotency, prohibited relationship, consent by force or fraud. As the inheritance rights of Christians are governed by the ISA 1925, children granted statutory legitimacy under the Christian Marriage Act, 1872 or the Divorce Act, 1869, inherit under ISA, 1925. In a rare and significant decision, the Kerala High Court, in *Jane Antony v. V. M. Siyath*<sup>37</sup> expanded the scope of inheritance rights for all Christian illegitimate children wherein it opined that when children both legitimate and illegitimate are entitled to maintenance under s. 125 of

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<sup>35</sup> Indian Divorce Act, 1869 (Act 4 of 1869), ss. 18, 19.

<sup>36</sup> *Id.*, s. 21.

<sup>37</sup> AIR 2009 (NOC) 816 (KER.)

Code of Criminal Procedure, there was no reason to deny such children right of inheritance in the property of their parents. By granting inheritance rights to all illegitimate children without restricting them based on the legitimacy criteria set out in s. 21 of the Divorce Act, 1869 the Court held that such children, though born out of wedlock, are children born to a man and woman who cohabited as husband and wife in substance, and are therefore entitled to inherit the property of their deceased father.

The Parsi Marriage and Divorce Act, 1936, which regulates Parsi marriage and divorce, invalidates marriage between parties (i) who are related to each other by consanguinity or affinity, or (ii) when marriage is not solemnized according to the Parsi form of ceremony called “Ashirvad” by a priest in the presence of two Parsi witnesses other than such priest, or (iii) when the bridegroom is less than 21 years and the bride less than 18 years of age but grants legitimacy to children born of all such marriages.<sup>38</sup> The Parsi Marriage and Divorce Act, 1936, considers bigamous marriage to be unlawful and declares it to be void, but remains silent on the legitimacy of children born from such a marriage. Thus, the Parsi law also extends statutory legitimacy to children born from invalid marriages but does not extend it to children born from unlawful marriages.

The Special Marriage Act, 1954, provides for a secular legal framework for marriages between people of different religions or communities without requiring them to renounce their marriage. According to the Special Marriage Act, 1954 the grounds for a void marriage include bigamy, unsoundness of mind, age less than 21 years for groom and 18 years for the bride, marriage within prohibited relationship and impotency of the respondent at the time of marriage and at the time of initiation of the suit.<sup>39</sup> The grounds for voidable marriage include non-consummation of marriage owing to the wilful refusal for consummation, pregnancy of the respondent at the time of marriage by some other person than the petitioner or consent obtained by force or fraud.<sup>40</sup> The Act grants statutory legitimacy to children born from void and annulled voidable marriage with the right also to inherit the property only of parents. Since the inheritance of Christians, Parsis, and others including those married under Special Marriage Act, 1925 is regulated by ISA, 1925, the statutory legitimate children born of void/voidable marriage under Divorce Act, the Parsi Marriage and Divorce Act, 1936 and Special Marriage Act, 1954 are entitled to inherit as a legitimate children

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<sup>38</sup> Parsi Marriage and Divorce Act, 1936 (Act 3 of 1936), s.3.

<sup>39</sup> Special Marriage Act, 1954 (Act 43 of 1954), s. 24.

<sup>40</sup> *Id.*, s. 25.

under ISA, 1925. For devolution of property by intestacy, ISA, 1925 defines ‘kindred’ or ‘consanguinity’ to mean when connection or relation of persons have descended from same stock or common ancestor and includes only lineal consanguinity or collateral consanguinity. ISA, 1925 does not expressly recognise illegitimate children as heirs but judicial interpretation in *In Re: Sarah Ezra v. Unknown*,<sup>41</sup> has confirmed that the Act excludes illegitimate children from inheritance. In *Emma Agnes Smith v. Thomas Massey*,<sup>42</sup> the court clarified that ISA, 1925 which defines certain relations simpliciter, does not intend any other relations than those flowing from lawful wedlock. Though illegitimate children are disentitled to inherit under ISA, 1925 the limited legitimacy granted by the Divorce Act, 1869, Parsi Marriage and Divorce Act, 1936 and Special Marriage Act, 1954 entitle them to inherit under ISA, 1925 as ‘kindred’. Over the past few decades, Indian secular laws and social perspectives have demonstrated a more tolerant and liberal approach towards these children, as evidenced by the legal recognition of their legitimacy in the broader society.

The treatment of illegitimacy under Indian personal laws reflects the complex web of tradition, religion and the legislative developments. Although efforts have been made to narrow the gap between legitimate and illegitimate children across different personal laws, progress remains slow. The need is to have a uniform approach, keeping in mind the constitutional principles of equality and dignity of every child, regardless of their birth status.

### **Tracing the Roots of Illegitimacy in Classical Hindu Law**

Under Hindu law, an illegitimate child has never been considered as *nullius filius*, but rather considered to be a member of the family, though with riders on his rights that are discriminatory in nature.<sup>43</sup> The distinction between ‘legitimate’ and ‘illegitimate’ is progressively being eroded under Hindu law. The legitimacy of child under Hindu law depends upon the legality of marriage between his parents. Classical Hindu law classified every child born outside a lawful marriage as illegitimate. It specifically designated children born of concubinage, adulterous relationships, or no marriage between parents, or unions lacking recognition as valid marriages as illegitimate.

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<sup>41</sup> *In Re: Sarah Ezra v. Unknown*, AIR 1931 CAL 560.

<sup>42</sup> (1906) 8 BOMLR 322.

<sup>43</sup> *Jane Antony v. V. M. Siyath*, AIR 2009 (NOC) 816 (KER.)

According to Manusmriti,<sup>44</sup> there are twelve kinds of sons – six are kinsmen as well as heirs i.e., they will inherit man’s family name as well as property and other six are kinsmen not heirs who inherit only the family name. Those sons who are both kinsmen and heir are (1) ‘Aurasa’ – body born (2) ‘Ksetraja’ – soil born i.e.,son born of the wife of a man either dead or impotent or diseased by one who has been duly authorised<sup>45</sup> (3) ‘Datta’- Given (adopted) i.e., son given in time of distress by father or mother (4) ‘Kṛtrima’ – appointed (5) ‘Gudhotpanna’ – secretly born and (6) ‘Apavidha’ – cast off and those who are only kinsmen are ) ‘Kanina’maiden born, (2) ‘Sahodha’- received along with the wife, (3) ‘kṛita’ - bought, (4) ‘Paunarbhava’ - begotten on a remarried woman, (5) ‘Svayan-datta’- self-offered and (6) ‘Shaudra’ – shudra born these six are only kinsmen, not heirs.<sup>47</sup> ‘One whom a man begets in his own sanctified ‘soil’, he is known as the ‘body-born’ (legitimate) son, (declared) to be the first in order.’<sup>48</sup> Legitimate’ (body-born) son is alone the owner of the paternal estate; but in order to avoid unkindness, he shall provide subsistence for the rest.’<sup>49</sup> Thus a child born of a lawful wife (*dharmapatni*) alone is a legitimate son (*aurasa putra*) who is entitled to inherit. Under Mitakhsara law the issue of the breast (*uras*) is a legitimate son (*aurasa*) born to a legal wife who is a woman of equal caste, espoused in lawful marriage and a son, begotten by her husband on her is a true and legitimate son and is chief in rank<sup>50</sup> entitled to right in coparcenary property or joint family property. Only legitimate sons have rights in coparcenary property, and illegitimate sons under the Mitakshara school are denied rights in the father’s coparcenary property and, at best, could claim maintenance from the father. In the twice-born classes<sup>51</sup>, the illegitimate child has no rights to inheritance either of the parents or of the collaterals. Among the fourth class i.e., in Sudras on failure of legitimate sons of the body, son’s sons, or son’s son’s sons, the illegitimate son of a Sudra and his descendants in the male line

<sup>44</sup> Manusmriti, Verses CLVIII in *Manusmṛiti with the Manubhaya or Medhatithi* (trans.) Mahamahopadhyaya Ganganath Jha, (Vol. V) 145 (University of Calcutta (1926) available at: <https://archive.org/details/in.ernet.dli.2015.281746>.

<sup>45</sup> *Id.*, at 153 (Verse CLXVII).

<sup>47</sup> *Supra* note 44 at 145 (Verses CLIX-CLX).

<sup>48</sup> *Supra* note 44 at 150 (Verses CLXVI).

<sup>49</sup> *Supra* note 44 at 147 (Verses CLXIII).

<sup>50</sup> S. S. Setlur, *Hindu Law Books on Inheritance* 30 (V. Kalyanaram Iyer and Co. 1911) available at: <https://ia601808.us.archive.org/21/items/in.ernet.dli.2015.95456/2015.95456.Hindu-Law-Books-On-Inheritance.pdf>.

<sup>51</sup> Also termed as *dvija*. According to Britannica ‘*dvija*, in the Hindu social system, are members of the three upper *varnas*, or social classes—the Brahmins (priests and teachers), Kshatriyas (warriors), and Vaishyas (merchants)—whose sacrament of initiation is regarded as a second or spiritual birth. Members of the lowest Hindu *varna*, the Sudras (artisans and labourers), and people below the four-*varna* system altogether are regarded as theoretically ineligible to study or even to listen to the Vedas, a collection of hymns in archaic Sanskrit. available at: <https://www.britannica.com/topic/dvija>.

inherit the ancestor's property and if legitimate children be living, the illegitimate son takes half a share.<sup>52</sup> Prior to the HMA, 1955, an illegitimate child had no coparcenary right, and his right to inherit the separate property of his father depended upon the caste or class to which he belonged.

While codifying Hindu personal laws, Parliament intended to make laws ‘up to date,’ yet the extensive debates did not succeed in establishing the necessity of either fully equating illegitimate children with legitimate ones or abolishing the distinction between them, whether in succession to the mother or, more contentiously, in succession to the mother’s kindred<sup>53</sup> as proviso to s. 3 (1) (j) of HSA, 1956 clarifies that illegitimate children shall be deemed to be related to their mother and to one another. The legitimacy of a child under the codified laws is still made contingent upon the validity of the marriage between the parents.

### **Inheritance Rights of Illegitimate Children: The Statutory Framework under Hindu Laws**

S. 16 of the HMA, 1955 grants legitimacy to an illegitimate child but restricts it only to a child born to parents whose marriage is forbidden by law. Although illegitimacy may arise when the parents are not married at the time of birth, when the child is born of an adulterous relationship, when the marriage is not validly performed, or when the marriage is prohibited by law, the HMA, 1955 does not extend legitimacy to all such children. S. 16 of HMA, 1955 grants statutory legitimacy only to children born of a void marriage under s. 11 and annulled voidable marriage under s. 12 of HMA, 1955. The provision has been amended by the Marriage Laws (Amendment) Act, 1976 to remove the ambiguity with respect to the need of decree for void marriage. Prior to the amendment by the Marriage Laws (Amendment) Act, 1976, s. 16 read:

*"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.*

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<sup>52</sup>Raymond West and Johann Georg Buhler, *A Digest of the Hindu Law on Inheritance, Partition, and Adoption* 81 (Education Society’s Press, Byculla 3<sup>rd</sup> Ed. Vol. I (1884) available at: <https://archive.org/details/in.ernet.dli.2015.216334/page/n169/mode/1up?view=theater>.

<sup>53</sup>J. Duncan M. Derrett, “The Hindu Succession Act, 1956: An Experiment in Social Legislation” 8(4) *The American Journal of Comparative Law* 501 (1959).

*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".*

S. 11 of the HMA, 1955 deals with void marriages, and states that any marriage solemnised after its commencement 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 s. 5. S. 5 deals with certain conditions for Hindu marriage. Clause (i) of s. 5 lays down that the marriage may be solemnized between any two Hindus if neither party has a spouse living at the time of marriage, clause (iv) of s. 5 states that the parties are not within the degrees of prohibited relationship<sup>54</sup> unless the custom or usage governing each of them permits of a marriage between the two and clause (v) of s. 5 clarifies that the parties are not sapindas<sup>55</sup> of each other, unless the custom or usage governing each of them permits of a marriage between the two. S. 12 of the HMA, 1955 deals with voidable marriages and states that any marriage solemnized whether before or after the commencement of the HMA, shall be voidable and may be annulled by decree of nullity if (a) marriage has not been consummated owing to impotency of the respondent; (b) marriage contravenes clause (ii) of s. 5 i.e., party is incapable of giving valid consent due to unsoundness of mind or though capable of giving valid consent has been suffering from mental disorder of such kind or to such extent as to fit for marriage and procreation of children or has been subject to recurrent attacks of insanity; (c) consent of the party was obtained by force or fraud as to

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<sup>54</sup>Hindu Marriage Act, 1955 (Act 25 of 1955), s. 3(g) defines prohibited relationship as:

*(g) degrees of prohibited relationship" two persons are said to be within the degrees of prohibited relationship-*

*(i) if one is a lineal descendant of the other; or*

*(ii) if one was the wife or husband of a lineal ascendant or descendant of the other or*

*(iii) if one was the wife of the brother or of the fathers or mothers brother or of the grand fathers or grandmothers brother of the other; or*

*(iv) if the two are brother and sister, uncle and niece aunt and nephew, or children of brother and sister or of two brothers or of two sisters;*

*Explanation: - For the purposes of clauses (f) and (g) relationship includes- (i) relationship by half or uterine blood as well as by full-blood; (ii) illegitimate blood relationship as well as legitimate; (iii) relationship by adoption as well as by blood; and all terms of relationship in those clauses shall be construed accordingly.*

<sup>55</sup> Id., s. 3(f) defines prohibited relationship as:

*(f) (i) "Sapinda relationship" with reference to any person extends as far as the third generation (inclusive) in the line of ascent through the mother, and the fifth (inclusive) in the line of ascent through the father, the line being traced upward in each case from the person concerned, who is to be counted as the first generation; (ii) two persons are said to be "sapindas" of each other if one is a lineal ascendant of the other within the limits of sapinda relationship, or if they have a common lineal ascendant who is within the limits of sapinda relationship with reference to each of them.*

the nature of ceremony or as to material fact or circumstance concerning the respondent provided that petition is filed more than one year after the force has ceased to operate or fraud had been discovered or the petitioner has with his/her full consent lived with the respondent as a spouse after the force has been ceased or fraud had been discovered ; or (d) the respondent was at the time of marriage pregnant by some other person other than the petitioner provided the petitioner was ignorant of such fact at the time of marriage, petition has been filed within one year of solemnization of marriage or within one year of commencement of the HMA, 1955 and the marital intercourse has not taken place with the consent of petitioner after the discovery of such ground.

Prior to amendment of s. 16 of HMA, 1955 by Marriage Laws (Amendment) Act, 1976, for the recognition of the legitimacy of a child under s. 16 of the HMA, 1955, the declaration by the court of the marriage's nullity was a condition precedent. If neither of the parties to marriage challenged it while they were still alive, or the petition for annulment was still pending before the court and one of the parties to marriage died before final decree, even marriage being *void ab initio* under s. 11 of the HMA, 1955, in absence of annulment decree the child was not competent to have the rights of a legitimate child and lost his right to inherit deceased's property. If decree of nullity had not been obtained, no part of the section could be invoked for the purpose of legitimising an issue born of such a void marriage.<sup>56</sup> Legitimacy was unnecessarily made to depend on securing a decree of nullity from the court, rather than on the substantive question of whether the marriage was void or voidable.<sup>57</sup> Marriage in Indian society is traditionally regarded as a sacred union imbued with religious sanctity and social legitimacy. Obtaining a decree of nullity for a void marriage, therefore, is challenging due to the prevailing social structure and cultural mindset, apart from being a complex process. Therefore, in the absence of formal revocation by the court, disentitling the vast majority of children born from such a marriage considerably diluted the very purpose of legitimising children born from void marriages.

The Law Commission of India's 59<sup>th</sup> Report<sup>58</sup> mentioned the gaps it found in granting legitimacy to a child born of a void marriage under s. 11. It noted that s. 16 is an adaptation of s. 9 of the Matrimonial Causes Act, 1950 of England, which did not deal with void marriage but with decrees of nullity issued for voidable marriages. It proposed that granting rights to an innocent

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<sup>56</sup> *Thulasi Ammal v. Gowri Ammal*, AIR 1964 MAD 118.

<sup>57</sup> B. Sivaramayya, "Section 16 of the Hindu Marriage Act, 1955—Illegitimate Children" 5(3) *Journal of the Indian Law Institute* 427 (1963).

<sup>58</sup> Law Commission of India, "59<sup>th</sup> Report on Hindu Marriage Act, 1955 and Special Marriage Act, 1954" 31 ( March 1974)

child born out of a void marriage would be more equitable and in line with social norms.<sup>59</sup> It also proposed expanding s. 16 by eliminating the need for a decree of nullity for void marriages covered by s. 11 of the HMA, 1955.<sup>60</sup> Marriage Laws (Amendment) Act, 1976 was enacted following the recommendations of the 59<sup>th</sup> Law Commission Report, which focused on the amendments to the HMA, 1955, and Special Marriage Act, 1954. Among other objects, one of the ‘Statement of Objects and Reasons’ of the Marriage Laws (Amendment) Act, 1976, called “*to remove certain anomalies and handicaps that have come to light after the passing of the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954.*” As a result, the Marriage Laws (Amendment) Act, 1976, eliminated the anomaly pertaining to the rights of children born of void and voidable marriages and replaced s. 16 of HMA, 1955 as:

*“16. Legitimacy of children of void and voidable marriages.-(1) Notwithstanding that a marriage is null and void under Section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976), and whether or not a decree of nullity is granted in respect of that marriage under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act.*

*(2) Where a decree of nullity is granted in respect of a voidable marriage under Section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties of the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.*

*(3) Nothing contained in sub-section (1) or sub section (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under Section 12, 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 amended section 16 brought the following changes:

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<sup>59</sup> *Id.*, at 33.

<sup>60</sup> *Id.*, at 34.

- (1) The amendment has been given retrospective effect *i.e.*, the right of child born out of void marriage under s. 11 is protected whether he is born before or after the commencement of the Marriage Laws (Amendment) Act, 1976;
- (2) The decree of nullity of void marriage in a petition under s. 11 of the HMA, 1955 is no longer a mandatory consideration for granting legitimacy under s. 16(1);
- (3) S. 16(1) does not limit legitimacy to be granted to a child where marriage has been declared to be void in a petition filed for the purpose but also guarantees legitimacy to child born of marriage which has been declared to be void in a suit filed for some other matrimonial dispute.
- (4) The amended provision under s. 16(2) retains the legitimacy right of child born out of voidable marriage whether he was conceived before or born before the annulment of marriage;
- (5) The proviso under the un-amended s. 16 that guaranteed the right of child born of void marriage or annulled voidable marriage in the property of parents only and none else has been made s. 16(3).

Speaking on the constitutionality of s. 16 of whether it created two classes of illegitimate children, namely those born of the invalid marriages before the HMA, 1955 came into force and those born of the void marriages after it, and its reference to s. 11 of HMA, 1955 the Supreme Court in *Parayankandiyal Eravathkanapraavan Kalliani Amma v. K. Devi*,<sup>61</sup> observed that the words “*notwithstanding that a marriage is null and void under section 11 employed in Section 16(1) indicate undoubtedly the following:-*

- (a) *Section 16 (1) stands delinked from Section 11.*
- (b) *Provisions of Section 16(1) which intend to confer legitimacy on children born of void marriages will operate with full vigor in spite of Section 11 which nullifies only those marriages which are held after the enforcement of the Act and in the performance of which Section 5 is contravened.*
- (c) *Benefit of legitimacy has been conferred upon the children born either before or after the date on which Section 16(1) was amended.*
- (d) *Mischief or the vice which was the basis of unconstitutionality of unamended section 16 has been effectively removed by amendment.*
- (e) *Section 16(1) now stands on its own strength and operates independently of other Sections with the result that it is constitutionally valid as it does not discriminate between*

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<sup>61</sup> AIR 1996 SC 1963.

*illegitimate children similarly circumstanced and classifies them as one group for conferment of legitimacy.*

Section 16, in its present form is therefore, not ultra vires the Constitution.” Thus, speaking on the rights of children born before the amendment to section 16 from legislatively prohibited second marriage of the deceased, the court noted that although the children are technically illegitimate for having been born from void or voidable marriage, a legal fiction is contained in section 16 that such children for all practical purposes including succession to the properties of their parents have to be treated as legitimate. Further, their succession rights are limited to the properties of the parents only and does not extend to the properties of any other relation. With respect to the words ‘any property in or to the property of any person other than the parents’ occurring in s. 16(3) of HMA there is no change made by the Marriage Laws (Amendment) Act, 1976 therefore even after amendment, the rights of such children extends to only in the property of the parents and not any other property of any other person. S. 16(3) does not confer the status of a ‘coparcener’ and do not entitle them to claim a share in the joint family or coparcenary property<sup>62</sup> therefore such children have rights only in the property of parents and no other relative.

Sec 11 has two components: one a declaratory component that lists the specific conditions that render a marriage void, and the second mandates a legal procedure requiring a petition to be filed in court to officially declare a marriage null and void.<sup>63</sup> Marriages covered by s. 11 of the HMA, 1955 are void *ipso-jure*, i.e., void from its very inception, and though the provision permits a formal declaration of presentation of petition, it is not essential to obtain in advance such a formal declaration from the court.<sup>64</sup> S. 16 (1) of the HMA, 1955 gives legitimacy to children born of void marriage that contravenes only s. 11 of the HMA, 1955, i.e., children born from bigamous marriage or marriage where parties are related by a prohibited relationship or are sapindas to each other. S. 16 (1) of HMA, 1955 clearly states that the marriage under s. 11 is void without any declaration of nullity by the court, i.e., a formal declaration is not essential, but children born of such a marriage, whether nullity has been granted by the court or not, would still be considered to be legitimate.

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<sup>62</sup> *Patel Chandrappa v. Hanumanthapa*, ILR 1989 Kar 2384.

<sup>63</sup> *Gowri Ammal v. Thulasi Ammal*, AIR 1962 MAD 510.

<sup>64</sup> *Yamunabai Anantrao Adhav A v. Ranantrao Shivram Adhav*, AIR 1988 SC 644.

The cases covered under s. 12 of HMA, 1955 are not void *ab-initio* and unless all the conditions mentioned therein are fulfilled and the aggrieved party exercises the right to avoid it, the same continues to be effective. The marriage under s. 12 is valid marriage till the court annuls the marriage by decree of nullity. S. 16 (2) refers to a decree of nullity as an essential condition for the grant of legitimacy to children born of a voidable marriage. Thus, children born from a voidable marriage as dealt under s. 12 will be considered statutory legitimate only when the court annuls the marriage by decree of nullity, and if no decree is passed, the children are legitimate. It is evident that although the legislature has deemed it prudent to grant legitimacy to a child born from a null and invalid Hindu marriage, it has not provided the same protection to the mother of the child.

S. 16 (3) of HMA, 1955 prominently brings out the right of property to be specifically given to such a child, but only in the property of parents and no one else. Granting legitimacy to a child born from a void and annulled voidable marriage, together with rights in the property of the parents, implies balancing of social justice with property rights. Devolution of property of Hindus is dealt with under the Hindu Succession Act, 1956 (hereinafter referred to as 'HSA, 1956'). Property under Hindu law could be either separate property or coparcenary property. Separate property includes self-acquired property, inherited property, property received by way of will or gift, or share received on partition of coparcenary property. Section 8 of the HSA, 1956 deals with the devolution of the separate property of a Hindu male and divided all heirs among four categories – Class I, Class II, Agnates and Cognates. S. 15 deals with the devolution of a Hindu female's property which divides the heirs into five different categories – husband, children and children of predeceased child, heirs of the husband, father and mother, heirs of the father and heirs of the mother. The children inherit as Class I heirs to father or are mother's primary heirs. Since s. 16 (3) of HMA, 1955 mentions 'property of parents' conferring rights to statutory legitimised children under s. 16(1) and 16(2) of the HMA, 1955, therefore the father's separate property could be inherited under s. 8 and mother's property under s. 15 of the HSA, 1956 by both legitimate as well as statutory legitimate children but not illegitimate children. Proviso to s. 3 (1) (j) of HSA, 1956 protects the inheritance rights also of illegitimate children not protected by s. 16 of HMA, 1955. It is confined to those children who are not clothed with legitimacy under s. 16 of HMA, 1955.<sup>65</sup> S. 3 (1) (j) of HSA, 1956 defines 'related' to mean related by legitimate kinship only, but

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<sup>65</sup> *Shantaram Tukaran Patil v. Dagubai Tukaram Patil*, AIR1987BOM182

the proviso clarifies that illegitimate children shall be deemed to be related to their mother and to one another, and their legitimate descendants shall be deemed to be related to them and to one another i.e, the illegitimate children not protected by s. 16 of HMA, 1955 have the right to inherit from mother. Proviso to s. 3(1)(j) Thus, the mother's property under s. 15 of the HSA, 1956 could be inherited by legitimate, statutory legitimate children, and also illegitimate children. Illegitimate children inherit from each other, and the legitimate descendants of such children inherit from their illegitimate aunts and uncles and from each other; but there is no heritable link between legitimate children and their descendants on the one hand, and those legitimate children's mother's illegitimate issue and their descendants on the other.<sup>66</sup> The difference in legitimacy is not limited upto their degree but creates two entirely different branches of collaterals where legitimate children's descendants could not inherit from illegitimate children descendants. Thus, the impact of discrimination between legitimate and illegitimate children continues beyond their generation which further increases the divide between legitimate and illegitimate children.

Coparcenary property includes property inherited from father, grandfather, or great-grandfather (but after the HSA, 1956 property inherited from father, grand-father and great grand-father is considered to be separate property of the son, grandson or great grandson), property acquired with the help of joint Hindu family property, property acquired by joint labour of all coparceners and separate property of any coparcener given by him into the joint stock of the joint Hindu family property. After HSA, 1956, since property inherited from male ancestors does not make it to be coparcenary property, the formation of coparcenary property is limited to property acquired by joint labour of coparceners, property acquired with the help of joint family property or any coparcener merging his separate property with coparcenary property. Property considered to be coparcenary property prior to the HSA, 1956 continued to be coparcenary property after the HSA, 1956 came into force. Devolution of coparcenary property is specifically governed by s. 6 of the HSA, 1956, wherein property devolves only upon the coparceners. Prior to HSA, 1956 coparcenary property devolved by survivorship. HSA, 1956 though did not make daughters coparceners but changed the mode of devolution of coparcenary property. The mode of devolution of coparcenary property was made dependent upon the presence or absence of any female of Class I. In presence of any such female or any male related to such female, the property now passed by succession. The coparcenary property could pass by survivorship only in absence of such female or

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<sup>66</sup> John Duncan Martin Derret, *Introduction to Modern Hindu Law* 34 (Oxford University Press London 1963).

any male related to such female. Prior to the Hindu Succession (Amendment) Act, 2005, only legitimate sons born from lawful marriage up to four generations from the last holder of the property were coparceners, but after the Hindu Succession (Amendment) Act, 2005, daughters have also been included within the coparcenary. Even though there are two types of properties under Hindu law - coparcenary and separate, the legislators only used the term 'property' when granting rights to statutory legitimate children under section 16 of the HMA, 1955. This term continued even after it was amended in 1976 by the Marriage Laws (Amendment) Act, 1976, leaving it up for interpretation as to whether or not it includes inheritance of coparcenary property within its purview. The rights of statutory legitimate children are limited to the property of the parents and no other relative. Since 'the property of parents' also include share in coparcenary property, the question is whether such children's rights extend to coparcenary property as well. The coparcenary property belongs to all the coparceners including the father of such children. The share received by son is coparcenary share which further gets divided among his branch of coparcenary and upon partition in his branch the share then received by son becomes his separate property. It is to be noted that though daughter has been made coparcener by Hindu Succession (Amendment) Act, 2005 and given coparcenary share on partition, but the share received by her no longer remains to be coparcenary property as received by son. The daughter's coparcenary share is her separate property, therefore, is not subdivided between her and her children but devolves upon her children after her death. Therefore the question of illegitimate children's rights relates only to the coparcenary share received by male. Coparceners have right by birth in coparcenary property and get a share on partition. Joint ownership and joint possession are the essence of coparcenary, therefore no coparcener could claim to be the exclusive owner of the coparcenary property, till partition takes place among the coparceners. In coparcenary consisting of father and sons including daughters after Hindu Succession (Amendment) Act, 2005, the father only upon partition of coparcenary property becomes exclusive owner of a share received by him. Both father and children as coparceners having birth right in such property get equal share after partition. The issue is whether the statutory legitimate children will also have birth right in such property and get a share on partition or will have rights in the share exclusively allotted to father.

The Bombay High Court<sup>67</sup> has clarified that a children born out of void marriage are legitimate children irrespective of whether the decree of nullity has been passed or not and though legitimacy

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<sup>67</sup> *Shantaram Tukaran Patil v. Dagubai Tukaram Patil*, AIR 1987 BOM 182.

entitles them right in the separate property of their parents, it does not entitle them to lay claim in the coparcenary property in which the parent has a share. However, if at the time of his death, the father of a child born from a void marriage was the sole surviving coparcener, then the coparcenary property in his possession, over which he had full rights to dispose of as he pleased, subject to the rights of female family members, must be treated as his separate or exclusive property for the purposes of Section 16(3) of the Hindu Marriage Act.<sup>68</sup> The Division bench of Karnataka High Court in *Patel Chandrappa v. Hanumanthappa*<sup>69</sup> noted that while Parliament was fully aware of the legal concepts surrounding joint families, coparcenary property, and the right of a coparcener to acquire interest by birth, it deliberately did not grant the status of ‘coparcener’ to such children, instead it limited their rights strictly to the property of their parents. The Court further clarified that had Parliament intended to extend coparcenary rights to these children, the language of Section 16(3) would have been different, rather s. 16(3) itself would be unnecessary. In *Sri Kenchegowda v. K. B. Krishnappa*<sup>70</sup> the same court observed Section 16 of the Hindu Marriage Act, 1955 serves a dual purpose: first, to restore the status of children born from void or voidable marriages, recognising that they are innocent and not at fault for their parents’ actions; and second, to grant such children property rights equal to those of children born within lawful wedlock, but limited to the property of their parents. The court also noted that, in view of the express language of the provision indicating a clear legislative intent to impose such a limitation, any interpretation that confers upon illegitimate children rights in coparcenary property would amount to judicial re-legislation, contrary to the will of Parliament.

### **Coparcenary Rights of Statutorily Legitimate Children in Hindu Law - Critical Appraisal of Supreme Court Jurisprudence**

Prior to the codification of Hindu personal laws, the Privy Council in *P.M.A.M. Vellaiyappa Chetty v. Natarajan*,<sup>71</sup> held that the illegitimate son of a Sudra from a permanent concubine inherits a share of father’s separate property but if father, though joint with his collaterals, dies leaving no separate property and no legitimate son, the illegitimate son was not entitled to demand partition of joint family property. Before independence, the Supreme Court in *Gur Narain Das v. Gur Tahal*

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<sup>68</sup> *Chikkamma v. N. Suresh*, ILR 2000 KAR 2234.

<sup>69</sup> ILR 1989 KAR 2384.

<sup>70</sup> ILR 2008 KAR 3453.

<sup>71</sup> AIR 1931 PC 294.

*Das*<sup>72</sup> while deciding on the coparcenary rights of illegitimate child born of a Sudra from continuous concubine stated certain well settled principles as “*firstly, that the illegitimate son does not acquire by birth any interest in his father's estate and he cannot therefore demand partition against his father during the latter's lifetime; secondly, that on his father's death, the illegitimate son succeeds as a coparcener to the separate estate of the father along with the legitimate son(s) with a right of survivorship and is entitled to enforce partition against the legitimate son(s); and thirdly, that on a partition between a legitimate and an illegitimate son, the illegitimate son takes only one-half of what he would have taken if he was a legitimate son.*” Thus, under classical Hindu laws, the illegitimate child neither had the right by birth in the coparcenary property nor had the right to claim its partition.

After codification of Hindu laws that granted legitimacy to child born of void or annulled voidable marriage, the question of rights of such child in coparcenary property came before two judge Bench of the Supreme Court for the first time in *Jinia Keotin v. Kumar Sitaram Manjhi*.<sup>73</sup> The issue was whether a child born of the father's second marriage, contracted during the subsistence of the first, could claim a share in coparcenary property. Emphasising on the expression under s. 16(3) that “*nothing contained in Sub-section (1) or Sub-section (2) shall be construed as conferring upon any child of a marriage, which is null and void or which is annulled by a decree of nullity under Section 12, 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 this not being the legitimate child of his parents*” the court while granting rights in separate property of father but negating the rights of such children in coparcenary property, observed that the express mandate of the legislature under s. 16 (3) leaves no room for presumption or inference that more rights be given to such illegitimate children in the name of recourse to object or purpose of enacting s. 16 of HMA, 1955. It further noted that any such attempt would not only distort the mandate of s. 16(3) but would also amount to legislating under the guise of interpretation, against the intent expressed in the enactment itself.

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<sup>72</sup> AIR 1952 SC 225.

<sup>73</sup> (2003) 1 SCC 730.

In *Neelamma v. Sarojamma*<sup>74</sup> the Supreme Court reaffirmed the decision in *Jinia Keotin* that illegitimate children would not be entitled to get share in joint Hindu family property but will get share of the self-acquired property of the parents.

In *Bharatha Matha v. R. Vijaya Renganathan*<sup>75</sup> children born from live-in relationship of mother when mother was already married to another person, claimed rights in coparcenary property of live-in partner. The court rejected the plea of presumption of marriage between parents due to long cohabitation on ground that the mother continued to be the legally wedded wife of her husband and non-access of her husband was not even pleaded, leave aside proving it, to rebut the presumption of legitimacy of child under section 112 of the Evidence Act, 1872. Denying rights to illegitimate children born out of live-in relationship in the coparcenary property of father who died without partition, the court referring to *Jinia Keotin* held that a child born of even void or voidable marriage is not entitled to claim share in the coparcenary property but is entitled only to claim share in self acquired property of parents.

The correctness of the decisions in *Jinia Keotin*, *Neelamma*, and *Bharatha Matha* has been doubted by a two-judge Bench in *Revanasiddappa v. Mallikarjun*.<sup>76</sup> The issue under the case was whether children born to father from his second marriage during the subsistence of his first marriage are entitled to a share in the coparcenary property or whether their share is limited only to the self-acquired property of their parents under s. 16 (3) of the HMA, 1955. The court, while rejecting the interpretation presented in *Jinia Keotin*, *Neelamma*, and *Bharatha Matha*, made the following observations:

- (i) under s. 16 (3), child born of only void or annulled voidable marriage could claim rights in the property of his parents and no one else;
- (ii) the term ‘property’ used in s. 16 (3) has not been qualified with self-acquired property or ancestral property, therefore, it is broad and general;
- (iii) clauses (1) and (2) of s. 16 expressly declare that such children shall be legitimate, therefore, 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. The prohibition contained in s.

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<sup>74</sup> (2006) 9 SCC 612.

<sup>75</sup> MANU/SC/0400/2010.

<sup>76</sup> (2011) 11 SCC 1.

16 (3) will apply to such children with respect to property of any person other than their parents;

- (iv) while referring to *Parayankandiyal Eravath Kanapravan Kalliani Amma v. K. Devi*<sup>77</sup> it held that HMA, 1955 intends to bring about social reforms and conferment of social status of legitimacy on innocent children is the obvious purpose of s. 16;
- (v) the benefit given under the amended s. 16 is available only in cases where there is a marriage, but such marriage is void or voidable in view of the provisions of HMA, 1955.
- (vi) in the case of joint family property, such children are entitled only to a share in their parents' property but they cannot claim it on their own right. Upon partition of ancestral property, the share allotted to the parents of such children is regarded as their separate and absolute property; therefore, there is no justification to deny such children a share in such property since under the amended law, they are equated with legitimate children of a valid marriage. The sole restriction even after the amendment is that such children could not demand partition during the life time of their parents but could do so only after the death of parents.
- (vii) The interpretation of s. 16 (3) must be based on the constitutional values of equality of status and opportunity as well as individual dignity.

While the court in *Jinia Keotin* had outrightly denied the rights of statutory legitimate children in coparcenary property without getting into the devolution of coparcenary property under s. 6 of HSA, 1956, the court in *Revanasiddappa* interpreted the devolution of coparcenary property and 'notional partition' under s. 6 of HSA, 1956 to give rights to statutory legitimate children in the coparcenary share received by deceased coparcener father after notional partition. The divergence of opinions between the two-judge Benches in *Jinia Keotin*, *Neelamma*, and *Bharatha Matha* on one hand, and the two-judge Bench in *Revanasiddappa* (2011) on the other, led the matter to be referred to a larger Bench of three judges in *Revanasiddappa v. Mallikarjun* (2023). The issues before the larger bench in *Revanasiddappa v. Mallikarjun* (2023) were:

- (i) whether the legislative intent was to confer legitimacy on a child covered by s.16 in a manner that made them coparceners, and thus entitled to initiate or get a share in the partition - actual or notional; and

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<sup>77</sup> (1996) 4 SCC 76.

(ii) at what point did a specific property transition into becoming the property of the parent?

The court made the following observations:

- (i) The Parliament in s. 16 (3) of the HMA, 1955 conferred legitimacy on the children born from a void or voidable marriage and gave them rights in the property of the parents and not a party other than the parents.
- (ii) After the amendment of the HSA, 1956 by Hindu Succession (Amendment) Act, 2005, the interest of Hindu Mitakshara coparcener for the purpose of s. 6 (3) has to be ascertained on the basis that a notional partition has taken place immediately before his death and the share received by him upon notional partition is governed by general rules of succession as specified in s. 8 of the HSA, 1956 according to the rules as laid down in s. 10 of HSA, 1956. Since the property falls in the share of the intestate after notional partition, it belongs to the intestate. The surviving sons and daughters together with widow and mother each take one share. Since legitimised children under ss. 16 (1) and 16 (2) of the HMA, 1955 are entitled to the property of their parents only, the sons and daughters will also include such legitimised child.
- (iii) In the notional partition under s. 6 (3) of the HSA, 1956, after its amendment in 2005, the coparcenary property is to be divided between the deceased coparcener, the surviving widow, and sons and daughters born out of lawful marriage. The child born from void marriage under s. 11 of the HMA, 1955 is not entitled to share in the notional partition itself. After father's share is determined in notional partition, the child whose legitimacy is protected under s. 16 (1) and s. 16 (2) of the HMA, 1955 will have father's share along with the surviving widow and other legitimate children.
- (iv) Property that has been partitioned from the larger coparcenary and allotted to the father for his own branch does not become his separate property until a further partition takes place between him and his coparcener sons and daughters. It remains coparcenary property in which the children from his valid marriage hold joint ownership. As it is not the exclusive property of the father, therefore, in light of the restriction under s. 16 (3), a child falling within the ambit of ss. 16 (1) and 16 (2) has no entitlement in such property.
- (v) A child made legitimate under s. 16 (1) or 16 (2) of the HMA, 1955, can inherit the share of property that their parent would have been allotted on notional partition. Such a

construction would be in accordance with s. 6 (3) of the HSA, 1956, and would harmonise it with the provisions of s. 16 (3) of the HMA 1955.

- (vi) Once legitimacy is conferred on an individual under s. 16 (1) or 16 (2) of the HMA 1955, the proviso to s. 3(1) (j) of HSA, 1956, which indicates that ‘*the illegitimate children shall be deemed to be related to their mother and to one another*’ no longer applies to them.
- (vii) The HMA, 1955 came into force on 18<sup>th</sup> May 1955, Marriage Laws (Amendment) Act, 1976 amending s. 16 of the HMA, 1955 came into effect on 27<sup>th</sup> May 1976 and the HSA, 1956, came into effect on 17<sup>th</sup> June 1956 and its amendment on 9<sup>th</sup> September 2005. While framing the HSA, 1956 the Parliament was well aware of existing provisions of s. 16 of HMA, 1955. Section 4 (1) (b) of the HSA, 1956 gives overriding effect to the Act, therefore, there is no inconsistency between s. 16 (3) of the HMA, 1955 and s. 6 (3) of the HSA, 1956 and both needs to be construed harmoniously.
- (viii) While enacting the HMA, 1955 the Parliament was aware of the concept of joint Hindu family governed by Mitakshara law, coparcenary and coparcenary property. While enacting the HSA, 1956, and its amendment, the legislature did not intend to destroy these institutions which have a distinct connotation.
- (ix) After amendment of the HSA, 1956 section 6 (1) confers coparcenary rights to daughters by birth as given to sons in the coparcenary property but the legislature has nowhere stipulated that a child who is legitimised under s. 16 (1) or 16 (2) of HMA, 1955 would become coparcener by birth. The legislature clearly intended to extend and restrict coparcenary rights only to daughters. Thus, when an individual falls within the protective ambit of s. 16 (1) or 16 (2) of the HMA, 1955, only then he would be entitled to get rights in the absolute or separate property of the parents.

The 2023 decision of the Supreme Court in *Revanasiddappa* highlights the complex legal and social considerations in recognising the coparcenary rights of an illegitimate child under Hindu law. In *Jinia Keotin and Bharatha Matha*, the Supreme Court held that illegitimate children could inherit only the separate property of their parents and not coparcenary property. But, the latest judgement of the Supreme Court harmoniously constructs s. 16 (3) of the HMA, 1955 and ss. 6, 8 of HSA, 1956. The term ‘property’ under s. 16 (3) of HMA, 1955 is not interpreted in isolation but has been given expansive interpretation by considering the impact of ‘notional partition’ of coparcenary property under s. 6 of HSA, 1956, and the devolution of property received by

deceased coparcener under s. 8, 10 of HSA, 1956. The explanation has resulted in recognising legitimised children's rights in both separate and coparcenary property, though not as coparceners to have right by birth. They are entitled to inherit as heirs in the deceased father's notional share of the coparcenary property, which upon partition becomes his separate property. Since the legislature has neither amended s. 16 (3) of HMA, 1955 to clarify term 'property' to include both coparcenary as well as separate property nor has given coparcenary rights to legitimised children in HSA, 1956 by its amendment in 2005 as given to daughters, it is clear that the legislature does not intend to give coparcenary rights to legitimised children but the decision of Supreme Court has minimised the discrimination rooted between legitimate and illegitimate child.

## Conclusion

The biological bond between a child and its parents exists regardless of whether they are legally married, and the absence of marriage between them cannot justify the discrimination that has been and still is being meted out to such children.<sup>78</sup> The legislative bias against illegitimate children is evident under all personal laws in India, but is more pertinent under Hindu law because property is classified into two types – separate and coparcenary. S. 16 of the HMA, 1955 segregates children on the basis of legitimacy as statutory legitimate and legitimate, limiting the rights of a statutory legitimate child to the property of parents only, whereas a legitimate child is entitled to share in both the coparcenary as well as separate property. The limited and ambiguous statutory changes made under Hindu law without taking into consideration the different kinds of property and its consequence on the right of statutory legitimate child clearly reflect the legislature's reluctance to introduce strong and comprehensive protective legislation for them, leaving their rights inadequately safeguarded. The continued distinction between children born of void marriage under s. 11 and annulled voidable marriage under s. 12 of the HMA, 1955 and children born out of other void marriages not mentioned under s. 11 of the HMA, 1955 further widens the gaps among the illegitimates as the former is granted statutory legitimacy getting rights under s. 16 of the HMA, 1955 and the later are illegitimates entitled to inherit property only from mother under s. 3 (1) (j) of the HSA, 1956. The Supreme Court's decision in *Revanasiddappa*, though progressive in extending inheritance rights to a statutory legitimate child in the separate property of the parents as

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<sup>78</sup> Editors, "Inheritance By, From and Through Illegitimates" 84 (4) *University of Pennsylvania Law Review* 540 (1936).

well as in the coparcenary share of the parents given after notional partition, still leaves a gap between legitimate and statutory legitimate children, as such children are not given the status of a coparcener. The denial of status preserves the discrimination between child born of void and voidable marriage on one hand and one born of valid marriage which goes against the mandate of equality and dignity as enshrined under art. 14 of the Constitution.

The Indian society has changed considerably. The concepts such as live-in relationship, single parenthood by use of surrogacy and assisted reproductive technologies are increasingly recognised socially and legally therefore defining legitimacy only on the basis of validity of marriage needs rethinking. The modern principle of 'best interest of child' must be weighed against historical mindset of preserving joint family property. Internationally, several jurisdictions have abolished the concept of 'illegitimacy', but India's continued discrimination between legitimate and illegitimate children places it below international standards. Retaining the concept of 'illegitimacy' under all personal laws including Hindu laws punishes children for no fault of theirs. The need is to bring broader reforms by removing the concept of illegitimacy and statutory legitimacy from all personal and secular laws including Hindu law and lay down uniform laws of inheritance for all child regardless of his status at the time of birth. Till major changes are legislatively brought, the legislature must immediately bring legislative clarity to the law as laid down in section 16 of the HMA, 1955 to grant legitimacy to all child born of void marriage (not limited to grounds mentioned under s. 11 of the HMA, 1955) and annulled voidable and expressly confer coparcenary property under 16(3) of the HMA, 1955 otherwise the risk of inconsistent application of the principle will always remain which will affect the stability of Hindu joint family system.