A Child Can Never Be Illegitimate

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I am me.
I will never pretend to be another.
I will never want to be another.
I will not change who I am just to fit in.
I am me.¹

Introduction

What do Leonardo da Vinci,² William the Conqueror³, Steve Jobs⁴, Marilyn Monroe⁵, Bernardo O’Higgins⁶, Jenny Lind⁷, Fidel Castro⁸, T. E. Lawrence⁹, and Oprah Winfrey¹⁰ have in common?¹¹

Unbelievable, isn’t it?

The honorable supreme court has recently¹² required that a larger bench decide whether illegitimate children are entitled to share in coparcenary¹³ property¹⁴ while, earlier decisions of the honourable court had denied “illegitimate” children certain propietal rights¹⁵. This matter has been pending before the court since 2011.

¹ Artist: Fearless Soul Album: I Am Me (If I Have to I’ll Walk Alone) Released: 2018 Genre: New Age
² Renowned painter and creator of the Mona Lisa, Leonardo da Vinci was the out-of-wedlock son of a wealthy father and a peasant mother.
³ The first Norman King of England, William the Conqueror, was also known as “William the Bastard.” He was the only son of Robert I, Duke of Normandy, but his mother never married Robert.
⁴ Steve Jobs, the co-founder of Apple Inc., was an American businessman and inventor who was born to his parents while they were dating. He was adopted and raised by another family.
⁵ American actress and model Marilyn Monroe was of a flapper mother and was raised by foster parents.
⁶ Born in 1778, was the illegitimate son of a Spanish officer. He grew up to be a Chilean independence leader who freed Chile from Spanish rule.
⁷ Also known as the “Swedish Nightingale,” singer Jenny Lind was the illegitimate daughter of Niclas Jonas Lind and Anne-Marie Fellborg.
⁸ Cuban revolutionary and the former President of the Republic of Cuba Fidel Castro was born out of wedlock in 1926.
⁹ T. E. Lawrence was the illegitimate child of an Anglo-Irish father and a Scottish mother. He grew up to become a famous archaeologist and writer, and earned international fame as “Lawrence of Arabia.”
¹⁰ Dubbed the “Queen of All Media,” Oprah Winfrey was born in 1954 to an unmarried, teenage mother. She is now ranked as the richest African-American.
¹² 15 march 2020
¹³ Coparcenary refers to equal property rights that was restricted only to members of the Hindu Undivided Family
This article does not advocate for “illegitimate” children to be give equal rights as “legitimate” ones. This article is a simple exercise to show that a child is a child. Both Constitutional jurisprudence and morality dictates that children can never be legitimate or otherwise, it is high time, the laws in India are amended removing the disabilities and stigma attached to illegitimacy.

Legitimacy is the quality of being legal.\(^\text{16}\) To be legitimate means a: lawfully begotten, specifically: born in wedlock, b: having full filial rights and obligations by birth, a legitimate child, 2a: being exactly as intended or presented: neither spurious nor false\(^\text{17}\)

To be illegitimate on the other hand, is to be born of parents not married to each other: not legal or fair: \(^\text{18}\)

Children are entitled to the same human rights and fundamental freedoms as all individuals, but, like other particularly vulnerable groups such as women and indigenous people, children have been given special status and protection within the United Nations framework and in regional human rights treaties. These treaties create positive obligations of States to ensure the protection of children. Violations of children’s human rights by State actors are considered particularly grave.\(^\text{19}\)

Child is “every human being below the age of eighteen years, unless under the law applicable to the child, majority is attained earlier.”\(^\text{20}\)

### Legal Provisions

### International law

“\textit{You know, I think there are certain words like ‘illegitimate’ that should not be used to describe a person. And certainly, we have come far enough in our technology that our language can evolve, because it has an impact.}” - Aimee Mullins

A plethora of instruments specifically address the special protections owed to children\(^\text{21}\): The Universal Declaration of Human Rights says that all equal rights and should be treated with equal dignity.\(^\text{22}\) It also says that same social protections should be given to all children whether born in or out of wedlock.\(^\text{23}\)

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\(^{16}\)https://dictionary.cambridge.org/dictionary/english/legitimacy

\(^{17}\)https://www.merriam-webster.com/dictionary/legitimate

\(^{18}\)https://dictionary.cambridge.org/dictionary/english/illegitimate

\(^{19}\)https://ijrcenter.org/thematic-research-guides/chilren rights/

\(^{20}\) Art 1 United Nations Convention on the Rights of the Child

\(^{21}\) African Charter on Human and Peoples’ Rights (art. 18(3))

African Charter on the Rights and Welfare of the Child

American Convention on Human Rights (art. 19)

American Declaration of the Rights and Duties of Man (art. 7)

Arab Charter on Human Rights (arts. 10, 17, 33 and 34)
The European Convention for the Protection of Human Rights and Fundamental Freedoms and the UN Convention on the Rights of the Child\textsuperscript{24} also insist that children should not be discriminated. It is worthy to note that UN Convention on the Rights of the Child does not use the words “legitimate” or “illegitimate”, it straightforwardly confers rights on the “child”.

The European Court of Human Rights in the Marckx case ruled that unequal treatment of marital and non-marital children can violate article 8 (private and family life) of the European Convention. Marckx v. Belgium, no. 6833/74, Judgment of 13 June 1979. See also Case of Inze v. Austria, no. 8695/79, Judgment of 28 October 1987. The UN Human Rights Committee has also issued a conclusion in which it found that a child may not be denied State benefits from a deceased parent based solely upon the marital status of his or her parents. Derksen v. The Netherlands (976/2001), ICCPR, A/59/40 vol. II (1 April 2004).\textsuperscript{25}

**Indian provisions**

“\textit{A word, for example, that is negative, pejorative, and has caused more pain and suffering is 'illegitimate.' But every person has a mother and father. It is another way we let society hurt others.}” -Alex Haley

\textsuperscript{22} Art 1 & 2 UDHR

\textsuperscript{23} Art 25(2) UDHR

\textsuperscript{24} Article 7 -1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.

\textsuperscript{25}https://ijrcenter.org/thematic-research-guides/childrens-rights/
The Civil law in Goa

The Civil law in Goa\(^{26}\) defines marriage as contract with the aim of legitimately establishing a family.\(^{27}\) The Code further provides for affiliation, that is the legitimizing of children, who, if not for these provisions would be considered illegitimate. The Code has provisions dealing with children who can and cannot be affiliate. Every illegitimate child, except those born out of incestuous relationships may be affiliated. This affiliation may be done spontaneously or by the Court. The Civil Code clearly provides that that succession is not only by legitimate issue,\(^{28}\) but also by illegitimate issue who have been affiliated,\(^{29}\) however, when legitimate and illegitimate children claim together, the Code makes a distinction between their shares.\(^{30}\)

Muslim law

Muslim marriage has been defined as a contract for the purpose of legalizing sexual intercourse and procreation of children. The learned Judge observed that though marriage under the Muslim law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it.\(^{31}\) In *Shayara Bano v. Union Of India*\(^{32}\) while invalidating the “triple talaq” Supreme Court had occasion to make reference to the “contract of marriage”

In muslim law the legitimacy of the child is bases on the lawfulness of the wedlock of his parents.\(^{33}\) An illegitimate child is a fillius nullius owing no nasab to either parent. The Hanafis take a milder view and relate the child to its mother. The child and its mother have mutual rights of inheritance.

Hindu law

Hindu law views marriage as a sacrament. The Hindu marriage Act, 1955,\(^{34}\) on the one hand provides for legitimizing of children in certain circumstances\(^{35}\) but on the other deprives them of rights which they would have had if been

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\(^{26}\) Code of 1867

\(^{27}\) Art 1 of decree 1 of 1910

\(^{28}\) Art 1985

\(^{29}\) Art 1989

\(^{30}\) Art 1785

\(^{31}\) Mohammad Zirgham Ansari v. Shamima Begam FIRST APPEAL No. - 160 of 2018 (Allahabad High Court)

\(^{32}\) (2017) 9 SCC 1

\(^{33}\) HabiburRehman v Altaf Ali (1921) 48 IA 114

\(^{34}\) Act No 25 of 1955

\(^{35}\) S. 16 Legitimacy of children of void and voidable marriages. —

(1) Notwithstanding that 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 to 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
The Hindu Succession Act, 1956\textsuperscript{37} nullifies the judgment of their Lordships of the Privy Council\textsuperscript{38} who held that under Mitakshara, Chapter I, Section 12, an illegitimate son of Sudra takes in the estate of his deceased father a half share of that which he would have taken had he been legitimate, followed by Madras High Court. \textsuperscript{39} A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor. \textsuperscript{40} But for succession, The Hindu Succession Act, 1956\textsuperscript{41} elaborates emphasizes the importance of legitimacy. \textsuperscript{42}

The precedents have move from

\begin{quote}
"Upon a review of the texts bearing on the question and of the decisions based on them my conclusion is that illegitimate children of a prostitute have no rights of inheritance under the Hindu Law as obtains in this Presidency, that the 1st Defendant is entitled to the property of Mukkayi and that 1st plaintiffs claim must fail."
\textsuperscript{43}
\end{quote}

to

\begin{quote}
"In view of the legal fiction contained in Section 16, the illegitimate children, for all practical purpose, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents."
\textsuperscript{44}
\end{quote}

\section*{Christian Law}

The Indian Divorce Act, 1869\textsuperscript{45} has a provision for legitimizing children of an annulled\textsuperscript{46} marriage. \textsuperscript{47}

The Indian Succession Act, 1925\textsuperscript{48} makes a reference to ‘child’ without expressly qualifying the word. \textsuperscript{49}

\begin{itemize}
\item 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.
\end{itemize}

\begin{itemize}
\item \textsuperscript{36} ibid
\item \textsuperscript{37} Act No 30 of 1956
\item \textsuperscript{38} Kamulammal v. Visvanathaswami Naicker (1923) I.L.R., 46 Mad., 167 (P.C.)
\item \textsuperscript{39} MAHARAJA OF KOLHAPUR VERSUS SSUNDARAM AYYAR AND 15 OTHERS LNIND 1924 MAD 14
\item \textsuperscript{40} Section 20(2) of the Hindu Adoptions and Maintenances Act 1956
\item \textsuperscript{41} Act No 30 of 1956
\item \textsuperscript{42} S. 3 (j) related means related by legitimate kinship: Provided that illegitimate children shall be deemed to be related to their mothers and to one another, and their legitimate descendants shall be deemed to be related to them and to one another; and any word expressing relationship or denoting a relative shall be construed accordingly.
\item \textsuperscript{43} Minakshi and others Versus MunianidPanikkar and others (1914) 2 MLJ 353
\item \textsuperscript{44} Balakrishnan and Others VersusSelvi and Others [2017] 7 MLJ 877
\item \textsuperscript{45} ACT No. 4 OF 1869
\item \textsuperscript{46} marriage no longer exists https://dictionary.cambridge.org/dictionary/english/annul
\item \textsuperscript{47} 21. Children of annulled marriage.- Where a marriage is annulled on the ground that a former husband or wife was living, and it is adjudged that the subsequent marriage was contracted in good faith and with the full belief of the parties that the former husband or wife was dead, or when a marriage is annulled on the ground of insanity, children begotten before the decree is made shall be specified in the decree, and shall be entitled to succeed, in the same manner as legitimate children, to the estate of the parent who at the time of the marriage was competent to contract.
\item \textsuperscript{48} Act No 39 OF 1925
\item \textsuperscript{49} S. 37 -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.
\end{itemize}
The rules for the distribution of the intestate’s property (after deducting the widow’s share, if he has left a widow) amongst his lineal descendants shall be those contained in sections 37 to 40.50

The judicial view appears to have softened in Jane Antony v. V.M. Siyath51 The Honourable High Court of Kerala Observed:

“We are of the strong view that all illegitimate children, though born out of wedlock, are children born to a man and woman who cohabited for some time and are in substance husband and wife for all purposes. Therefore, we have no hesitation in holding that the two children born to deceased Antony in RW.1, namely respondents 4 and 5, are legitimate children entitled to succeed to the estate of deceased Dr.Antony.”

Parsi Law

The Parsi Marriage and Divorce Act, 193652 also provides for legitimizing of ‘illegitimate’ children53 akin to the Hindu Marriage Act.

The Special Marriage Act, 1954

This Act54 permits solemnization of marriage under it subject to certain conditions.55 Further it provides for legitimizing of children.56

50 S.36
51 LNIND 2008 KER 515
52 ACT NO. 3 OF 1936
53 S. 3(2) Notwithstanding that a marriage is invalid under any of the provisions of sub-section (1), any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate.
54 Act No.43 of 1954
55 S.4 Conditions relating to solemnization of special marriages.—Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage the following conditions are fulfilled, namely:—
(a) neither party has a spouse living; 1[(b) neither party—
(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(ii) 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
(iii) has been subject to recurrent attacks of insanity 2[***];]
(c) the male has completed the age of twenty-one years and the female the age of eighteen years; 3[(d) the parties are not within the degrees of prohibited relationship: Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship; and] 4(e) where the marriage is solemnized in the State of Jammu and Kashmir, both parties are citizens of India domiciled in the territories to which this Act extends].5[Explanation.—In this section, “custom”, in relation to a person belonging to any tribe, community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family: Provided that no such notification shall be issued in relation to the members of any tribe, community, group or family, unless the State Government is satisfied—
(i) that such rule has been continuously and uniformly observed for a long time among those members;
(ii) that such rule is certain and not unreasonable or opposed to public policy; and
(iii) that such rule, if applicable only to a family, has not been discontinued by the family.
56 S. 18 Effect of registration of marriage under this Chapter.—Subject to the provisions contained in sub-section (2) of section 24, where a certificate of marriage has been finally entered in the Marriage Certificate Book under this Chapter, the marriage shall, as from the date of such entry, be deemed to be a marriage solemnized under this Act, and all children born after the date of the ceremony of marriage (whose names shall also be entered in the Marriage Certificate Book) shall in all respects be deemed to be and always to have been the legitimate children of their parents: Provided that nothing contained in this section shall be construed as conferring upon any such children...
The Indian Evidence Act, 1872

The Indian Evidence Act provides for a presumption of legitimacy, which can, however, be rebutted in certain cases. Neither the result of the DNA test nor adverse inference can lead to dislodging the conclusive proof contemplated by Section 112 of the Evidence Act, so long as it remains in the current unamended form. The rights of the child shall remain insulated and protected. Conclusive proof of legitimacy as contemplated under Section 112 of Indian Succession Act would arise unless it is shown that the parties to the marriage they had no access to each other at any time, when he could have begotten such a child.

The Code Of Criminal Procedure, 1973

The Code of Criminal Procedure provides for maintenance. It states that both legitimate and illegitimate children are entitled to maintenance from the father and magistrate may pass an order to ensure the same. This provision does not make any difference as to whether the child is legitimate or illegitimate, male or female.

Constitution Of India, 1950

“The greatest development is achieved during the first years of life, and therefore it is then that the greatest care should be taken. If this is done, then the child does not become a burden; he will reveal himself as the greatest marvel of nature.” - Maria Montessori

The Constitution of India is the grund norm, all laws are tested on the constitutional anvil. The Constitution guarantees fundamental rights, the interpretation of which are constantly evolving.
In early years, the scope of the guarantee provided by these rights was considered to be very narrow. Individuals could only claim limited protection against the State. This position has changed since long. Over the years, the jurisprudence and development around fundamental rights has made it clear that they are not limited, narrow rights but provide a broad check against the violations or excesses by the State authorities. The fundamental rights have in fact proved to be the most significant constitutional control on the Government, particularly legislative power.67

The most paramount right enshrined in the Constitution is without doubt the right to life.68 Right to life includes the right to live with dignity.69 The right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival.70 Every limb or faculty through which life is enjoyed is thus protected by Article 21 and *a fortiori*, this would include the faculties of thinking and feeling.71

The Constitution further guarantees equality before law and equal protection of law to all persons.72 The right to equality has been recognized as one of the basic features of the constitution.73 Equality does not mean that all should be treated equally. In fact when all are not equally circumstanced equality demands that we treat unequally. However before meting out different treatment, we have to ensure that the recipients of unequal treatment are not equally situated, and there is a valid connection between the discrimination and the object of the law.74 Equality also means absence of arbitrariness. Equality is the antithesis of arbitrariness.75

While historically the court has washed its hands off the responsibility of testing the personal laws vis a vis the fundamental rights,76 the recent position is interpretation and expansion of the same.77

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(3) In this article, unless the context otherwise requires law includes any Ordinance, order, bye law, rule, regulation, notification, custom or usages having in the territory of India the force of law; laws in force includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas

(4) Nothing in this article shall apply to any amendment of this Constitution made under Article 368 Right of Equality

67 I.R. Coelho (Dead) By Lrs v. State Of Tamil Nadu AIR 2007 SC 861
68 Art 21 Protection of life and personal liberty No person shall be deprived of his life or personal liberty except according to procedure established by law
69 Bandhua Mukti Morcha v. Union Of India AIR 1984 SCC 802
70 Francis Coralie Mullin v. The Administrator, Union Territory Of Delhi 1981 SCR (2) 516
71 ibid
72 Art 14 Equality before law The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India
73 IndraSawhney II v. UI AIR 2000 SC 498
74 State of W.B v. Anwar Ali Sarkar AIR 1952 SC 75
75 Maneka Gandhi v. Union of India 1978 SCR (2) 621
76 In Re, Smt. Amina v. UnknownAIR 1992 Bom 214, Sri Krishna Singh v. Mathura Ahir1980 SCR (2) 660,
77 John Vallamattom v. Union Of India AIR 2003 SC 2902
Conclusion

“While I know myself as a creation of God, I am also obligated to realize and remember that everyone else and everything else are also God's creation.” - Maya Angelou

Do these children not have a right to live a life full of all joy life can hold, “the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.”

What is the purpose of a law distinguishing between children, classifying them, as it were, into legitimate and illegitimate? Is it some old, archaic concept of morality? Is it another facet of misogyny?

Are we still in medieval times?

“It recognized the obvious danger of foisting spurious offspring upon her unsuspecting husband and bringing an illegitimate heir into his family. Accordingly, secular courts treated adultery as a private injury and a tort for criminal conversation was introduced in the late 17th century, which allowed the husband to sue his wife’s lover for financial compensation.

In 19th century Britain, married women were considered to be chattel of their husbands in law, and female adultery was subjected to ostracism far worse than male adultery because of the problem it could cause for property inheritance through illegitimate children. Consequently, many societies viewed chastity, together with related virtues such as modesty, as more central components of a woman’s honor and reputation than of a man’s. The object of adultery laws was not to protect the bodily integrity of a woman, but to allow her husband to exercise control over her sexuality, in order to ensure the purity of his own bloodline. The killing of a man engaged in an adulterous act with one’s wife was considered to be manslaughter, and not murder.”

Do we wish to penalize and stigmatize them for no fault of theirs? Is their status to be determined solely by accident of birth? Can any progressive, democratic society answer the above questions in the affirmative?

It is submitted that the various personal law provisions discriminating between children on the sole ground of the validity of their parents marriage are unconstitutional being unequal, arbitrary, and curtailing the right to life, thus, violating article 14 and 21 and ought to be struck down by the court or suitably amended by the legislature.

I'm not perfect but I'm working on

Myself. Working to become the best version of myself.

I'm working on myself,

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78 Francis Coralie ibid
79 Misogyny refers specifically to a hatred of women https://www.merriam-webster.com/dictionary/misogyny
80 JOSEPH SHINE VERSUS UNION OF INDIA L &NIND 2018 SC 493
To continue to expand my own self,

Through my own work, in my own way.

I am me. Not the me you think I am.

Not the me you want me to be... But just me. The one I want to be

As the Declaration of Rights of the Child proclaims “mankind owes to the child the best it has to give.”81