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THE SIGNIFICANCE OF CONSTITUTIONALISM IN ENSURING PROPERTY RIGHTS OF ILLEGITIMATE AND SURROGATE CHILDREN

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ABSTRACT:

In India, property rights of every citizen are governed under Article 300A of the Constitution of India, 1950. The Constitutionalism in providing property rights to illegitimate and surrogate children prevents tyranny and provides equality to these children. It holds the operative system of laws relating to property rights accountable. Property rights to a natural child or a legitimate child are vested with them since birth. But the question arises whether the illegitimate children as well as the surrogate children enjoy the same rights that of legitimate children.

In general terms an illegitimate child is one who is born to parents who are not legally married to each other at the time of his/her birth. A surrogate child is born through the process of surrogacy. The surrogate mother carries the child and gives birth to the child for the intended parents. The Constitution provides equality to all but as far the property rights, it is limited to a certain purview. As per the property laws for illegitimate and surrogate children, the access to the ancestral property, inheritance, succession and claim of maintenance are frequently questioned and are vague.

The Constitution does not explicitly define the illegitimate and surrogate children but recognizes, protects, and provides legal framework through the enactment of personal and statutory laws. Article 14 ensures equal protection and rights. Article 15(3) allows the State to make special provisions for children's right against discrimination, which extends to the above

said children as well. Article 21 provides the right to beget children through surrogacy and ensures that the child has the equal rights and opportunity as of the natural children. The property laws that govern the rights for illegitimate children are Indian Succession Act, 1925; Hindu Succession Act, 1956; Muslim, Christian and Parsi laws and CrPC. The Surrogacy (Regulation) Act, 2021, The Assisted Reproductive Technology (Regulation) Act, 2021 and Indian Succession Act, 1925 regulates the property rights of a child born through surrogacy. It is in light that every act enacted, and every single judgement of the courts must pass the test of Constitutional validity.

Albeit there is legal recognition towards both illegitimate and surrogate children, as our society tends to be a conservative one the perspective against both is still underdeveloped in the aspect of acceptance in the family as well as the social community. But the Constitutional awareness and precedents stand as a proof of the change of stigma towards these children so that they are not affected to their access to equality in education, opportunity, and livelihood. This article will provide a broader perspective towards the legal standing of the Constitution in providing property rights for the illegitimate and surrogate children.

KEYWORDS: *Constitutionality, Equality, Property rights, Inheritance, Succession, Illegitimate Children, Surrogate Children, Social stigma.*

I. INTRODUCTION:

India is a multi-diverse country that there are many religions and customs contribute a lot in shaping our law. The practises of marriage and lifestyle of the parents impacts the life of the children on such a way that they are legitimate, illegitimate, adopted or a born out of surrogacy. The legitimacy of a child is conferred on their birth itself. It is determined on the child's parents' marital status and on under what marriage act their marriage has been legalised. In general terms an illegitimate child is one who is born to parents who are not legally married to each other at the time of his/her birth. A surrogate child is born through the process of surrogacy. The surrogate mother carries the child and gives birth to the child for the intended parents. As per the property laws for illegitimate and surrogate children, the access to the ancestral property, inheritance, succession and claim of maintenance are frequently questioned and are vague. The Constitution does not explicitly define the illegitimate and surrogate children but recognizes, protects, and provides legal framework through the enactment of personal and statutory laws. This article will provide a broader perspective on how the

Constitution has contributed to the personal laws and the need for the change societal dynamics as per this fast modern age.

II. DEFINITIONS:

2.1. WHO ARE ILLEGITIMATE CHILDREN?

The term 'illegitimate' derives from the Latin word 'illegitimus' means 'Something which is contrary to the law or not in accordance with law' and the term illegitimate children refers for such children's who are not born out of lawful wedlock or children born out of illicit relationship or children's born out of annulled/voidable marriage or children's born through concubinage, whereas legitimate child is born from lawful wedlock¹.

In India, not just society discriminated against them but even the law discriminates them, since time immemorial such children's have faced discrimination in all communities.

Illegitimacy is a status of a child acquired on birth when his/her parents are not legally married or not their marriage is not legally recognised². Status of an illegitimate child can be summed up as:

- a. Children born of void marriage,
- b. Children born of annulled/voidable marriage,
- c. Children born of illicit relationship,
- d. Children born through concubinage and
- e. Children born of a marriage which is not valid for want of proper ceremonies.

2.2.WHO ARE SURROGATE CHILDREN?

Surrogacy is traced back to the Babylonian origins. The word "surrogate" is rooted in Latin "Subrogare" (to substitute), which means "appointed to act in the place of." It means a substitute, especially a person deputizing for another in a specific role, so the surrogate mother implies a woman who becomes pregnant and gives birth to a child with the intention of giving away this child to another person or couple, commonly referred to as the "intended" or "commissioning" parents³. The children born out

¹ <https://www.britannica.com/topic/illegitimacy>

² <https://lawbhoomi.com/rights-of-an-illegitimate-child/#:~:text=Illegitimacy%20comes%20from%20a%20Latin,This%20relationship's%20legal%20status.>

³ <https://pmc.ncbi.nlm.nih.gov/articles/PMC6262674/#ref1>

through this process are surrogate children.

III. LEGALITY OF ILLEGITIMATE CHILDREN

Under Hindu law, by virtue of the Hindu Succession Act, 1956 (hereafter HSA), an illegitimate child has the right to succeed to the property of only his/her mother since they are deemed to be related to their mother. The relationship of the child with the father is not recognised⁴.

Section 16 of the Hindu Marriage Act, 1956, was inserted in 1976th amendment to protect the children born out of void and voidable marriage⁵.

The Ithna-Ashari school of Muslim law treats illegitimate children as “filius nullius”⁶. It was then moderated by the Hanafi school which gave rights to the child to be fed and nourished by the mother. It also provided the inheritance rights⁷.

The Indian Constitution does not explicitly define or explains illegitimate children but recognises them and provides all the right that of a natural child. Under Article 14 provides right to equality, Article 15(3) allows the State to protect children. Such provisions extend to illegitimate children as well.

Section 125 of CrPC states that illegitimate children are entitled to maintenance from both the parents.

IV. LEGALITY OF SURROGATE CHILDREN

The Surrogacy (Regulation) Act, 2021 allows only altruistic surrogacy⁸. Altruistic surrogacy means the surrogacy in which no charges, expenses, fees, remuneration or monetary incentive of whatever nature, except the medical expenses and such other prescribed expenses incurred on surrogate mother and the insurance coverage for the surrogate mother, are given to the surrogate mother or her dependents or her representative.

This act further prohibits commercial surrogacy. It requires all clinics providing

⁴ Section 3(1) (j), Hindu Succession Act, 1956

⁵ Revanasiddappa & Anr. vs Mallikarjun & Ors, (2011) 5 MLJ 392 (SC).

⁶ <https://www.merriam-webster.com/legal/filius%20nullius>

⁷ Asaf A. A. Fyzee, Outlines of Muhammadan law (fourth edition)

⁸ Sec 2(b), The Surrogacy (Regulation) Act, 2021

surrogacy treatment to be registered and for practitioners to meet certain criteria. The intending couple must be legally married, meet age requirements, and have no other children through surrogacy or adoption. Section 8 of this act states that the child born through surrogacy is a biological child of the intended couple⁹ and it also has all the rights and privileges of a natural child under all laws operating at the time of the child's birth.

The Assisted Reproductive Technology (Regulation) Act, 2021, states that the child born out through ART procedure is a biological child of the commissioning couple¹⁰ and it also has all the rights and privileges of a natural child under all laws operating at the time of the child's birth.

The Indian Constitution does not explicitly define or explain illegitimate children but recognises them and provides all the rights of a natural child. Under Article 14 provides right to equality, Article 15(3) allows the State to protect children. Such provisions extend to surrogate children as well.

V. PROPERTY RIGHTS OF ILLEGITIMATE CHILDREN

The rights of the children are granted under four heads. They are,

- i. **Maintenance-** The right to be maintained, however, extends only up to the period of minority. An illegitimate child is not entitled to be maintained by his or her parents after attaining majority. Such a child will also not be entitled to be maintained if he or she has ceased to be a Hindu by conversion to another religion¹¹.
- ii. **Inheritance-** After the enactment of Hindu Succession Act, 1956 legitimacy of child and their inheritance rights determine and regulated based on validity of marriage provided under Hindu Marriage Act, 1955. Sec 16 (3) of the Hindu Marriage Act, 1955, which provides that 'the children born of void and voidable marriage are only entitled to the property of their parents and not of any other relation'. This implies that an illegitimate child would only have the right to his father's self-acquired property, not his ancestral property and over the property of other relation.

⁹ Sec 2(r), The Surrogacy (Regulation) Act, 2021

¹⁰ Sec 2(e), The Assisted Reproductive Technology (Regulation) Act, 2021

¹¹ Hindu Adoptions and Maintenance Act, 1956

- iii. **Joint family property and partition-** Under section.16 of HMA,1956, illegitimate child form coparcenary with father and such child has coparcenary rights over fathers' property only and can file partition suit over fathers' property after his death.
- iv. **Guardianship-** As per section 6(b) of Minority and Guardianship Act,1956, a mother has preferential right of guardianship then father. The mother is considered the natural guardian of illegitimate child¹². if both the parents of an illegitimate child are Hindus, Buddhists, Jains or Sikhs by religion, or if one of the parents of such child is a Hindu, Buddhist, Jain or Sikh by religion, and such child is brought up as a member of the tribe, community, group or family to which such parent belongs or belonged, then the Hindu Minority and Guardianship Act, 1956, applies to such a child, and under section 6 of the Act, in the case of an illegitimate boy or illegitimate unmarried girl, the mother is the natural guardian, and after her, the father is the natural guardian, and in the case of a married girl, the husband is the natural guardian. But under that Act, such a guardian is not entitled to function as such if he or she had ceased to be Hindu or has completely and finally renounced the world by becoming a hermit or an ascetic¹³.

5.1. HINDU LAW:

After HSA amendment Sec 16 (3) of the Hindu Marriage Act, 1955, which provides that 'the children born of void and voidable marriage are only entitled to the property of their parents and not of any other relation'. This implies that an illegitimate child would only have the right to his father's self-acquired property, not his ancestral property and over the property of other relation.

But in *Revan Siddappa vs Mallikarjuna & Ors*, The Supreme Court has held that under the Hindu Marriage Act (HMA), illegitimate children are entitled to all rights in the property of their parents, both self-acquired and ancestral.

A Bench of Justices G.S. Singhvi and A.K. Ganguly, hearing an appeal by *Revanasiddappa*, differed with earlier judgments in interpreting Section 16 (3) of the HMA that "such children are only entitled to the property of their parents and not of any other relation"¹⁴.

In *Jinia Keotin & Ors vs Kumar Sitaram Manjhi & Ors* the importance of inheritance

¹² Minority and Guardianship Act,1956

¹³ <http://www.shareyouressays.com/117169/comprehensive-essay-on-the-illegitimate-children-under-hindu-law>

¹⁴ *Revanasiddappa & Anr. vs Mallikarjun & Ors*, (2011) 5 MLJ 392 (SC).

rights to the illegitimate children was established by the Supreme Court. The court emphasized on empowering and recognising the rights of the illegitimate children¹⁵.

In *Kamulammal (deceased) represented by Kattari Nagaya Kamarajendra Ramasami Pandiya Naicker vs T.B.K. Visvanathaswami Naicker (deceased) & Ors*, the Privy Council held when a Sudra had died leaving behind an illegitimate son, a daughter, his wife and certain collateral agnates, both the illegitimate son and his wife would be entitled to an equal share in his property.

The illegitimate son would be entitled to one-half of what he would be entitled had he been a legitimate issue. An illegitimate child of a Sudra born from a slave or a permanently kept concubine is entitled to share in his father's property, along with the legitimate children¹⁶.

Shantaram Tukaran Patil and Anr. vs Dagubai Tukaram Patil and Ors. the Bombay High Court observed that the children of void marriages would be deemed legitimate, irrespective of the decree of nullity although they would not acquire the right to succession to the same extent as is available to the children of valid marriage¹⁷.

In *Raja Jogendra Bhupati Hurri Chundun Mahapatra vs Nityanund Mansingh & Anr*, the facts were that the Raja was a Sudra and died leaving behind a legitimate son, an illegitimate son and a legitimate daughter and three widows.

The legitimate son had died, and the issue was whether the illegitimate son could succeed to the property of the Raja. The Privy Council held that the illegitimate son was entitled to succeed to the Raja by virtue of survivorship¹⁸.

When child born out of void and voidable marriages are treated as legitimate children under section 16 of HMA, they form a coparcenary right with their father and can also file a suit for partition over their father's death as such children have coparcenary rights over the father's property. Such children can also file suit over mother's property as they are conferred with the same coparcenary right.

¹⁵ 20 December 2002 AIR ONLINE 2002 SC 635

¹⁶ (1923)25 BOM LR 577

¹⁷ AIR1987BOM182 9 January 1987

¹⁸ (2003) 1 SCC 730, 733

5.2. MUSLIM LAW:

According to the Muslim Law, an illegitimate child is filius nullius and owes no nasab¹⁹ to either of the child's parents. The doctrine of Ikar²⁰ confers the status of legitimacy on child, they are:

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

Hence, under Shia and Sunni law there is no proper distinctive way is mentioned for providing inheritance of their father's property. But in Hanafi law, the illegitimate children are granted to inherit their mother's property, and the children inherit not merely property of mother but also the property of all other relations with whom the children are related through the mother and the mother can also inherit from the children's property²¹.

In *Sukha vs Nini*²², the apex court held that Mohammedan law no make provision for maintenance of illegitimate child. As matter of fact maintenance of children has been statutorily recognised under sec 125 of Cr.P.C. in our country and it is in consonance with this wholesome policy that the off-springs born under such circumstances are to be provided for and should not be left to the misfortunes of vagrancy and its attendant social consequences.

5.3. CHRISTIAN LAW:

In *Jane Antony vs V.M. Siyath Velloparambil*²³, it was held that under Christian law, the court first held that under law of succession children means legitimate children and does not include illegitimate children which does not entitled them of right over any property of the parents. Therefore, such a child has no share in the property of the parents. But in the appeal,

¹⁹ https://www.academia.edu/9511621/The_Law_of_Nasab_in_Islam

²⁰ *Sadiq Hussain V Hashim Ali* (1916) ILR38 All 627

²¹ AIR1952ALL640, AIR 1952 Allahabad 640

²² 1965 AIR SC 314

²³ 2008 (4) KLT 1002

the court recognized that the right of illegitimate child and is granted under Indian Succession Act, 1925.

VI. PROPERTY RIGHTS OF THE SURROGATE CHILDREN

India allows surrogacy as a legal practice, but it is important to note that not all forms of surrogacy are permitted. The Surrogacy (Regulation) Act of 2021 strictly prohibits commercial surrogacy in India²⁴. Instead, altruistic surrogacy is the only recognized form of surrogacy. Altruistic surrogacy in India involves intending parents who do not provide monetary compensation to the surrogate mother beyond covering her medical expenses and insurance during pregnancy.

The case of *Baby Manji Yamada v. Union of India*²⁵ raised the question on the legal rights and status of the child born through surrogacy in India. This case involved a surrogate baby born to a Japanese couple through a surrogate mother in India. The couple later divorced, and the mother refused to take custody of the child, while the father was unable to obtain a visa to enter India to collect the child. The Supreme Court directed the Japanese consulate in India to issue travel documents for the child so that she could be taken to Japan and recommended that the Indian government create regulations to govern surrogacy in India.

6.1. HINDU LAW

Hindu inheritance laws were codified by enacting the HSA, 1956 hence Section 9 of the act was strictly applied for the inheritance and devolution of the property. The surrogate children were seen as the natural/biological children. They were deemed to be given the same status and legal right as of legitimate and illegitimate children as per the act prescribes. They are given rights to inherit the properties from both father and mother and are also the coparcener to the father's property²⁶. As per the 2005 amendment of HSA both daughter and son are coparceners in Hindu joint family property.

6.2. MUSLIM LAW

Under the Muslim law in India, surrogacy is not permitted and is not recognised. Religious concerns, ethical reason under their religious teachings, need of maintaining pure

²⁴ Jan Balaz vs Anand Municipality [2009 SCC On-line Guj 10446]

²⁵ (2008) 13 SCC 518

²⁶ Section 16, Hindu Marriage Act 1956

lineage are the main reasons for not permitting surrogacy. As surrogacy is considered as to be adulterous in Islam, the children born out of surrogacy are not acknowledged.

VII. CONSTITUTIONALISM IN PROVIDING RIGHTS

The Constitution does not explicitly define the illegitimate children but recognizes and protects their rights and interests from the society's stigma. Even though the statute provides framework to enact laws for these children's welfare it is still in doubt whether they are treated equally without any harsh problems the society creates to them. Article 14 provides equality and equal protection for the children. Article 15(3) allows State to enact special provision. Article 21 protects the life of the children, provides personal liberty and right to live without any shame of illegitimacy. Article 21A grants the children free and equal opportunity of education. Article 24 prevents the children from working in factories or any other labour and employment.

The Directive Principles of State Policy under Article 39(f) states that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment²⁷. Article 300A²⁸ states that no person shall be deprived of his property saved by the authority of the law. This provision also includes the property rights provided for the children and they shall not be deprived of this right.

In *Levy vs Louisiana*, a landmark decision of the US Supreme Court, a Louisiana statute that denied illegitimate children the right to recover damages in the event of the wrongful death of their mother was struck down as discriminatory. It was held that the basis of the classification was completely unrelated to the "purpose" and the "subject matter of the statute." This reasoning set into motion a series of judicial decisions that resulted in discarding most of the glaring substantive inequalities between legitimate and illegitimate children²⁹.

In *Jane Antony vs V.M. Siyath Velloparambil*³⁰, the Kerela High Court adopted the same reasoning when it called for reform in India's illegitimacy laws. The equal protection

²⁷ The Constitution (Forty-second Amendment) Act, 1976

²⁸ The Constitution (Forty-fourth Amendment) Act, 1978

²⁹ *Levy vs Louisiana*, 391 U.S. 68 (1968).

³⁰ *Jane Antony vs V.M. Siyath Velloparambil*, 2008 (4) KLT 1002

logic (or the doctrine of legitimate classification) must also be extended to bring equality between different intimate relationships pursued in the private sphere.

The need for amending the Constitution is evidently seen as there is no proper definition for illegitimate children as well as surrogate children though they are now protected. Provision made through the amendments in statutes can solidify the legal status and rights of these children.

VIII. CONCLUSION

The Indian society which is diverse and rooted to our customs is not ready to accept on and follow the modernization of laws and practises. In light, it is to be taken into note that all the rights provided to both illegitimate as well as surrogate children are based on personal laws. The Constitution plays a major part in shaping the society, but the lack of acceptance and implementation still forces the innocent children to suffer. The acceptance and liberty towards the children must be practised. People should not blame the children on their birth, but the irresponsible parents must be blamed. We should stive to break the stigma and stereotypes toward the illegitimate and surrogate children by creating sufficient awareness towards the society as well as educate the family to accept, respect, nurture and treat these children equally.

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