PRESUMPTION OF LEGITIMACY UNDER THE EVIDENCE ACT: A CENTURY OF ACTION AND REACTION

*Tahir Mahmood**

I. Introduction

HUNDRED YEARS ago the enactment of section 112 in chapter VIII (dealing with *burden of proof*) of the Indian Evidence Act, 1872 had given a severe blow to the rules of legitimacy under the heterogenous systems of personal law prevailing in the subcontinent. Though Hindu law was not spared, most adversely effected was the Muslim personal law whose attitude to legitimacy and the period of gestation was wholly negatived by the newly enacted provision, made applicable to all citizens of the erstwhile British India irrespective of their religion. At present, the rules laid down in section 112 of the Evidence Act are applicable in all the three countries of the subcontinent, *viz*, India, Pakistan and Bangla Desh. A century of their application has not, however, been able to set at rest the controversy regarding their scope and ambit; and voices are still raised against the 'havoc' these rules are alleged to have played with certain aspects of the religious personal laws. The purpose of the present paper is to survey in brief the various judicial verdicts made and academic opinions expressed about this aspect of the hundred-year old legislation, specially in the light of the modern view of the rules of Hindu law and the legislative reforms recently introduced into the Muslim personal law in some contemporary states.

Section 112 of the Evidence Act, 1872 raised a legal presumption of legitimacy applicable to the offspring of all married couples in India. It laid down that a child would be deemed to be legitimate if it was born :

(*i*) either "during the continuance of a valid marriage" between its parents, or

(*ii*) "within 280 days after its dissolution, the mother remaining unmarried."

The fact of a child's birth in either of these two circumstances would, according to the section, be a conclusive proof of its legitimacy, unless it could be shown that the persons stated to be its parents never had access to each other at a time when it "could have been begotten". The legal presumption raised by the section had the effect of throwing the burden of proving the illegitimacy of a child satisfying its requirements on the person interested in making it out. The provision has since been treated by the

* Associate Research Professor, Indian Law Institute, New Delhi.

courts in India as the general law determining legitimacy in the questions involving rights of inheritance and maintenance, *etc.*, under all civil, criminal and revenue cases.[1]

Judicial interpretation

During the course of the first hundred years of its life, the following significant aspects of the legislative measure under study have been settled by the courts :

1. The provision lays down a rule of prudence and is also in accordance with natural justice.[2]
2. Section 112 would apply irrespective of the question whether the mother was a married woman or not at the time of conception.[3]
3. Where there is no valid marriage, there is no occasion for raising the presumption under the section.[4]
4. The presumption is rebuttable by satisfactory evidence.[5]
5. The presumption is always in favour of legitimacy. Hence the evidence of non-access is on the party alleging it.
6. The presumption being highly favoured by law, the proof of non-access must be clear and satisfactory.
7. It would have no application to a case where the validity of the marriage and the legitimacy of the offspring are admitted and what is disputed is only if the marriage was conducted in such a way as to confer a particular status upon the offspring of the union.[6]
8. Access and non-access connote merely the existence or non-existence of opportunities for marital intercourse, and do not require proof of actual cohabitation.[7] (This seems to be in conformity with the Muslim law doctrine of 'valid retirement' (*khilwat al-sahih*).[8] However, if there has been an opportunity but the husband proves that there was no cohabitation, non-access will be established.[9]
9. No presumption of legitimacy can be raised if a child was born before the marriage of the parents;[10] but if it is born after marriage, it is immaterial how soon after the marriage it was born.[11]

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1. *Subamma* v. *Venkata Reddi*. A.I.R 1950 Mad 394.
2. *Bhagvathi* v. *Aiyappan*, A I.R. 1953 T C. 470.
3. *Palani* v *Sethu*, A.I.R 1924 Madras; 81 I.C. 456.
4. *Abdul Rahman Kutty* v. *Aysha*, A I.R. 1960 Ker. 101.
5. *Kurapaya* v. *Mayanai*, 1934 P.C 49.
6. *Molapo Mojila* v. *Thabo Lerotholi Mojila*, A.I.R. 1928 P.C. 276.
7. *Venkateshwarlu* v. *Venkatvaray ma*. A I.R. 1954 S.C. 176; also *Vira Reddy* v. *Kistamma*, A.I R. 1969 Mad. 235.
8. See for details, A.A.A. Fyzee, *Outlines of Muhammadan Law* (1968).
9. *Kasi Ammal* v. *Ramaswami*, A I.R. 1949 Mad. 881.
10. *Khwaja Ahmad Khan* v *Mst. Aurmuzi Khanam*, A.I R. 1922 Oudh 81, 61: I.C. 177.
11. *Kahan Singh* v. *Natha Singh*, A.I.R. 1925 Lah. 417.

10. Unless there is a lawful dissolution of the marriage, a child born to the couple must be taken to have been born during the continuance of a valid marriage.

We have seen what the law settled by section 112 of the Evidence Act, 1872 is and how it has been judicially interpreted by the courts till 1972.

We will now examine its effects on the personal laws of the Hindus and the Muslims

II. The rule under the Evidence Act and Hindu personal law

In the ancient Hindu law, twelve (or thirteen kinds) of sons are mentioned, one of which is an *aurasa*. The *Manusmriti* defined an *aurasa* as a son "when a man begets on his own wedded wife".[12] *Smritikar Yajnavalkya*[13] as well as the author of the *Mitakshara*[14] seem to be in agreement with *Manu* in holding that procreation as well as birth both must have taken place after marriage, in order to confer the status of legitimacy on a son. *Tikakar* Kulluka Bhatt too, in his commentary on the *Manusmriti*, describes an *aurasa* as a son "that the man himself begets on his wife, married as a virgin".[15] Thus, according to the *Shastras*, to constitute an *aurasa* son, conception as well as birth both should have taken place during the continuance of a lawful wedlock.

Privy Council's interpretation

Apart from an *aurasa* son, the ancient Hindu law also recognized, along with the other about a dozen kinds of sons mentioned in the *Shastras*, a *sahodhaja*, *i.e.*, a son "born to a woman whom one, while she is pregnant, knowingly or unknowingly marries".[16] Moreover, the marriage of a non-virgin girl or of an unmarried mother was expressly permitted by the ancient texts of Hindu law, though described as an *unapproved* marriage. These aspects of Hindu law could be interpreted as permitting the legalization of a procreation which took place before marriage, by undergoing the proper ceremonies. The possibility of such an interpretation, probably, led the Privy Council to decide, two years after the enactment of the Evidence Act, 1872 that Hindu law did not require procreation, as well as birth, to be after marriage to render a child legitimate. In *Pedda Amani* v. *Zamindar of Marungapuri*,[17] Justice Sir Barnes Peacock of the Privy Council held that only the birth of a child during a lawful wedlock was enough in Hindu law for conferring on it the status of legitimacy, expressing an opinion that the *Shastric* rule to the effect that 'the nuptial texts

12. *Manu*, IX: 166.
13. *Yajnavalkya*, II: 128-132.
14. *Mitakashara*, I, IX, 2
15. See Mayne, *Hindu Law and Usage*. 107 (11th ed).
16. *Id.* at 106.
17. (1874) I.A. 282, 293.

should be confined to virgins' was merely a moral precept and not an imperative rule of law.

Academic opinions

The correctness of the above view taken by the Privy Council was questioned by Sir Goordas Banerjee at his classic—*Marriage and Stridhana*.[18] It was also strongly dissented from by the great jurist Babu Golap Chand Sarkar Shastri. He wrote :

> The learned counsel for the appellants could not cite any authority for the proposition that in order to render a child legitimate the procreation as well as the birth must take place after marriage, and hence their Lordships held that the Hindu law is the same in that respect as the English law ..an eminent judge as Sir Barneas Peacock...was led to such a conclusion from want of assistance at the Bar ...The only natural son who is now recognized by law and custom is the *aurasa* son. The *aurasa* son is defined by Yajnavalkya as the one begotten by the man himself on his lawfully wedded wife. It is said "on the lawfully wedded wife", and not on the woman who was subsequently married by the begetter. Moreover, such a son is never recognized as a legitimate son even by custom.[19]

The above view is shared also by Dr Priyanath Sen, author of *Hindu Jurisprudence*. Commenting on various kinds of sons mentioned in the *Shastras* he writes :

> [T]he conception of sonship has undergone an important change, and now a son means primarily a truly legitimate son begotten by the father upon his lawfully wedded wife. From this altered conception of sonship it follows that *legitimatio per subsequens matrimonium*, which was rocognized by the Roman Law can no longer be recognized in the Hindu Law, for he alone is an *aurasa* who is begotten by the father upon his lawfully wedded wife.[20]

However, since 1874 the Privy Council's decision has constituted the binding law.

Rules of Hindu law compared with section 112

The true legal position seems to be as follows :

(*i*) A child conceived as well as born during a lawful wedlock will

18. Tagore Law Lectures (5th. ed., 1925) at 176-177 See also *Aiti Kochuni* v. *Aidew Kochini*, (1919) 24 C.W.N. 173, 175.

19. Golapchand Sarkar Sastri, *Hindu Law*, 136 (8th. ed., 1940).

20. P.N. Sen, *General Principles of Hindu Jurisprudence*, 237, (1918).

be regarded as an *aurasa* son in the Hindu personal law; it will also be considered legitimate under section 112 of the Evidence Act, 1872.

(*ii*) A child conceived before the date of marriage but born thereafter will not have the status of an *aurasa*. Though under some of the *Shastras* it could be regarded in Hindu Law as the child of the man who later married its mother, the present Hindu law would give no recognition to such a child. Under the Evidence Act, such a child will be presumed to be legitimate, unless non-access between the parents is proved.

(*iii*) A child born to an unmarried girl could be regarded under an ancient custum recognized in Hindu law as the son of the man who later married her (if a male child it is called *kanina* or *sahodhajā*; but the Hindu law as now applicable in India would not regard it as a son. Under section 112 of the Evidence Act such a child will be illegitimate.

(*iv*) A child born to a widow after the expiry of 280 days from the date of her husband's death could have the status of a *kshetraja* in the ancient Hindu doctrine, but modern Hindu law has no place for such a child. Under section 112 of the Evidence Act it will not be presumed to be legitimate.

Whatever be the distinction between the rule laid down in section 112 and the corresponding rules of ancient or modern Hindu law, at present, questions of legitimacy of Hindu children are governed by the Evidence Act exclusively, and not by any contrary provisions of the *Shastric* law. The modern Hindu law enacted in 1955-56 is silent on this subject and does not modify the rules determining status of legitimacy established in Anglo-Hindu law.

In *V. Krishnappa* v. *T. Venkatappa*[21] it was argued before the Madras High Court that since marriage was a religious sacrament (*samskara*) in Hindu law, section 112 of the Evidence Act should have no application thereto. The court considered the argument to be "absurd" and upheld the applicability of section 112 to the issues of Hindu couples.[22]

III. Section 112 and the Muslim personal law

As said earlier, the presumption of legitimacy raised by section 112 of the Evidence Act, 1872 most seriously conflicted with the corresponding provisions of Muslim personal law. The extent of this conflict may be analysed separately in regard to (i) children born during the continuance of their parents' wedlock and (ii) those who take birth after its termination.

21. A.I.R. 1943 Mad. 632.
22. *Ibid.*

Birth during wedlock

Following the English law,[23] the rule in the Evidence Act adopted the time of birth (as distinct from conception) as the factor determining legitimacy. Contrary to this, in the law of Islam, to which the concept of 'legitimation' is wholly unknown,[24] it is the fact of conception (to be distinguished from birth) which determines legitimacy. Accordingly, the minimum period of gestation being fixed by the Muslim jurists unanimously at six months, under all the schools of Muslim law a child born within less than six months from the date of marriage is considered illegitimate. In other words, a child born after at least six months from the date of marriage is presumed to be legitimate, unless the putative father disclaims it by having recourse to the process of 'mutual imprecation' (*li'ān*). Thus, a child born to a couple before the expiry of six months from the date of marriage will be illegitimate in Muslim personal law, but it will have full recognition as a legitimate child under section 112 of the Indian Evidence Act, 1872. As regards a child born during the continuance of the wedlock between its parents, the two legal provisions are, thus, diametrically opposed to each other.

Post-divorce birth

The rules under the various schools of Islamic law are not uniform as to the maximum period of gestation, which is the determining factor in the case of legitimacy of a child born after the dissolution of its parents' marriage. It ranges from nine lunar months to seven years under the different schools. Since in the Indian subcontinent many schools of Muslim law prevail, the legitimacy or otherwise of a child born after its parents being separated from each other would be governed by the principles of that school of Muslim law to which the parents belong.

Under the *Hanafī* law, which an overwhelming majority of Muslims in the Indian subcontinent adhere to, a child born at any time within two years from the date of dissolution of marriage will be considered legitimate, unless disclaimed by the father in accordance with the process of 'mutual imprecation' (*li'ān*). The Shāfi'ī law, governing the remaining *Sunnī* Muslims of the subcontinent, extends the status of legitimacy to a child born at any time before the expiry of four years from the date of the dissolution of marriage. On the other hand, the *Shī'a* law denies recognition to the legitimacy of a child given birth to by a woman more than nine, or at the most ten, months after the date on which her marriage was dissolved. As against all these conflicting principles of Muslim personal law, the Evidence Act fixed the maximum period of gestation at 280 days. It is not known if the framers of the Evidence Act took notice of the contrary provisions of Muslim personal law and had the intention of

23. See *Pal Singh v. Jagir*, 7 I.L.R. Lahore 369.

24. See F.A. Mann, Legitimation and Adoption in Private International Law *Law Quarterly Review*, 112 (1942).

abrogating them by the implications of the new provisions drafted by them. Before the enactment of the Evidence Act, in a Calcutta case the court had declined to apply the principles of Muslim law relating to legitimacy to a case in which a child was born nineteen months after the date of divorce, on the ground that to hold that such a child was legitimate would be "contrary to the course of nature and impossible".[25] However, it cannot be ascertained if this decision had influenced the architects of the Evidence Act.

Judicial attitude

After the enactment of the Evidence Act, the first significant case, in which the applicability of section 112 to Muslims, in view of its being wholly opposed to the principles of Muslim law, had been considered, was reported nearly eight years after its enforcement. In *Muhammad Allahdad* v. *Muhammad Ismail*,[26] Justice Syed Mahmood of the High Court of Allahabad posed the question if section 112 of the Evidence Act had the effect of superseding the contrary provisions of Muslim personal law. He, however, left the question open. Nearly half a century later, in *Sibt Muhammad* v. *Muhammad*,[27] the same court held that the section did apply to Muslims in supersession of the corresponding provisions of their personal law. The same view was taken by the Lahore High Court in *Mt. Rahim Bibi* v. *Chiragh Din*[28] and *Ghulam Mohy-ud-Din* v. *Khizar*.[29]

The judicial attempts at the abrogation of the provisions of Muslim personal law by section 112 of the Evidence Act presented some difficulties. The presumption of legitimacy raised in the section was to apply only if the existence of a valid marriage was proved, and not in the case of an invalid marriage. Unlike common law, in which all those marriages which are not valid are absolutely void, Muslim law classifies invalid marriages into irregular (*fāsid*), namely, marriages of which the invalidity is merely relative and can be removed, and void (*bātil*), *i.e.*, marriages which are absolutely unlawful and cannot be regularized.[30] The courts, therefore, faced the problem whether the issue of a Muslim couple whose marriage was irregular (*fāsid*), though not void (*bātil*), would be governed by section 112 of the Evidence Act. Holding that a valid marriage, for the purposes of the section, meant a "flawless" marriage, the Oudh Chief Court held in *Mst. Kaniza* v. *Hasan*,[31] that section 112 could not be applicable to marriages which were irregular (*fāsid*) under Muslim law.

25. *Ashraf Ali* v. *Ashad Ali* (1871), 16 W.R. 260.
26. (1880) 10 All. 289, 339.
27. (1926) 48 All. 625; of. *Ismail Ahmad Peepadi* v. *Momi Bibi*, (1941) 193 I.C. 209.
28. A.I.R. 1930 Lahore 97, 120 I.C. 495.
29. (1929) 10 Lah. 470, 114 I.C. 74.
30. A brilliant analysis of the *Hanafī* law relating to 'irregular, and 'void' marriages will be found in J.N.D. Anderson, Void and Irregular Marriages in Hanafī Law, *XIII Bulletin of the School of Oriental and African Studies*, 357 (1950).
31. A.I R. 1926 Oudh 234.

Scholars' views

Opinions dissenting from the judicial decisions referred to above have been expressed by some scholars regarding the interaction of section 112 of the Evidence Act and the corresponding provisions of Muslim personal law.

R. K. Wilson, in his celebrated work on Muslim law,[32] has stated that the principle in the Evidence Act being, in effect, a rule of substantive law, it can have no application to Muslims so far as it conflicts with the rule of Muslim law under which a minimum six months' period of post-wedding gestation is absolutely essential for a child in order to claim legitimacy.[33] So, Wilson seems to have disfavoured the application of only the first part of section 112 to Muslims, namely, the presumption raised in it about the legitimacy of a child born during the continuance of wedlock. As regards the application of the second part of section 112 to Muslims, which involves determination of the maximum period of gestation, he seems to be indifferent. Many other great scholars of Muslim law, *e.g.*, Syed Ameer Ali, M.U.S. Jung and Baillie, have expressed the opinion that the two-year or four-year period of gestation was laid down by the ancient Muslim jurists only to meet abnormal and extraordinary cases and was not meant to be the general law.[34] However, Ameer Ali was of the opinion that section 112 which embodied English law could not be held to supersede by implication the contrary rules of Muslim law. This opinion of Ameer Ali was, it seems, concerned with only the first part of section 112.

Among the present-day scholars, Asaf A.A. Fyzee has said that the reason for the divergent (maximum) periods of gestation found in Muslim law are partly attributable to "the imperfect knowledge of gestation and pregnancy prevalent in early times".[35] As such, he also seems to have indirectly favoured the application of at least the second part of section 112 to Muslims. Describing the Allahabad High Court's decision in *Sibt Muhammed's* case[36] as incorrect, Kashi Prasad Saksena, author of the well-known work *Muslim Law as Administered in India and Pakistan*,[37] has said that the Judicial Commissioner of Nagpur was right in holding, in *Zakir Ali* v. *Sugrabi*,[38] that section 112 did not apply to Muslims.[39] He adds:

> It is probable that Sir Fitz James Stephen drafted this section

32. R.K. Wilson, *A Digest of Anglo-Muhammadan Law* (1903).
33. *Id.* at 184.
34. A.A.A. Fyzee, *Outlines of Muhammadan Law*, 182 (3rd ed., 1968).
35. *Ibid.*
36. *Supra* note 19.
37. 4th. ed., 1954.
38. 15 N.L.R., 1.
39. K.P. Saksena, Need for a Code of Muslim Law in, Tahir Mahmood (ed.). *Islamic Law in Modern India*, 134 (I.L.I. pub., 1972).

> without giving sufficient thought to the Muslim law of legitimacy. Whatever be the reason, the Muslim law of legitimacy constitutes substantive law and as such cannot be superseded by section 112 of the Evidence Act.[40]

Voicing similar sentiments, Dean S.M. Hasan of Aligarh University has expressed a feeling that the "fundamental differences" between the attitudes of Muslim law and the English common law towards legitimacy "escaped the notice of the law-makers".[41]

Recent reform in Muslim countries

In order to assess the weight of the criticism of section 112 of the Indian Evidence Act for its 'outrageous' effect on Muslim personal law, it is significant to make a reference to the reforms recently introduced into the law of legitimacy in some West Asian countries.

(*i*) *Minimum period of gestation* : The fundamental criterion of legitimacy is, in Muslim law, the conception of the child during lawful wedlock; and this has not, in the least, been changed by modern legislation in any Muslim country. The rule of the traditional Islamic law prescribing six months as the minimum period of gestation is still observed throughout West Asia and North Africa. The codes of personal law recently enacted in Syria,[42] Tunisia[43] and Morocco[44] expressly state that six months will constitute the minimum period of gestation, giving a codified form to the rule of the classical Islamic law that a child born to a couple within the first six months of marriage will be considered illegitimate, unless acknowledged by the father.

(*ii*) *Maximum period of gestation* : However, modern research in gynaecology and physiology necessitated a revision of the divergent rules of Muslim law relating to the maximum period of gestation. So, in Egypt[45] and the Sudan,[46] it was laid down by means of procedural laws that one solar year would be deemed to be the maximum period of gestation. Later, the codified laws in Syria,[47] Tunisia[48] and Morocco[49] expressly adopted the same rule. Much before the introduction of these reforms, the courts of Muslim law in Algeria, too, had abandoned the *Mālikī* law (which is otherwise applicable in that country) of legitimacy, under which

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40. *Id.* at 135.
41. S.M. Hasan, Muslim Law of Legitimacy and Section 112 of the Evidence Act, in Tahir Mahmood (ed.), *Islamic Law in Modern India*, 200 (I.L.I pub., 1972).
42. Syrian Law of Personal Status, 1953, art. 128.
43. Tunisian Code of Personal Status, 1956, art. 71.
44. Moroccan Code of Personal Status, 1958, art. 76.
45. Egyptian Law No. 45 of 1929, arts. 15-17.
46. Sudanese Judicial Circular No. 41 of 1935, art. 8.
47. *Supra* note 31.
48. *Supra* note 32.
49. *Supra* note 33.

gestation might last for as long as seven years, and adopted the ten-month rule which conformed to the *Shī'a* doctrine in Islamic law.[50]

Rules in Muslim law compared with section 112

Compared with various divergent rules under the classical and modern systems of Muslim personal law, the presumption of legitimacy raised by section 112 of the Evidence Act, 1872 stands as follows :

(1) A child born during the first six months of marriage will be presumed to be legitimate under section 112 of the Evidence Act, unless non-access between the parents is proved. Under all systems of Muslim law, classical as well as modern, such a child will be presumed to be illegitimate, unless owned by the father in accordance with the Islamic law doctrine of 'acknowledgement' (*iqrār*).

(2) A child born after the dissolution of the marriage of its parents will be presumed to be legitimate (unless the presumption is lawfully rebutted) if it took birth within the following periods running from the date of the dissolution of marriage :

(*i*)	under section 112 of the Evidence Act :	280 days
(*ii*)	under Muslim law—	
	(*a*) as now applicable in Algeria :	ten months
	(*b*) as now applicable in Egypt, the Sudan Syria, Tunisia and Morocco :	one year
	(*c*) of the classical *Shī'a* school :	nine to ten months
	(*d*) of the classical *Hanafī* school :	two years
	(*e*) of the classical *Shāfi'ī* and *Hanbalī* schools :	four years
	(*f*) of the classical *Mālikī* school :	seven years

The law in Pakistan and Bangla Desh

The view taken by the High Court of Allahabad in *Sibt Muhammad's* case[51] was dissented from in the united Pakistan in 1962. In *Abdul Ghani* v. *Taleh Bibi*[52] the High Court of Lahore held that where the parties to a disputed case of legitimacy were Muslims, the rules of Muslim personal law and not section 112 of the Evidence Act would be applicable. The High Court held that the repeal of section 2 (which stated that all contrary laws would be deemed to be abrogated) of the Evidence Act by the Repealing Act of 1938 had the effect of reviving the Muslim law of legitimacy.[53] The verdict is opposed to the stand taken by A. Munir, the former Chief

50. A detailed study of all the reforms referred to here will be found in Tahir Mahmood, *Family Law Reform in the Muslim World*, 52, 53, 67, 89, 96, 103, 112, 125-26, 149-50, 287-88 (I.L.I. pub.. 1972).

51. *Supra* note 19.

52. P.L.D. 1962 (W.P.) Lah. 531.

53. *Ibid.*

Justice of Pakistan at his *Principles and Digest of the Law of Evidence*.[54] M. Hidayatullah, the former Chief Justice of India, commenting on the Lahore ruling, in his 17th edition of Mulla's *Principles of Muhammedan Law*, has said that the ruling needs to be reconsidered, expressing an opinion that section 2 of the Evidence Act was repealed in 1938 as a 'spent' provision and that its repeal could not revive any of the laws repealed in 1872.[55]

Since the Supreme Court of the united Pakistan did not have an occasion to pronounce its verdict on the Lahore ruling, it is extremely doubtful if the decision of the Lahore High Court in *Abdul Ghani* v. *Taleh Bibi*[56] will have a binding force or a persuasive value in the Republic of Bangla Desh.

IV. Conclusion

That part of section 112 of the Evidence Act, 1872 which deals with the legitimacy of post-divorce births does not seem to be very seriously objectionable from the view-point of either the Hindu law or the Muslim personal law. Whereas the *Shastric* Hindu law is silent as to the maximum period of gestation, in Muslim law, as applied in most countries of West Asia and North Africa, the legislatures or the courts have adopted a period slightly longer (namely, ten to twelve months) than that stated in section 112 of the Evidence Act, which is a bit over nine months. The latter period also conforms to the corresponding rule in the classical *Shī'a* school of Muslim law.

On the other hand, regarding the legitimacy of a child born during wedlock, there are basic doctrinal differences between the policy of section 112 of the Evidence Act on the one hand and the attitude of Hindu and Muslim personal laws on the other. As against section 112 which insists only on birth after marriage, the conception itself must take place after the marriage in the case of all sons in Muslim law; and the same is necessary at least in the case of *aurasa* sons in Hindu law. No doubt, Hindu law knows many other kinds of sons, under the rules governing whom a pre-nuptial conception may be legalized by a post-conception marriage ceremony; and the same purpose may be achieved in Muslim law through the device of a lawful 'acknowledgement (*iqrār*) made by the putative father; yet, there is no basic presumption, as is raised by section 112 of the Evidence Act, in either of these two systems of law, in favour of the legitimacy of a child conceived before the marriage of its parents.

Whatever be the extent of the conflict between the provisions of section 112 of the Evidence Act and the corresponding rules in the two major systems of personal law in India, it is generally believed in this country that the former has had the effect of pulling out the issue of the

54. 4th ed., at 8-9.
55. Mulla, *Principles of Muhammadan Law*, 373 (1972).
56. *Supra* note 41.

status of legitimacy from the realm of religious personal laws. Tyabji's observation that "the process by which a rule of evidence passes into the realm of substantive law is not by any means rare"[57] seems to be very truly applicable in the case of this piece of Indian statute law. In view of the fact how contemptuously an illegitimate child, whether a Hindu or a Muslim, is looked down upon by the society in our country, the general tendency is to regard the rule laid down in section 112 as substantive law of a binding nature. Whether or not the belief and the tendency are correct and justifiable is, however, still disputed, even after the lapse of a hundred years since the enactment of the Evidence Act. As such, this is a fit case meriting fresh legislation.

Another unsatisfactory aspect of section 112 of the Evidence Act may be noted here. The Hindu Succession Act, 1956 has recognized the rights of inheritance of a child who was in the womb of its mother at the time of the death of the propositus.[58] The Muslim law, too, provides detailed rules relating to the succession rights of an embryo. The law on this subject in both the systems, being closely connected with the rules determining the period of gestation, leads to certain complications.[59] And these complications are further aggravated, rather than cleared up up, by the compulsory application of section 112 of the Evidence Act. As such the provision contained in the section needs reconsideration.

The best course would be to repeal section 112 of the Evidence Act and replace it by a separate 'Legitimacy of Children Act' applicable to all citizens of India. There will, then, remain no doubts about the rules relating to legitimacy being substantive law abrogating all laws and customs to the contrary. Moreover, in view of the fact that the Hiudu jurisprudence and the Islamic *fiqh* exhibit an almost identical approach to the criteria determining the status of legitimacy, it will not be very difficult to enact the provisions of the suggested 'Legitimacy Act' in a way which will make it easily acceptable to all sections of Indian citizens.

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57. Tyabji. *Muslim Law*, 200, f.n. 5 (4th ed., 1968).

58. See s. 20.

59. As to Hindu Law see J.D.M. Derret, *A Critique of Modern Hindu Law*, 247 (1970). The problem of embryo in the Muslim law of inheritance has been discussed by J.N.D. Anderson, 'Islamic Law of Testate and Intestate Succession and the Administration of Deceased Persons' Assets', in Tahir Mahmood (ed.), *Islamic Law in Modern India*. 206 (I.L.I. pub., 1972). Also see A.A.A. Fyzee, *supra* note 34 at 388, 405, 455.