CHAPTER VII

LEGITIMACY

THE TERM "illegitimate child" is one which is being gradually abolished and removed from family jurisprudence in many parts of the West. In India, egitimacy of a child is, however, still very important. Illegitimate children here suffer from many social hardships and legal disabilities. In this chapter we shall make a survey of the following kinds of law:

(*i*) laws determining if a child is legitimate or not; and

(*ii*) laws creating disabilities and disqualifications in regard to illegitimate children.

I DETERMINATION OF LEGITIMACY—VALID MARRIAGES[1]

Traditionally, legitimacy of children in India has been a concern of the family law and, therefore, it is necessary to examine the Hindu and Muslim personal laws relating to legitimacy of children. Section 112 of the Indian Evidence Act, 1872 lays down some "presumptions" in regard to legitimacy of children. Whether this section supersedes the contrary principles of the Hindu and Islamic laws or not—has been a controversial matter, though generally it is believed that the law as laid down in the Evidence Act now constitutes the general law.[1a] Recently, the Madras High Court has held that section 112 of the Evidence Act is now a general law applicable in all cases. As regards Muslims, though earlier also the courts applied section 112 to

1. This part of the chapter is based mainly on T. Mahmood, 'Presumption of Legitimacy under the Evidence Act: A Century of Action and Reaction *J.I.L.I.* 78 (Special Issue) (1972), and Hasan, 'Muslim Law of Legitimacy and Section 112 of the Indian Evidence Act', in Tahir Mahmood (ed.), *Islamic Law in Modern India* 192 (1972).

1*a*. *Subamma* v. *Venkatta Reddi*, A.I.R. 1950 Mad.394.

them,[1b] the Madras High Court has emphatically held that it supersedes contrary rules of Muslim law.[1c] We shall in any case briefly refer to the rules of classical Hindu and Islamic laws relating to legitimacy.

Hindu law

Under the Hindu law only a child is regarded as legitimate if he was conceived after marriage.[2] In other words, a child who has taken birth after the marriage of its parents, but was conceived before the same, will be illegitimate. In a case decided in 1874 the Privy Council, however, held that only birth during wedlock (and not necessarily also conception during wedlock) was necessary under the Hindu law of legitimacy.[3] Renowned scholars of the Hindu law questioned the correctness of this decision and argued that only that child who was not only born, but was also conceived during wedlock could be legitimate.[4]

What has been said above is, however, true about *aurasa* son only. Hindu legal texts mention 11 or 12 other kinds of sons also, including the son of a wife who was pregnant at the time of marriage.[5] These kinds have now become obsolete and for all practical purposes only the concept of an *aurasa* son remains in existence. Though the judgment of the Privy Council has not been strictly in accordance with the ancient Hindu law texts, yet it has been the binding law.

It is not certain what was the minimum period of gestation under the classical Hindu law. None of the modern Hindu law enactments speak either about the period of gestation or about the rules determining legitimacy of children. There are references to illegitimate children in the Hindu Marriage Act, 1955 and other similar laws; but all of them are silent as to under what conditions a child will be deemed to be legitimate, except that they mention that children conceived or born out of void and voidable marriages will be legitimate. The reason seems to be that the legislators were aware of the opinion prevailing at the time of the enactment of these laws that the principles of the Hindu law relating to legitimacy would not stand if they are different from the provision of section 112 of the Evidence Act of 1872.[5a] In 1943, it was argued before the Madras High Court that section 112 should not apply to the Hindus.[6] The High Court, however, did not agree and upheld the

1*b*. See *Ismail Ahmed* v. *Momin Bibi*, A.I.R. 1941 P.C. 11.
1*c*. *A.G. Ramachandran* v. *Shamsunnissa Bivi*, A.I.R. 1977 Mad. 182.
2. See *Manu*, *Yajnavalkya* and Kulluka Bhatt as cited in T. Mahmood,*supra* note 1.
3. *Pedda Amani* v. *Zamindar of Marungapuri*, (1874) 1 I.A. 282.
4. See Sir G. Banerjee and G.S. Sastri as quoted in T. Mahmood, *supra* note 1.
5. See Mayne, *Hindu Law and Usage* 106-107 (11th ed. 1953).
5*a*. For the text of s. 112, see *infra*.
6. *V. Krishnappa* v. *T. Venkatappa*, A.I.R. 1943 Mad. 632.

application of section 112 to the Hindus.[7] The courts have proceeded on the basis that section 112 applies to all the communities including the Hindus.

Muslim law

Under the Islamic law, conception during a lawful wedlock determines the legitimacy of a child. The minimum period of gestation under all the schools of Muslim law is six months; and, therefore, a child born during the first six months of its parents' marriage will be illegitimate in Islamic law.[8] In other words, a child born after the expiry of six months from the date of its parents' marriage is presumed to be legitimate. However, in the Muslim law there are the rules of *li'an* and *iqrar* (imprecation and acknowledgement, which may affect the aforesaid presumption of law). A child, who according to the said presumption will ordinarily be legitimate in Muslim law, may be disowned by its father under the principle of *li'an* (imprecation).[9] Similarly, a child who will ordinarily be illegitimate, on account of being born during the first six months of its parents marriage, may be acknowledged by the father as his child.[10] Such an acknowledgement can be made if the following 3 conditions are fulfilled :

(*i*) the child in question should be of uncertain paternity;
(*ii*) it must not knowingly be an issue of illicit intercourse; and
(*iii*) there must not be any circumstance rebutting the possibility of its paternity being acknowledged by the father.[11]

A child born after the termination of its parents' marriage (whether by husband's death or by divorce) is legitimate in classical Muslim law if born :[12]

(*a*) within 10 lunar months in *Shia* law;
(*b*) within 2 lunar years in *Hanafi* law;
(*c*) within 4 lunar years in *Shafei* or *Maliki* law.

These classical rules have now been reformed in several Islamic countries.[13] In Egypt, Syria, Sudan, Tunisia and Morocco the maximum period of gestation has been fixed to be one solar year.[14] So, a child

7. *Ibid.*
8. Mulla, *Principles of Mahomedan Law* 323 (1972).
9. Fyzee, *Outlines of Muhammadan Law* 190 (1974).
10. *Ibid.*
11. *Id.* at 192; also see the cases of *Muhammed Allahdad* v. *Ismail*, (1888) 10 All. 289; *Sadik Husain* v. *Hashim Ali*, (1916) 43 I.A. 212; and *Habibur Rahman* v. *A.A. Chowdhry*, (1921) 48 I.A. 114.
12. *Supra* note 9.
13. See generally, T. Mahmood, *Family Law Reform in the Muslim World* 52, 53, 67, 89, 96, 103, 112, 125-126, 149-150, 287-88 (I.L.I. 1972).
14. *Ibid.*

born after the expiry of one year from the date of the termination of its parents' marriage will now be illegitimate in these countries.

The minimum period of gestation continues to be 6 months all over the Muslim world and, therefore, a child born during the first 6 months of its parents' marriage remains to be illegitimate in all Muslim countries.[15]

In India both the minimum as well as the maximum periods of gestation as laid down in the traditional Muslim law remain unreformed. However, according to judicial opinion, all contrary rules of Muslim law on the subject of legitimacy have been superseded by section 112 of the Evidence Act, 1872. This was specifically laid down by the Allahabad High Court in *Sibt Muhammad* v. *Muhammad*.[16] This verdict of the court has been dissented from by many scholars of Muslim law including R.K. Wilson and K.P. Saksena.[17] In view of the doubtful situation, it has been suggested that a separate Legitimacy Act should be enacted with clear and unambiguous provisions;[18] and this suggestion merits consideration.[19] But as the Madras High Court has also now taken the position that section 112, Indian Evidence Act applies to Muslims, it may not be necessary to pursue the matter further.[19a]

Evidence Act, 1872

As noted above, according to the courts in India, the Hindu and Islamic laws of legitimacy stand superseded in India by section 112 of the Indian Evidence Act, 1872. The Act applies also to other Indian communities including Parsis, Christians and Jews, notwithstanding any contrary rule of their personal or religious laws. The rule under the Evidence Act, as seen above, does conflict with Hindu and Islamic laws.[20] Whether it clashes also with Jewish, Parsi and Christian laws is not clear.

Section 112 reads:

> The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can

15. *Ibid.*
16. (1926) 48 All. 625.
17. *Supra* note 1 at 85-86.
18. *Id.* at 89.
19. See Hasan, *supra* note 1.
19a. *A.G. Ramachandran* v. *Shamsunnissa Bivi*, *supra* note 1c.
20. *Supra* note 1 at 81-82, 87.

be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

Thus, if a child is born during the continuance of a valid marriage, it will conclusively establish that he was a legitimate child, unless the husband and wife had no access to each other. The word "access" means "opportunity of intercourse" and not actual cohabitation, and the burden is on the party disputing legitimacy of a child to prove that the parties lacked this opportunity.[21] Section 112 applies only to cases where a valid marriage subsisted between the parties.[22] Further,it is the birth during marriage which is material for the application of section 112 and not conception which may take place even before the marriage, the presumption of legitimacy arises from birth and not conception.[23] It is immaterial how soon after marriage the child is born.[24]

II DETERMINATION OF LEGITIMACY—INVALID MARRIAGES

As explained earlier, section 112, which applies to all Indians alike, governs the children of parents who are lawfully married; it has no application where the marriage is invalid — void or voidable. Legitimacy or illegitimacy of children of invalid marriages is not touched by the Evidence Act; it is still regulated by the various personal laws.

Hindu law

The law of marriage applicable to Hindus, Sikhs, Buddhists and Jains is now to be found in the Hindu Marriage Act, 1955. Under this Act, a marriage is void in the following circumstances :

(*a*) when it is a bigamous marriage;[25]

(*b*) when the parties have *sapinda* blood—unless protected by custom;[26]

(*c*) when they are within prohibited degrees.[27]

Further, in the following circumstances the marriage will be voidable at the option of the aggrieved party:[28]

(*a*) when the other party was insane at the time of marriage;

21. *Karapaya Servai* v. *Mayandi*, A.I.R. 1934 P.C. 49.
22. *Abdul Rahimankutty* v. *Aysha Beevi*, A.I.R. 1960 Ker. 101; *Bhagwathi* v. *Aiyappan*, A.I.R. 1953 T.C. 470.
23. *Palani* v. *Sethu*, A.I.R. 1924 Mad. 677.
24. *Kahan Singh* v. *Natha Singh*, A.I.R. 1925 Lah. 414.
25. Hindu Marriage Act, 1955, ss. 5, 11.
26. *Ibid.*
27. *Ibid.*
28. S. 12.

(*b*) when the other party was impotent at the time of marriage;

(*c*) when the wife was pregnant at the time of marriage by some person other than the husband (without the latter's knowledge); and

(*d*) when the consent of the other party (or the guardian's consent in regard to a minor bride) was obtained by force or fraud.

All void marriages may be so declared by a decree of nullity passed by the court at the instance of either party.[29] All voidable marriages can be annulled by the court on the application of the aggrieved party if the statutory conditions are complied with.[30]

An important question thus arises as to the legal status of children born of a marriage which is void or voidable under the Act. As regards voidable marriage, if the aggrieved party having the option of annulment does not exercise it and continues in wedlock, the children of that marriage will always remain legitimate. Their legal status of legitimacy can never be doubted. We have to see what will be the status of a child if a voidable marriage has been annulled by a court at the instance of the aggrieved party. Also what will be the status of a child of a void marriage (*a*) if annulled by a court; and (*b*) if never annulled by a court?

The Hindu Marriage Act originally provided that when a void or voidable marriage was declared to be void or annulled by a court, any child begotten or conceived before such a decree was granted would have the same status as if the marriage had been dissolved by a decree of divorce.[31] In other words, such children would be deemed to be legitimate children of such parents. The rationale behind this provision seemingly was that for the conduct of the parents or rigidities of the law the innocent children must not suffer. However, this rationale was defeated by the way in which the courts interpreted section 16 of the Hindu Marriage Act. According to the courts, the section was applicable only if a decree of nullity was passed by a court; in the absence of such a decree the children remained illegitimate in the case of void marriages.[32] Thus, again for the conduct of the parents (for their failure to get their void marriage declared a nullity) the innocent children are made to suffer; and this was a serious lacuna in the Act. Happily, it has now been

29. S. 11.
30. S. 12.
31. S. 16.
32. See *Thulasi Ammal* v. *Gowri*, A.I.R. 1964 Mad. 118.

removed and the Act, as amended by the Marriage Laws (Amendment) Act of 1976 provides that children of all void marriages—whether annulled by the court or not—shall be deemed to be legitimate.[33] They will inherit property from their parents, but not from other relatives.[34]

The traditional view which held that the children of void marriages are to be regarded as illegitimate was grounded on the public policy of prohibition of such marriages and giving effect to legal consequences which discourage persons from entering into such alliances. The consequence of the children being regarded as illegitimate was regarded as some restraint on such marriages. The matter was examined by the Law Commission and it thought it to be of great difficulty. The Commission summarised the following four principal views:[35]

(*i*) one view is that such children must be regarded as illegitimate, because a void marriage has, in law, no existence, and the children of such a marriage can only be regarded as *nullus filius*;

(*ii*) the second view is that they should be entitled to succeed to their parents, as if they were legitimate, provided that the parents had contracted the marriage *bona fide* and without knowledge of any impediment;

(*iii*) according to the third view, they should, in all cases, be entitled to succeed to their parents as if they were legitimate;

(*iv*) there could be a fourth view, namely, that they must be entitled to succeed to other relations in all cases.

Though, the second view had some support of the Commission on account of the fact that "if the parties are not aware of the true facts constituting the impediment to a valid marriage, the demands of public policy, according to the second view, are sufficiently met by declaring the marriage to be void, without visiting the consequences of the mistake of the parents on the children" (and in England it is the second view which is the prevailing law), yet it favoured the third view, and the Act of 1955 was accordingly modified.

Muslim law

In Muslim law, the *Hanafi* school classified invalid marriages into void (*batil*) and irregular (*fasid*). Children of all void marriages are

33. See s. 16 of the Act as amended in 1976.
34. *Ibid.*
35. Law Commission, *Fifty-ninth Report* 30 (1974).

illegitimate, but children of *fasid* marriages are considered legitimate.[36] The marriages which are void (*batil*) in the Hanafi law are:[37]

(*a*) a marriage in violation of the rules relating to prohibited degrees;

(*b*) bigamous marriage of a woman;

(*c*) marriage of a Muslim woman with a non-Muslim man;

(*d*) marriage with a triply divorced wife without the intervention of a *halala* marriage.[38]

The issues of all the afore-mentioned marriages are considered illegitimate and legitimacy can never be conferred on them.

A marriage without witnesses, marriage of a Muslim man with a "non-Kitabi" non-Muslim woman, one in violation of the rule of "unlawful conjunction," *etc.*,[39] are only irregular (*fasid*) in the Hanafi law and, therefore, children born of all such marriages shall be legitimate under that law.

The *Shia* law does not recognize the *Hanafi* distinction between *batil* and *fasid* marriages and, therefore, all invalid marriages are void in that law.[40] So, unless a marriage is perfectly valid, a child born of that marriage will be illegitimate in the *Shia* law. Thus, children of all those marriages which are mentioned above as irregular marriages in the *Hanafi* law will be illegitimate in the *Shia* law.

The *Hanafi* law is, thus, much more liberal and favourable to children than the *Shia* law and it extends illegitimacy to children only in a few cases of *batil* marriages.

Laws of other communities

In the Parsi law a marriage is void if solemnised in violation of the rules relating to monogamy, prohibited degrees and guardian's consent, where required.[41] About the status of the children of such marriages, the law is silent. Under the Christian Marriage Act, 1872, also there is no provision regarding the legitimacy of children begotten out of void marriages.[42] The reason for the absence of such provi-

36. Fyzee, *supra* note 9 at 112-115.
37. *Ibid.*
38. Details of these concepts may be seen in Fyzee's work, *ibid.*
39. *Ibid.*
40. *Ibid.*
41. See generally, Parsi Marriage and Divorce Act, 1936.
42. See generally, Christian Marriage Act, 1872.

sions appears to be that these are old enactments when there was not much community consciousness about the legitimacy of children. It is suggested that these laws may be amended by incorporating the second view mentioned earlier.

Law of civil marriages

Under the Special Marriage Act, a marriage is void in the following circumstances:

(*a*) if it is a bigamous marriage;[43]

(*b*) if either party was insane at the time of marriage;[44]

(*c*) if the parties are within the prohibited relationship;[45]

(*d*) if the bride was under 18 years or the bridegroom under 21 years of age at the time of marriage;[46]

(*e*) where either party was impotent at the time of marriage and the other party seeks a decree of nullity.[47]

Voidable marriages under the Special Marriage Act, 1954 are those where the following grounds exist:[48]

(*a*) wilful non-consummation of the marriage;

(*b*) bride's pregnancy at the time of marriage by another man; and

(*c*) force or fraud used to obtain the consent of the aggrieved party.

A void marriage can be so declared, and a voidable marriage can be annulled by the courts by decrees of nullity.

Like section 16 of the Hindu Marriage Act, 1955, section 25 of the Special Marriage Act originally provided that when a decree of nullity was granted in case of a void or voidable marriage, the children of such a marriage would be legitimate. In 1976, this provision has also been amended along with section 16 of the Hindu Marriage Act—and the two provisions are now exactly the same.[49]

43. Ss. 4 (*a*), 24 (1) (*i*).
44. *Ibid.*
45. *Ibid.*
46. *Ibid.*
47. S. 24 (1) (*ii*).
48. S. 25.
49. See s. 26 of the Special Marriage Act, 1954, as amended in 1976; *cf.* s. 16 of the Hindu Marriage Act (as amended in 1976).

III DISABILITIES AND RIGHTS OF ILLEGITIMATE CHILDREN

Once it is established that a child is illegitimate, the next question is as to the legal disabilities and rights of such a child. It is necessary to examine various personal laws and family enactments in this regard. The Indian Evidence Act being a procedural law, it could not obviously provide any rule about it.

In the Hindu law, under the Hindu Succession Act, 1956, "relation" ordinarily means only legitimate kinship and illegitimate children can claim "relation" only with their mother and with one another.[50] Thus, an illegitimate child does not have any right of succession to the property of his father or his legitimate son, but he inherits from his mother and from his own brother or sister (uterine).[51]

A child of a void or voidable marriage, though legitimate under section 16 of the Hindu Marriage Act, 1955, cannot claim succession to the property of any person other than his parents if under the traditional Hindu law he would have been an illegitimate child but for the provision made in section 16.[52] Thus, where legitimacy is conferred on children of void or voidable marriages in the Hindu law, their rights of inheritance are confined to their parents' property only. As regards other illegitimate children, the right to inheritance does not extend even to the father's property.

Under the Hindu Adoptions and Maintenance Act, 1956, both parents are liable to maintain their illegitimate children.[53] In this regard, an illegitimate child now suffers from no disability; we will study this point further in the chapter on custody and maintenance of children.

The Hindu Minority and Guardianship Act, 1956 provides that first the mother and then the father will be the guardian of an illegitimate child.[54] In the case of legitimate children, however, the order is reversed.

In the Muslim law, under the *Hanafi* school, an illegitimate child has no right to inherit from his father, but may inherit from his

50. S. 3(1) (*j*).
51. For details see J.D.M. Derrett, 'Inheritance by, from and through illegitimates at Hindu Law', 57 *Bom. L.R.J.* 1-22, 25-39 (1955).
52. See proviso to s. 16 of the Hindu Marriage Act. Also see G.K. Dabke, 'Legitimacy of Children of Void and Voidable Marriages', 58 *Bom. L.R.J.* 148 (1956).
53. S. 20.
54. S. 6 (*b*).

mother.[55] He may also inherit through his mother from her relations.[56] An illegitimate child of its parents is not recognized as the uterine brother or sister of their legitimate children, and so the former does not inherit from the latter.[57]

Under the *Shia* law a "child of fornification" (*walad-al-zina*) is a *nullus fillius* and does not inherit from either parent.[58] However, a "child of imprecation" (*walad al-mala'ina*), *i.e.*, who has been disowned or disclaimed by his father, inherits from his mother but not from his father.[59]

In the Muslim law a father is not bound to maintain an illegitimate child.[60]

Under the general provisions of the Indian Succession Act, 1925 which apply to Christians and Jews and to the property of persons governed by the Special Marriage Act, 1954, there is no express provision enabling or disabling illegitimate children from inheritence. However, interpreting section 37 of the Act relating to children's share in the property of intestate parents, it has been held by the courts that an illegitimate child has no right of inheritance under this provision.[61]

The old Criminal Procedure Code, 1898 provided that a putative father of an illegitimate child could be ordered to pay a monthly allowance to his illegitimate son.[62] The provision has been retained in the new Criminal Procedure Code of 1973.[63]

IV CONCLUSION

Section 112 of the Indian Evidence Act, 1872 is a sound rule for determining the legitimacy of children during valid marriages and subsequent to dissolution of such marriages. This provision should apply to all communities in India beyond any shadow of doubt.

The rule now introduced into the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954—conferring legitimacy on children

55. Fyzee, *supra* note 9 at 396. For a divergent view on this point see N.J. Coulson, *Succession in the Muslim Family* 173 (1971). The former view is supported by case law in India.
56. *Ibid.*
57. *Ibid.*
58. *Id.* at 463.
59. *Ibid.*
60. *Id.* at 215.
61. *In the goods of Sarah Ezra*, A.I.R. 1931 Cal. 560.
62. S. 488.
63. Ss. 125-127.

of void marriages—is quite satisfactory. The Parsi Marriage and Divorce ct, 1936 and the Christian Marriage Act, 1872 are silent with regard to legitimacy of the children born out of void marriages. These enactments may also be amended on similar lines. The subject of legitimacy is such as admits of uniformity amongst all the communities. For the Muslims also, the law should be the same as in the case of other communities.

Under the Muslim law, an illegitimate child inherits from his mother and from his own brother or sister. This is a sound rule which may be extended to other communities as well.

Some of the Indian statutory provisions are on the lines of the U.N. Draft General Principles on Equality and Non-discrimination in Respect of Persons Born out of Wedlock. Thus, under section 112 of the Indian Evidence Act a child born during marriage is presumed to be legitimate though he may have been conceived earlier to the marriage. Then under the Hindu Marriage Act and the Special Marriage Act children born out of void and voidable marriages remain legitimate (Muslim law is deficient in this respect). Further every illegitimate child is entitled to maternal filiation to the woman who gives birth to the child. Under the Hindu Adoptions and Maintenance Act, 1956 both parents are liable to maintain their illegitimate children. Legally, every person born out of wedlock enjoys the same political, social, economic and cultural rights as persons born in wedlock. A few of the matters in which our law falls short of these Draft Principles are : (*i*) there is no general law which provides for the establishment of paternal filiation through a variety of means, including acknowlegement, recognition of legal presumptions and judicial decision; (*ii*) there is no law to provide that any person born of parents who may marry each other after the birth of that person is considered to be born of that marriage; (*iii*) there is no law to equate illegitimate children with legitimate children in the matter of succession to property, *etc.*, even where paternal filiation has been established.