

# MUSLIM LAW OF LEGITIMACY AND SECTION 112 OF THE INDIAN EVIDENCE ACT

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## I. The changing attitude towards illegitimacy

ILLEGITIMACY IN earlier days subjected a bastard to severe disabilities and was a much greater stigma than it is nowadays. On the whole, our general social attitudes have become more relaxed and tolerant towards individual shortcomings and permissiveness is becoming increasingly fashionable. The following observation is an illustration of this attitude:

The whole concept of matrimonial offences is ridiculous. Who is guilty, who is innocent, these are the questions asked when we just have two victims in an overwhelming situation.<sup>1</sup>

Such remarks tend to give an impression that those who regard adultery and similar acts as serious matrimonial offences are persons with out-moded views and are out of tune with reality. While it is true that psychological and sociological researches have greatly increased our understanding of the realities of matrimonial problems, yet a distinction should be made "between the academic view of social trends and their reality."<sup>2</sup> Despite such general remarks, most of us still feel that the family is still a permanent and stable institution and is not an out-of-date concept. It is not old-fashioned to speak of the great public interest in preserving the integrity of the family. Soviet law, which in 1818 had abolished the distinction between legitimate and illegitimate children, was forced in 1944 to recognize certain differences between children whose parents had registered their marriages and those whose parents had not. Islamic law embodies the principles of strict enforcement of sexual morality and holds that any sexual relationship is a crime unless it is between husband and wife

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1. This observation of an eminent advocate of divorce reform is quoted in B. D. Inglis, 'Family Law Reform' in *Law and the Commonwealth*, 531 at 532 (1971).

2. Inglis, *supra* note 1 at 531.

(or master and slave-concubine in the old days). Under its provisions, therefore, legitimacy is strictly insisted upon.

**English law**

The conflict between the principles of the status of legitimacy under the Muslim law and the provisions of section 112 of the Indian Evidence Act has given rise to certain controversies. Since section 112 imports certain principles of English law, it seems desirable to notice briefly the rules of English law.

The English common law, which was modified by statute only recently, had two features: (a) The status of illegitimacy could never be lost. The concept of legitimation, whether by subsequent marriage, adoption or recognition, was unknown. (b) The status and rights of the illegitimate children were inferior, and as far as inheritance went, virtually non-existent. Coke had remarked that the illegitimate child was *filius nullius*—the child of nobody. Where marriage was later declared to be null and void, children born of such union were illegitimate, and this continued till 1950 when legislation modified the rule. The tendency today is to soften the edges of distinction between the legitimate and the illegitimate children and the rationale behind it is that the law should not discriminate against any child or impose disabilities on him by reason of the accident of his birth. A recent New Zealand statute is a good illustration. Section 3(i) of the New Zealand Status of Children Act 1969 provides :

For all the purposes of the law of New Zealand the relationship between every person and his father and mother shall be determined irrespective of whether the father and mother are or have been married to each other, and all other relationships shall be determined accordingly.

A Hong Kong court has recently held that the children of a void union between a man and his concubine are nevertheless the lawful children of their parents.<sup>3</sup> The deciding judge admitted that this conclusion would seem “extraordinary” in western eyes.

The English common law rule is that a child is legitimate if his parents were lawfully married either at the time of his conception or at the time of the child's birth. A presumption of legitimacy arises even though the child must have been conceived before the marriage, for by marrying the mother the husband has *prima facie* taken to have acknowledged the child as his own. This presumption of legitimacy places the burden of proving the illegitimacy of a child born to a married woman on whoever asserts that he is illegitimate. The presumption can be rebutted by proving that no sexual intercourse took place between the husband and the

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3. *Wong Kan Ying v. Man Chi Tai*, 1967 H.K.L.R. 201.

wife during the possible period within which the child must have been conceived or that, despite such intercourse, the husband was not the father, as the mother had other lovers at the same time. In the latter case it was almost impossible for a husband to dispute the paternity of a child born to his wife. This can be illustrated by such cases as *Francis v. Francis*<sup>4</sup> where a husband failed to rebut the presumption that he was the father of his wife's child even though she admitted committing adultery at the time of conception and he proved that he was habitually wearing a contraceptive sheath for sexual intercourse during the relevant period. Where reliance is placed on the husband's impotency for the purpose of rebutting the presumption of legitimacy, it might still be possible to establish his paternity by proving that the birth was the result of an artificial insemination with his seed.<sup>5</sup> The presumption of legitimacy continues :

[N]otwithstanding that the wife is shown to have committed adultery with any number of men, the law will not permit an inquiry whether the husband or some other man is more likely to be the father of the child, and it must be affirmatively proved before the child can be bastardized that the husband did not have sexual intercourse with his wife at the time when it was conceived.<sup>6</sup>

Thus, once sexual intercourse between the spouses is proved or presumed to have taken place at the material time, no evidence is admissible to prove that the child was not the issue of that intercourse.

The presumption of legitimacy equally applies where the child is born within the possible period of gestation after the marriage has been terminated by the husband's death or by a final decree of divorce or nullity. The question as to what is the precise period of gestation still remains debatable. Although it has been said that the average period of gestation is 280 days, the courts cannot accept this as a fact without expert evidence, and medical witnesses have proved difficult to tie down to either a minimum or a maximum period. In *Preston Jones v. Preston Jones*,<sup>7</sup> the House of Lords refused to hold that the birth of a child 360 days after the last possible date of matrimonial intercourse was of itself proof of adultery. The shortest period of gestation which has been accepted by English courts is 174 days.<sup>8</sup> The position, therefore, remains that courts will take judicial notice of the fact that there is a normal period of gestation. Courts will also assume judicial notice that that period is not always followed. But no specific maximum and minimum periods of gestation are judicially recog-

4. (1960) p. 17 (D.C.)

5. *Clarke v. Clarke* (1943) 2 A.E.R. 540; *R.E.L. v. R.E.L.* (1949) 211.

6. 3 *Halsbury's Laws of England*, 88 (3rd ed.).

7. (1951) A.C. 391 (H.L.).

8. *Clark v. Clark* (No. 1) 1939 p. 228.

nized. Lord Simonds in the *Preston Jones* case cited precedents to remark that even the normal period of human gestation has from time to time been differently stated, e.g., 270-275 days, 273-280 days. On the basis of medical testimony it has been held that a period of 331 days was quite possible,<sup>9</sup> but when expert testimony was laid to show that the interval of 21 days between coitus and fertilization as had been suggested in *Gaskill's* case was not authentic, it was held that a lapse of 349 days between coitus and the birth of a normal baby was impossible.<sup>10</sup> The latter view was claimed to be based on modern methods of examination. In the *Preston Jones* case, the medical testimony on behalf of the husband had sought to make out that a lapse of 360 days after coitus was impossible. Lord MacDermott observed :

The law of England has not fixed limits of deviation from the normal period in the sense that more than a certain period or less than a certain period is to be deemed impossible, or impossible until the contrary is proved.

He then proceeded to observe that a time must come "when, with the period far in excess of the normal the court may properly regard its length as proving the wife's adultery beyond reasonable doubt," but, he then sounded a note of caution by remarking :

If a line has to be drawn I think it should be drawn so as to allow an ample and generous margin, for it may be as difficult for the wife to prove a freak of nature as for anyone else.

### **Blood tests**

Blood tests are said to provide evidence for doing better justice in disputed questions of paternity. They are, however, negative in character and can show either that a man *cannot* be the father of a given child or that he *may* be; never that he *is*. In affiliation proceedings the danger of miscarriage of justice is great, as an abandoned girl-friend or scorned woman is liable to be vindictive and the alleged putative father may be able to rely on his own evidence to deny a false charge. Blood tests may be of help in such cases. It has been claimed that in cases where the man concerned is not the father, there is about 70% chance of his paternity being negated.

These tests are, however, not as useful as they appear at first sight. The child may be illegitimate even if its blood-group is compatible with the husband's and wife's groups. Further, blood samples may be taken only with a person's consent. As such, since tests cannot prove legitimacy, but only illegitimacy, these are against the child's interest and will generally be refused by those having custody of the child. In several cases,

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9. *Gaskill v. Gaskill* (1921).

10. *M.T. v. M.T. & Official Solicitor* (1949), cited in the *Preston Jones* case.

courts have shown reluctance to accept scientific criteria of proof. Open hostility to orders for blood tests has been expressed in a Calcutta case where the judge observed that if these tests were allowed:

There would be nothing to prevent such cases becoming the battle-group of experts with bloody hands.<sup>11</sup>

### **Legitimation**

Legitimation and legitimacy are quite distinct. In a Privy Council decision,<sup>12</sup> Lord Dunedin laid down the difference as under:

Legitimacy is the status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. In the proper sense there is no legitimation under the Mohammadan law.

Legitimation by subsequent marriage is now widely recognized in the common law world. The Legitimacy Act 1926 introduced the principle of legitimation into English law. Its effect is to render legitimate a living illegitimate child whose parents marry at any time after his birth. Since the enactment of the Legitimacy Act 1959, legitimation operates although either or both the parents were married to a third person at the time of the child's birth, but it applies only if the father was domiciled in England at the time of the marriage. The legal rights and duties of a legitimated person are generally speaking the same as those of a person born legitimate. A child of a valid marriage is treated as legitimate provided that at the time when its conception must have taken place or, if later, at the time of the celebration of the marriage either parent, or both, reasonably and honestly believed that their marriage was valid.<sup>13</sup>

Scottish law has recognized the principle of legitimation by subsequent marriage for centuries, but it does not give this privilege to adulterine children. However, the Scottish Law Commission has recommended that this bar to legitimation be removed.<sup>14</sup>

## **II. The Muslim law of legitimacy**

N.J. Coulson observes :

Islamic law embodies the principle of strict enforcement of sexual morality in the severe punishment it prescribes for the offence of *zina*, or fornication. Under English law a sexual relationship

11. *Nishit Kumar Biswas v. Anjali Biswas*, A.I.R. 1968 Cal. 105.

12. *Habibur Rahman v. Altaf Ali* (1921) 48, I.A. 114, 120.

13. Legitimacy Act 1959, s. 2.

14. Report (1967) Comnd. 3223.

outside marriage is not a legal offence unless it is aggravated by circumstances such as lack of consent, the young age of the girl, the blood relationship of the persons concerned, or unnatural behaviour which will amount to the criminal offences of rape, unlawful carnal knowledge, incest, bestiality, or sodomy. Islamic law, on the other hand, holds that any sexual relationship is a crime unless it is between husband and wife or was, in the old days, between a master and his slave concubine.<sup>15</sup>

There is no mode or method recognized by Muslim law to legitimize an illegitimate child, for the western doctrine of legitimation is not recognized at all. Muslim law insists that conception in order to render a child legitimate should take place after the marriage, actual or semblable. There are only two methods through which parentage is established in Muslim law (a) by birth during a regular (also irregular but not void) marriage, or (b) by acknowledgement (adoption is not recognized in Islam). The doctrine of acknowledgment of paternity is quite different from the doctrine of legitimation.<sup>15a</sup> Whereas legitimation proceeds upon the principle of legitimating children whose illegitimacy is proved and admitted, the rule of acknowledgment proceeds upon the assumption that the acknowledged child is not only the offspring of the acknowledger by blood, but also the issue of a lawful union between the acknowledger and the mother of the child.<sup>16</sup>

#### Presumptions of legitimacy and period of gestation

The presumptions of legitimacy in Muslim law are well summarized by Fyzee :<sup>17</sup>

1. A child born within six months of the marriage is illegitimate unless the father acknowledges it.
2. A child born after six months of the marriage is legitimate, unless the father disclaims it.
3. A child born after the termination of marriage is legitimate if born :
 

within 10 lunar months	in <i>Shī'ī</i> law;
within 2 lunar years	in <i>Hanafī</i> law; and
within 4 lunar years	in <i>Shāfi'ī</i> or <i>Mālikī</i> law.

15. N.J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence*, 78 (1969).

15a. Acknowledgment of paternity by father may arise only (a) where the paternity of a child is not known or established beyond a doubt; (b) it is not proved that the claimant is the offspring of *zina*; and (c) the circumstances are such that they do not rebut the presumption of paternity.

16. Mahmood, J. in *Muhammad Allahdad Khan v. Muhammad Ismail* (1888) 10 All. 289 at 341.

17. Fyzee, *Outlines of Muhammadan Law*, 181 (1964).

The above periods lay down earliest viable age and gestation. The shortest period of gestation in the human species is taken as 6 months. Regarding the longest period of gestation, Jung is of the view that 10 months is the period fixed by *Shi'a* jurists and also accepted by many of the *Sunnī* jurists.<sup>18</sup> The period of two years as the maximum was assigned by Imām Abū Hanīfa on the authority of 'Āyisha, who is reported to have said as having received it from the Prophet himself, that a child remains no longer than 2 years in the womb of its mother, even so much as the turn of a wheel. The Lahore High Court observed:

It is obvious that the varying maximum periods of pregnancy given in books of medical jurisprudence and the maximum period fixed by the Mohammadan law relate to abnormal cases, and in each case it is for the plaintiff who alleges that there were abnormal circumstances attending his birth to show that they existed.<sup>19</sup>

Section 112 of the Indian Evidence Act limits for conclusive presumption the period of gestation to 280 days after the dissolution of marriage to render the child legitimate.

Referring to the dictum of Imām Abū Hanīfa that the birth must take place within 2 years after dissolution or divorce, Jung says:

We cannot argue that the great Imām has fixed 2 years as the longest period of gestation because this rule is to be read together with the provision that while observing the period of *'idda* the woman must declare that she is pregnant. This fact is to be decided within the period of *'idda*. And if after declaration the woman were to continue *enciente* and exceed the natural maximum limit of gestation, the case would then be fully covered by the 2 years rule of Imām Abū Hanīfa.<sup>20</sup>

The minimum and maximum limits of gestation fixed by Muslim law have been criticised on the ground that they are not borne out by modern scientific knowledge of gestation and pregnancy. With regard to the minimum period of 6 months, this limit has not been exactly fixed by the *Qur'an*; it is only inferred from two passages of the *Qur'an*.<sup>21</sup> The shortest period of gestation which has been accepted by English courts is 174 days. The 6 months being lunar months, the period may be less than 180 days. Medical testimony would generally approve this minimum limit of Muslim

18. M.U.S. Jung, *A Dissertation on the Muslim Law of Legitimacy*, 4.

19. *Umar Hayat v. Misri Khan*, 1924 Lahore 477.

20. *Supra* note 18 at 13.

21. The period of 6 months is derived after subtracting the durations of 2 years and 30 months respectively given in two different passages of the *Qur'an*. See Jung, *op. cit.* *supra* note 18 at 3.

law. The criticism is mainly directed against the maximum limit, which in itself is so divergent. Coulson, in his discussion of "Idealism and Realism" in Islamic jurisprudence makes a brief but very meaningful comment on this point.<sup>22</sup> The basic reason for these long periods is, in his opinion, the excessive caution displayed by the Sunnite jurists. He then observes:

With authoritative medical opinion setting the period of gestation at a maximum of one year, the traditional *Sharī'a* law occasioned manifest injustice.

This is illustrated by an example :

A child born to a widow just short of 2 years after her husband's death would be presumed to be the legitimate child of the former husband and would, thus, be entitled to a lion's share of his estate. This would mean that those who would seek to deny the claims of this dubious child would be subjected to an impossible burden of proving that the child was, in fact, illegitimate. Egyptian law developed an expedient which, in effect, recognized one year's period as the maximum period of pregnancy without rejecting the traditional doctrine.<sup>23</sup>

The reason for these long periods may be the imperfect knowledge of gestation and pregnancy in those days and this could have led to an attitude of caution. But those considerations also exist now and perplex the most skilful of the medical specialists. It was in this context of uncertainty that Lord MacDermott added a note of caution that if a line was to be drawn :

It should be drawn so as to allow an ample and generous margin for it may be as difficult for the wife to prove a freak of nature as for any one else.<sup>23a</sup>

The Sunnite jurists acted with the same caution and humane sentiments in fixing the maximum limits. Although *Mālikī* jurists had fixed 4 years, yet in Algeria, the *qādīs* administering *Mālikī* law have adopted 10 months.<sup>24</sup>

### III. Application of section 112, Evidence Act, to Muslims

Section 112 of the Evidence Act lays down a conclusive presumption of legitimacy. It provides that a child born during the continuance of a valid marriage or within 280 days after its dissolution, the mother remain-

22. Coulson, *op. cit.*, *supra* note 15 at 74. He gives 5 years as the longest period in *Mālikī* school, but text-books give 4 years.

23. *Id.* at 75.

23a. *Supra* note 10.

24. Ameer Ali, 2 *Muhammadan Law*, 224 (1908).



ing unmarried, is conclusively presumed to be legitimate, unless there was no access when he could have been begotten. The question whether this section supersedes the Muslim law of legitimacy still remains open. In *Sibt Muhammad v. Muhammad Hameed*<sup>25</sup> the Allahabad High Court held that to the question whether the Muslim child born within 6 months of the marriage of his parents was to be considered legitimate, section 112 applied and the child was legitimate. But in the well known case of *Muhammad Allahdad v. Muhammad Ismail*,<sup>26</sup> which contains the most authoritative discussion of the Muslim law of legitimacy, the Allahabad High Court had left it as an open question. Mahmood, J. referred thus to section 112:

It may some day be a question of a great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan law of marriage, parentage, legitimacy and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the courts in British India. Fortunately, the difficulty does not arise in this case.

The opinion of text-book writers and the decisions of the courts show considerable divergence. The uncertainty will continue until the Supreme Court has occasion to adjudicate upon the matter. The following difficulties arise if section 112 is made to supersede the Muslim law :

1. A child born within 6 months of the marriage is, in the absence of evidence of non-access, to be deemed to be legitimate under section 112, but according to Muslim law such a child would be illegitimate. The Muslim jurists have always considered the point of conception to be very essential even during a valid continuance of wedlock. Here section 112 has imported the rule of English law which does not concern itself with the conception and recognizes the doctrine of legitimation *per subsequens matrimonium*. This fundamental difference seems to have escaped the notice of the law-makers.

2. The establishment of paternity is a portion of the Muslim family law and, though described for convenience as a legal presumption, forms a branch of substantive law. Wilson holds the view that the rule in section 112 is really a rule of substantive marriage-law rather than of evidence and as such has no application to Muslims so far as it conflicts with the Muslim law rule that a child born within 6 months after the marriage of its parents is not legitimate.<sup>27</sup> In *Allahdad's* case, Mahmood, J. dealt with such questions within the province of Muslim law of inheritance and marriage. Since these matters are posterior in date than the Evidence Act, they should, according to Wilson and other writers, prevail in cases of

25. 48 All. 625 (1926).

26. 10 All. 289 (1888).

27. Wilson, *A Digest of Anglo-Muhammadan Law*, 184 (2nd ed. 1903).

direct conflict. In a recent Pakistan case<sup>28</sup> it was held that the view of the Allahabad High Court in *Sibt Muhammad's* case was not agreeable.

3. Section 112 contemplates a "valid marriage" and there is no definition of this expression in the Act itself. Commenting on this, Munir observes :

The section cannot be applicable in any way to a marriage which is neither void *ab initio* (*batil*), nor absolutely void but is *fāsid*, i.e., irregular, inasmuch as the section is based on a division of marriages merely into two categories and cannot be applicable to the Mohamadan law which divided marriages in three categories. In any case if sec. 112 can be held applicable, the word "valid" in the section must be construed as "flawless" so that the presumption would not apply to *fāsid* marriages.<sup>29</sup>

If section 112 is allowed to supersede the Muslim law, the fine distinction maintained between *sahih*, *fāsid* and *batil* will have to be made to fit into two categories—valid and void.

4. If section 112 is made to apply to Muslim law, not only will it affect the relationship of the child with the father but with other members of the family also. Even if it is taken for granted that a person should be made to support his offspring, legitimate or illegitimate, why should other members of the family be compelled to accept a stranger, already socially condemned, as their prospective heir, for the Muslim law of inheritance admits of minute division of property into shares and those shares again have reciprocal rights of inheritance *inter se* under certain contingencies well known to lawyers.<sup>30</sup> In short, several difficult questions arise if section 112 is made applicable to Muslims. It is, therefore, still an open question as to whether section 112 of the Evidence Act should supersede Muslim law of legitimacy.

28. *Abdul Ghani v. Taleh Bibi*, P.L.D. 1962 Lah. 531.

29. Munir, A., *Principles and Digest of the Law of Evidence*, 282 (1967).

30. Jung, *supra* note 19 at 17-18.