Chapter 7

A GLOBAL PROSPECTIVE

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A GLOBAL PROSPECTIVE

0.0. Introduction

In the preceding chapter attention was focused on Legitimation as such process became inevitable in view of the social stigma tagged to the illegitimate child which followed him like a shadow even in day light. Consequently; it was vested firstly with derogatory rights that of the size of a peanut and then gradually the scope of rights got enlarged. The doctrine of Legitimation reinforced and recognized by Statutory provisions got a big fillip resulting in the blurring of distinction between the legitimate and illegitimate child, resulting in a compassionate consideration that illegitimate child is also a human being and to be treated as such and for that purpose we have to scan the law in a global perspective as to how the illegitimate child has been legally treated. To start with we divert our vision to the Declarations and Conventions that speak about the child.

1.0 International Declarations and Conventions

1.1. Declaration of Geneva 1924.

This Declaration came forth for the welfare of the child endorsed by the League of Nations and called "Declaration of Geneva." This declaration recognizes that mankind owes to the child the best that it has to give; declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed.

1.1.1. Five Principles

This declaration laid down five principles to be followed by the member states of the League of Nations and be guided by its principles in the work of child welfare.

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I. The child must be given the means requisite for its normal development, both materially and spiritually.

II. The child that is hungry must be fed; the child that is sick must be fed; the child that is backward must be helped; the delinquent child must be reclaimed, and the orphan and the waif must be sheltered and succored;

III. The child must be the first to receive relief in times of distress;

IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;

V. The child must be brought up in the consciousness that its talents must be devoted to the service of it’s fellow men.

It was the first international legal instrument in which the rights of the child were given global consideration. This Geneva Declaration affirmed, among other principles, that the child must be given the means requisite for her or his normal development, both materially and spiritually, and satisfaction of her or his primary needs, thus it paid special attention to the specific requirements of the child.

"No doubt, this "Geneva Declaration" is a laudable attempt and achievement to provide protective umbrella to the children but this declaration being the result of series of ILO Conventions, basically looked to the needs of the child from economic angle. Social aspect of the child appears to be missing. However, it set the ball rolling and many countries enacted laws to remove the social discrimination between illegitimate and legitimate child.

1.2. Universal Declaration of Human Rights, 1948

It was not until after World War II and the establishment of the United Nations, that the concept of rights received further development. The first international instrument which defined human rights was the Universal Declaration of Human Rights, adopted by the United Nations, General Assembly in 1948 which spoke of the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family which is the foundation of freedom, justice and peace in the world. It contains 30 Articles. Articles 1,2, 25(2) and 30, in particular are relevant here.
1.2.1. Implement Provisions

1.2.1.1. Article-I

Article-I. All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

1.2.1.2. Article-2

Article-2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

1.2.1.3. Article-25(2)

Article 25(2). Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock shall enjoy the same social protection.

1.2.1.4. Article-30

Article 30. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

If these Articles are read together, three derivatives are forthcoming:

(i) All human beings are entitled to all rights and freedoms without any distinction.

(ii) All children whether born in wedlock or out of wedlock shall have same social protection. There shall be no discrimination between such children.
(iii) No body shall do any act to destroy the rights and freedoms of any human being including children whether born in wedlock or out of wedlock.

1.3. Declaration of the Rights of the Child, 1959

After the drafting and adoption of a number of other human rights instruments, o'n November 1959, the General Assembly adopted a new Declaration of the Rights of the child.

The Preamble of this Declaration states.

Reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person.

(i) Article-2 of the Universal Declaration of Human Rights was reaffirmed.

(ii) The child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.

(iii) Recognized the special safeguards provided in the Geneva Declaration of the Rights of the child of 1924, Universal Declaration of Human Rights of 1948 and the Statutes of specialized agencies and international organizations concerned with the welfare of children.

(iv) Mankind owes to the child the best it has to give.

'The General Assembly proclaims this Declaration of the Rights of the child' to the end that he may have a happy childhood and enjoy for his own good and for the good of the Society the rights and freedoms herein set forth, and calls upon parents, upon men and women as individuals and upon voluntary organizations, local authorities and national governments to recognize these rights and strive for their observance by legislative and other measures progressively taken in accordance with the following principles. This Declaration contains ten principles. Herein, in particular, three principles are mentioned.

\[1(a)\] General Assembly Resolution 1386 XIV
1.3.1. Relevant Principles

1.3.1.1. Principle-1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whether of himself or of his family.

1.3.1.2. Principle-3

The child shall be entitled from his birth to a name and a nationality.

1.3.1.3. Principle-10

The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, and friendship among peoples, peace and universal brotherhood and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

This Declaration of 1959 gave a new dimension in the sense that the rights of the child were positively recognized and asserted for the first time. The principles affirmed in this Declaration Constituted "in nuce" the basis for the convention on the Rights of the child, which was adopted by the General Assembly on 20th November 1989.

Though Declaration of 1959 is a watershed on the rights of the child, the idea of drafting a Convention on children's rights began to be realized in 1979, which was proclaimed by the United Nations as the International year of the child. That year, the Commission on Human Rights established an open ended working group on the question of a Convention on the Rights of the child. Almost there was complete
participation of all shades of States, groups, social organizations and all drafting of
the Convention was done on the basis of consensus and not majority rule.

This Convention on the Rights of the child brought about two changes in the field of
children's Rights under International Law. The first change concerns the compulsory
character of the rules elaborated in the convention. Whereas the two Declarations of
1924 and 1959 laid out Universal principles, they were not legally binding on States.
The second change concerns the philosophy of the convention, which gives children
rights independent from their parents, but does not exclude the application of other
general human Right Treaties to children as Human beings.


The Convention contains 53 Articles. It contains many new principles, the most
important of which is the "best interest" of the child as stipulated in Article 3 of the
Convention because h is to be the guiding principle in all actions concerning children.

1.4.1. Article-3 (1)

"In all actions concerning children, whether undertaken by Public or Private
social welfare institutions, Courts of Law, Administrative authorities or
legislative bodies, the best interest of the child shall be a primary consideration."

Other Articles

There are many other Articles like Article (6) which refers to the child's survival and
development; Article (7) which refers to the right to have a name, nationality and
right to know and 'be cared for by his or her parents; Article (8) concerns the
preservation of his or her identity including name, nationality and family relations;
Article (16) speaks of refrain from arbitrary or unlawful interference with his or her
privacy, family, home or correspondence. Article (41) is very important dealing with
"savings clause" which says:-
Article-41

"Nothing in the present Convention shall affect any revisions which are more conducive to the realization of the Rights of the Child and which may be contained in:"

(a) The Law of a State Party; or
(b) International Law in force for that State.

Declaration on the Rights of the child 1959, in its preamble refers to Universal Declaration of Human Rights, 1948 and convention of the Rights of the child 1989 again in its preamble speaks of the Universal Declaration of Human Rights and International Covenants on Human Rights and Article 25(2) of the Universal Declaration of Human Rights speaks of the child born in wedlock or out of wedlock. Thus all conventions and Declarations speak of the child. The convention on the rights of the child represents an already reaffirmed international expression of the special rights and needs of children. It does not abrogate existing international instruments which mention the position or which protect the rights of human beings including the child. The relationship between the Convention and previous International acts can be explained in this way that prior International instruments addressing the rights of the children, being declarations, were impossible to enforce as law. The convention on the rights of the child is made up of rules which render the precedents enforceable. Additionally, the convention ensures that when provisions of National or International Law are more beneficial to children those rules must prevail over those of the convention. In other words, the rules of the Convention on the rights of the Child are in keeping with and complementary to International law rules regarding human rights whether global, regional or national.

It is worth mentioning that in December 1976 the United Notions adopted a resolution which proclaimed 1979 as International year of the child. A poem to this effect sums up the treatment to be given to the child necessary for his/her development.

2 Maria Rita Saulle, The Rights of the child international Instruments, page 36
If a child lives with criticism, he learns to condemn.
If a child lives with hostility, he learns to fight.
If a child lives with shame, he learns to feel guilty.
If a child lives with tolerance, he learns to be patient.
If a child lives with encouragement, he learns confidence.
If a child lives with praise, he learns to appreciate.
If a child lives with fairness, he learns justice.
If a child lives with security, he learns to have faith.
If a child lives with approval, he learns to like himself.

With these Declarations and Conventions before us, we have to rotate the lens of our vision to look to the various countries as to how they have imbibed this spirit in their national law.

2.0. Status of Illegitimate Child across the World

2.1. New Zealand

The legal story of legitimation having started in New Zealand in 1894, culminated in the legitimation Act of 1908. In view of "the Legitimation Act 1908," when the parents of an illegitimate child inter marry, the father may legitimate the child; the mother has no voice in the matter. The Act provides that nothing in it shall have the effect of legitimating any child if at the time of the birth there existed any legal impediment to the intermarriage of the parents. This does not quite carry out the apparent intention of excluding all adulterine children.

However, on the pattern of the English Legitimacy Act 1926 New Zealand enacted Legitimation Act 1939. Section 3 of the said Act stipulates:-

(1) "Every illegitimate person whose parents have intermarried, whether before & after the passing of this Act, shall be deemed to have been legitimated by the marriage from birth.

3 Dorothy Notle-Children Learn what they live. Page 21-22
(2) The provisions of this Section shall apply whether or not the illegitimate person was living at the date of the marriage or at the time of his birth."

Section 3 of the Act of 1939 refers to a person who is illegitimate in fact, whether presumed to be legitimate at birth or not and has the same meaning as the phrase "any child born before the marriage of his or her parents" in the Act of 1894 & 1908. This view was held by the court in Taylor v Harley.4

Earlier the Dominion Parliament before the Legitimation Act, legislated in the direction of succession of illegitimates to the mother's property. A mother is declared to be the next of-kin of her illegitimate child who dies unmarried and without issue. If the illegitimate, being a male, leaves a widow and no issue, the widow and mother share equally. Further, an illegitimate child succeeds to the property of his mother provided that he does not come into competition with legitimate issue. Thus this law was discriminatory in nature.

But by the Legitimation Act, this position got changed. New Zealand by subsequent legislations removed the legal disadvantages of children born outside marriage.


There are now three concepts:-

(i) child's autonomy to express views and make decisions
(ii) family's responsibility to nurture and bring up children
(iii) State's responsibility to provide services which protect and enhance the lives of children

4 (1943) N.Z.I.R. 68 Smith J.
New Zealand signed and ratified the 1989 Convention on the Rights of the child on 13 March 1993, three years after it was adopted by the United Nations. After its ratification became incumbent on the State to bring in Legislation and the judiciary can apply the rules of the Convention to protect and preserve the "best interest of the child." In family law, judge Inglis QC has begun to use the language of children's rights to justify decisions about the placement of children. In New Zealand Law, the Parent child relationship is expressed in terms of parents having a 'right' to control the upbringing of their children. This "right" is seen as placing a duty on parents to nurture children to the stage when they become independent of their parents.

Thus in short, various enactments like status of Children Act, 1969 Matrimonial Property Act 1976, Adult Adoption Information Act 1986, Status of Children Amendment Act 1987, Young Persons and Their Families Act 1989, New Zealand Bill of Rights Act, 1990, Guardianship Amendment Act 1991, The Child Support Act 1991 have been enacted wherein the best interest of the child is kept in view. But to safeguard the interests of child who is innocent, State must come forward as "whoever enjoys the power of decision will influence not only the means but the very objectives of child rearing" and parents must adhere to the sanctity of the family because an array of legislative and other formal measures of implementation will ultimately be less important and less effective than measures designed to inculcate the values enshrined in the Convention into the consciousness of the masses as well as the decision making elites.

2.2 Australia

Australia followed New Zealand's lead earlier in the field of legitimation on the pattern of 1894, 1908 and 1939 Acts and again in the 1970s followed New Zealand in passing legislation to remove the remaining legal disadvantages of children born outside marriage. Federal States of Australia brought enactments for their own States.


Acts like "Status of Children Act 1974 (Tasmania)", "Family Relations Act 1975 (S. Australia)", "Children (Equality of Status) Act 1976 (N.5.W)", "Status of Children Act 1978 (N. Terr)", "Status of Children Act 1978 (Queensland)", were passed. The motive behind these enactments was to remove the remnants of discrimination against children who are born outside marriage. The key provision of the enactment is from the law of Victoria. Victorian Law says:-

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

The legislation includes specific provisions ensuring that Exnuptial children share equally on the intestacy of a parent with any nuptial children and specifically abolishes the former rule of construction, according to which words such as "child" when used in "wills" are taken to refer only to children born inside the marriage. Even in other contexts, the law is focusing more on actual relationship than on relationships recognized through marriage.

Even maintenance of Exnuptial children is recognized that it is the obligation of all parents to support them. Proceedings can be initiated under State Laws. Every State has its own laws. It is generally the mother who claims maintenance from the father but it is possible for the position to be reversed. Various States have such laws like Maintenance Act 1964 (N.s.W.), Maintenance Act 1965 (Victoria); Maintenance Act 1965-78 (Queens) Married Persons and Children (summary relief) Act 1965-72 (W. Aust.), Maintenance Act 1967 (Tasm), Maintenance Ordinance 1968 (Australia. Cap. Terr.), Maintenance ordinance 1971 (N. Terr). Community Welfare Act 1972-1979 (S. Aust.). Thus Australian legislation has almost removed the distinction and that child in nuptial or exnuptial is the same for succession, maintenance, physical care and upbringing.

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7 Status of Children Act 1974 (Victoria).
9 Ibid., § 7(2).
10(b) Ex-nuptial means born out of wedlock.
MUSLIM COUNTRIES

Muslim Law subscribes to the notion of "Filius Nullius." However, even there is awakening in Muslim Countries for a change in personal law and many countries have brought in changes in different aspects of matrimonial law but two countries need special mention here.

2.3. Tunisia

The social legislation promulgated by President Habib Bourgiba finds no parallel in other Islamic Countries. Though State religion of Tunisia is Islam, there are latitudes allowed in their family law. Tunisia is the only country in the whole Arab world where bigamous marriages are absolutely unlawful and penal\(^\text{11}\). In the field of family law the traditional system of the Maliki School Islamic law had been retained in Tunisia but subject to a number of very significant reforms. Some of the reforms so introduced have a bearing on the legal status and rights of children, specifically invalid marriages and legitimacy of children\(^\text{12}\).

The code of personal status, 1956, affords protection to the children born of an invalid marriage, whether the invalidity results from want of free consent, minority of either party, bigamy, violation of prohibited relationship or any other irregularity. In all such cases the marriage is to be compulsorily annulled. However, if prior to the annulment any such marriage has been consummated resulting in the birth of a child, it will be deemed to be a legitimate issue of its parents, notwithstanding the nullity of their marriage. Such a child will, therefore, be entitled to get maintenance from their parents and will also be their legal heir in accordance with the entitlement of legitimate children\(^\text{13}\).

2.4. Egypt

The legitimacy of a child born during the marriage is presumed. However, if the father refrains from registering the birth of the child or if he denies paternity, the

\(^{11}\) The Tunisia Code of Personal Status, 1956, Art 18.

\(^{12}\) Dr. Tahir Mahmood-Law relating to children: Recent Reforms in Tunisia S.c.J. 1974 page 23

\(^{13}\) Ibid (11) Art 22
mother is entitled to request a court hearing to establish paternity. The man has a similar right to seek a court hearing to prove his paternity if the mother denies it. However, the court will not entertain such an action in two instances:

(a) If the husband proves that he had no physical contact with his wife since the marriage was contracted or
(b) If the wife gives birth to the child after the lapse of a year following divorce, absence, or death of the husband. The court has discretionary power to evaluate evidence and seek expert advice. According to Islamic Sharia, upon the father's declaration of paternity, the child acquires all legal rights pertaining to the status of a legitimate child. However, such a declaration is considered a nullity if the man admits that the child is the fruit of an illicit relationship.

As a result of a declaration of paternity the father: legally obligated both to provide physical care and to maintain the child. The law states that if a child has no means of livelihood, his or her father must provide for his or her maintenance. Maintenance to a daughter must continue until she marries or until she is able to earn her own living. The son is entitled to support until the age of fifteen on condition that he is capable of earning an adequate living. However, if the child is incapable of earning a living due to some physical or mental defect or on account of the pursuit of education or if earning a living is not otherwise possible the father must continue to support his child.

COMMUNIST COUNTRIES

2.5. Czechoslovakia

The legal status of child in relation to marriage of parents is based on the concept of equality. The family law of Czechoslovakia consistently proceeds from the

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15 Art No: 25 on Norms on Personal Status, Art 15 (1929)-Act on Personal Status
constitutional principle of the equality of all citizens. In relation between parents and children this principle mandates the total equality of all children. This precludes discrimination in the law between children born in or out of wedlock.

However, if the paternity is in doubt, then its determination in the family law is ruled by a system of legal presumptions. The law provides three presumptions which are rebuttable by means of court proceedings.\(^1\)

1. The law grants a presumption of paternity, which attaches to the mother's husband. The husband is deemed to be the father of the child if the child is born within the period from the day of the contracting of marriage to the three hundredth day following its dissolution or its invalidation. If the child is born to a remarried mother, the latter husband is deemed to be the father of the child, even though the child was born before the expiration of the three hundredth day following the termination or invalidation of her previous marriage.

2. This presumption is based upon a concurrent statement on paternity by both parents of the child. Such a statement is effective if made before a court or before the national committee entrusted with keeping the register. The declaration must be made orally and personally but does not have to be made simultaneously. The joint statement of the parents may even relate to the paternity of a yet unborn child.

3. This presumption comes into the picture when the first two presumptions do not establish paternity. Under this presumption the man is considered to be the father of the child if he had sexual relations with the child's mother no less than 180 and no more than 300 days before the birth of the child unless significant circumstances preclude such paternity. This presumption is based on a valid court decision determining the paternity and no motion of denial can be filed.

With the establishment of paternity, parents' obligations and rights and under the cover of obligations there is upbringing of children, their representation and the

\(^{18}\) Family Code §§ 51-62.
administration of their affairs. The law explicitly states that the decisive role in the upbringing of children is played by their parents. The parents are responsible to the society. The law further stipulates that the upbringing of children is the combined responsibility of the parents, the State and public organizations. Therefore, it is imperative that they carry out their tasks in unity and in harmony\textsuperscript{19}. The rights and obligations of the parents arise on the birth of the child and these parental rights and obligations become extinct once the child has attained majority subject to the condition that the child becomes self supporting. Thus child is not to be a parasite on the society. Child is the asset of the nation.

2.6. Cuba

Legal status of the child in relation to marriage of parents is based on the principle of equality. The family code, reinforcing the principle of equality of children with respect to their parents, addresses the subject of determination of paternity, which had been avoided by prior Cuban legislation. The\textsuperscript{20} Code provides that the following are presumed to be the children of those united in matrimony.

(a) Those born during the marriage.
(b) Those born within 300 days following rupture of the matrimonial ties, provided the mother has not married again.

However, in cases where paternity is in issue, the\textsuperscript{21} Code stipulates that paternity is presumed:-

(a) When acknowledged (expressly or by implication) in a statement made by the father on an uncontested document.
(b) Whenever the sexual relations of the man with the mother during the period in which the conception may have occurred were notorious.
(c) Whenever it can be inferred by reason of the actions of the man or of his family.

\textsuperscript{19} Ibid., § 30-33.
\textsuperscript{20} Family Code Art 74.
\textsuperscript{21} Cuban Code Art 75
The alternatives given above, clearly show that the family Code provides every possible but plausible avenues to legitimate the illegitimate children and the legitimated children are at par in all respects with that of legitimate children.

According to the constitution, parents have the duty to provide support and maintenance of the children to the extent that the optimal development of the child should be established. The family code makes it clear that child support is a duty of both the parents regardless of which parent exercises parental authority or is responsible for guardianship and care.

2.7. Poland

Legitimacy of illegitimate children is akin to the provisions of recognition of illegitimate children to the German Civil Code. Under the Polish Family Code of 1964 a child recognized by the putative father is approximated to the status of a legitimate child. The Code provides a prescribed form and consent of the mother or guardian is also necessary. So the legitimating is governed by the doctrine of "Legimatio per rescriptum principis."

But, Poland has played a dominant role in giving initiative to the U.N. Convention on children's rights, passed by the General Assembly of the United Nations on 20, November 1989. The preliminary draft of the said Convention was submitted by Poland to the U.N. Human Rights Committee in 1978 and amended draft in 1980 and maintained the leading role throughout the 11 year gestation period of the Convention.

The Polish constitution of 22 July 1952 is the main source of Polish Law which constructs the concept of responsibility for the child and of the rights conveyed to him or her. Art 79 of the Constitution is the most significant provision, stating that marriage, motherhood and the family remains under the protection and care of the State. This provision imposes a special duty on parents to bring up children as rightful

22 Ibid 59
23 Polish Family Code Art 77
and responsible citizens of the Republic. Art 80 of the constitution imposes an obligation 'on the State' to protect young people with care, provide for their education and assure the widest possible scope of development.

The Constitutional norms and the provisions of the Convention of 1989 were specified in the Family and Guardianship Code which has been in force since 1 January, 1965. Art 96 of the Code states that parents are to raise their child who remains under their parental authority; that they are to guide him or her and care for his or her physical and spiritual development. They have the responsibility to prepare the child for work, for the good of the society according to his or her talents.

The State may interfere with the exercise of the paternal authority but danger to the child's well-being is a prerequisite for limiting the paternal authority\(^{24(a)}\). The great majority of provisions in Polish Family Law conform fully with the Convention on Children's Rights 1989, except Article 7. The children's rights as included in the Convention were put into effect by Polish Family Law. The Republic of Poland entered a reservation to the effect that the adopted child's right to meet his biological parents remains limited because of laws which allow adoptive parents to keep the child's origin secret\(^{25}\).

There is a landmark judgment of the Supreme Court of Poland as to whether there should be a domestic law to cover the rights of a child as included in the Convention of children's Rights 1989. The Supreme Court declared that the U.N. Convention on Children's Rights, ratified with the consent of parliament in the form of an Act, should be treated with legal consequences equal to parliamentary Acts, due to the fact that the Convention was published in the Official Journal of Laws. Thus in Poland there is a total emphasis on the child and the various Articles of the Family Code along with Civil Proceedings Code and Criminal Code governing children illustrate comprehensively that child has been considered an asset of the nation.

\(^{24(a)}\) Family and Guardianship Code Arts 109-111.

\(^{25}\) Law on Registry of Birth, Marriage and Death.
2.8. U.S.S.R.

Regarding illegitimacy the law adopted by the Soviet Union is very radical. Soon after the Revolution, it has been the policy of Soviet Governments to remove all legal distinctions and differences between the legitimate and illegitimate children\textsuperscript{26}. Not merely this, Government purported to wipe out all social stigmas attached to illegitimacy and it was a duty imposed on the courts to see this policy succeeds. The 1918 Code imposed a duty on the putative father to provide maintenance to the illegitimate children.

In the early period of implementation of the law it seems that the courts have been more interested in finding out a person who could be saddled with the responsibility of the maintenance of the child, irrespective of the fact whether he was found to be in fact the putative father of the child. Law provided that when several persons had had relations with the mother during the period of conception, the court might declare all the persons as liable to support the child\textsuperscript{27}. However, this was found as a judicial defect and remedied in the Supreme Court's decision in \textit{Lv Vinogradov}\textsuperscript{28}. In this case two persons have intercourse with the mother on the same night resulting in pregnancy. The court chooses one of them\textsuperscript{29}.

Later, the 1944 Law abolished the duty of maintenance to illegitimate child of the putative father which was replaced by the State's duty of providing education, maintenance etc for the children\textsuperscript{30}.

Immediately after the revolution, adoption was abolished\textsuperscript{31} from the Soviet law but from March 1, 1926 it was reintroduced, sole motive being the paramount of interest of the child. Under the Soviet law the adopted child has the same status as under Hindu Law.

Even much attention has been paid towards Juvenile delinquency. Children's homes

\textsuperscript{26} Code of 1918, Art 133  
\textsuperscript{27} Ibid., Art. 144.  
\textsuperscript{28} No: 358 (1930) 10 Suo Prak RSFSR: 9  
\textsuperscript{29} HAZARD-Law and the Social change in U.S.S.R. Page 250  
\textsuperscript{31} Ibid Art 183.
were established for destitute children to get proper parental care. Even in private home treatment two institutions were developed called "Dependency" and "Patronat." The whole idea behind is the proper care and attention of the child which includes maintenance and education also.

Soviet Union looked the child from three angles:- First, types of problems which might propel a child into public care, secondly, care arrangements for those who cannot remain at home and thirdly the part that legislation plays in child protection intervention. General principles underlying child care law are in the provisions of the Fundamental Principles of Legislation of Marriage and the Family (1968) and in the codes on marriage and the family in each Republic. The basic principle of paramount of the child's interests underlies all childcare legislation. Children may come into care on a voluntary or compulsory basis and the state has a duty to provide children's homes for children in need of temporary or permanent accommodation. These homes cater to children of parents who are in prison, to abandoned children and to a wide variety of other children whose parents are unable to look after them. The children have three options such as guardianship, adoption and residential care. Each option is available to children admitted into care through both the voluntary or statutory routes.

The U.N. Convention on the Rights of the child entered into force in the territory of the Russian Federation on 15 September 1990. As a result Russia undertook to review its national legislation and bring it into line with the convention and to ensure that every new legislative act, no matter what sphere of human relations it concerns should be considered from the point of view of its conformity with the convention.

Under Russian Law there is differentiation between judicial (compulsory) establishment of paternity and administrative (voluntary establishment of paternity). Under the Code on marriage and the family a court considering a case, on establishment of paternity takes into consideration the following factors.

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32 Law of Nov. 29, 1928 (1929) 1. Sob. UZAK RSFSR No: 22 item 233, Art 42
34 Section 48 of the Code.
"residence in a common household of the mother and the respondent before the child's birth; on the mother and the respondent's common upbringing or maintenance of the child; or reliable evidence confirming the respondent's acceptance of his paternity."

Of course in Russia, the Human Rights and Freedoms Declaration adopted in November 1991 was to bring Russian Legislation into line with universally recognized international standards of Human Rights and freedoms. This declaration proclaimed the principle and inalienable rights of citizens belonging to them from birth, the right to life, the right of freedom including that of movement, thought, conscience and religion, the right to personal privacy, privacy of home and private life, the right of property, the right of inheritance, and the right to education and so on. These fundamental rights and freedoms were incorporated into the New Constitution of Russia of 1993. Child's rights are paid adequate attention in the Fundamentals of Russian Legislation on Protection of citizen's Health and many sections speak about it.\(^\text{35}\)

However, there are no more laws on matrimonial matters except USSR Law of May 22, 1990\(^\text{36}\). As this law is that of Soviet Union, it is uncertain whether such law continues to be in force on Russian territory after the dismemberment of Soviet Union. Though much has been done in Russia with respect to the child, Russia, in the present situation and in the light of the convention of 1989, some changes have to be brought about in the Code on Marriage and the Family. But so far as the question of illegitimacy is concerned, it is almost over and there is no social stigma also.

2.9. China

The most radical law in the Communist World is that of People's Republic of China \(^\text{37}\) which says that "Children born out of wedlock shall enjoy the same rights as children born in wedlock. No person shall be allowed to harm or discriminate against children born out of wedlock. The second Para of the Article runs:-"where the paternity of the child born out of wedlock is legally established by the mother of the child or by other witnesses or by other material evidence, the identified father must

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35 Sections 33 and 43
36 Ved USSR (23),1990, item 442
bear whole or part of the cost of maintenance and education of the child until it has attained the age of eighteen." Para third runs:-" with the consent of the natural mother, the natural father may have the custody of the child." Thus the distinction between legitimate and illegitimate children is attempted to be done away with.

According to Marriage Law, parents are not allowed to abuse or desert their children. Physical and mental cruelty, as well as refusal of support are all considered offences against the personal rights of children and hence legally punishable. The injured children themselves have the right to bring their case to court. Parents found to abuse or desert their children are subjected to public condemnation. Serious cases are prosecuted under criminal code. Thus the emphasis is on child and protection of its rights without any distinction.

SCANDINAVIAN COUNTRIES

2.10. Denmark

Danish law aims to place all children whether born in or out of wedlock, in the same legal position vis-à-vis their parents in terms of inheritance and maintenance but not of custody. The paramount consideration in all decisions regarding children is the welfare principle; cases have to be decided according to the best interests of the child. The purpose of the legislation is to secure the maximum possible close contact between children and both parents.

In Denmark the proportion of children born to unmarried parents is very high because of the great number of Unmarried cohabitants. Minor's Act (Act No: 231 of June, 1985) has been changed by Act No: 387 of 14 June 1995 on custody and Access, coming into force on January 1996 but the basic principles have been maintained.

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38 Dr. Pams Diwan-Children and Legal Protection page 37.
39 Art 182 & 183 of the Criminal Code
40 Linda Nielsen and Lis Frost--Children and the Convention: the Danish Debate-Children's Rights- A comparative perspective page 68
A child born to a mother cohabiting with the father is considered to be a child born outside marriage, and the mother has sole custody.

Married parents both have parental rights\(^41\). If there is divorce or separation, the custody of the child, unless there is agreement between the parents, the court will decide the questions of custody applying the principle of the best interest of the child\(^42\). Custody includes child's upbringing according to child's best interests. After the Convention on the Rights of the child, 1989, the Center of Gravity is shifted from status of child to welfare of the child. Danish law has addressed the problem in three ways i.e. Family law, Social Welfare Law and Criminal Law.

In the past the parents had a statutory privilege to use violence towards their children but this was abolished in 1866. In 1985 a new provision stating that custody implies an obligation to protect the child against physical violence and mental cruelty and other kinds of humiliating treatment was enacted\(^43\).

The social welfare law says that all people have a duty to report to the city council if a child is being neglected or humiliated by parents or others who raise the child or if a child is otherwise living under circumstances that are threatening to her or his health or development\(^44\). Furthermore, the city council has a general obligation to keep an eye on the conditions in which children are living\(^45\) and if the city council somehow learns about violence against the child it has to take action.

It is felt that children are the victims of Domestic Violence. Domestic Violence may be of many kinds but generally cases of sexual abuse of children come\(^46\) to the court and the abuser is generally either the biological father or the stepfather of the child. A biological relationship demands a more severe penalty than other relationships\(^47\). The abused child is considered as a crown witness and he or she has a right to a lawyer\(^48\).

\(^{42}\) Minor's Act Section 10, Custody Act, Section 9
\(^{43}\) Minor's Act Section 7; Act on Custody & Access, Section 2.
\(^{44}\) Social Security Act, Section 20.
\(^{45}\) Social Security Act, Section 32(1).
\(^{46}\) The Social Service Act, Section-12.
\(^{47}\) Criminal Code Sections 210, 222, 223
\(^{48}\) Administration of Justice Act, Section 741(a)(1).
Then there is an Act called Social Welfare Act, 1992. Many changes were brought in and still the debate is going on. There is compulsory removal of the child if there is insufficient caring or treatment of the child; violence or other serious excesses; abuse problems, and other problems affecting the child.

Thus Danish law is striving for achieving that what makes a child to be born as a loved and wanted human being to parents who emotionally can and will fulfil the task of bringing him or her to adulthood.

2.11. Norway

In the progressive European Countries there was a show process in granting full family rights to illegitimate children. It remained for Norway, in the so called Children's Rights Laws of April 10, 1915 to take the initial step towards putting illegitimate children on an equal footing with legitimate issues. The Norwegian Statute, among other subject matters, enacts that a child whose parents have not entered into marriage with each other has a right to the family name of both father and mother, the right to inherit from both and from their relatives as if born in wedlock and a claim on whichever of the parents has the care of it to maintenance and education in the same manner as if it were legitimately born.49

According to the children's Act 34, married parents have joint parental responsibility, while if the parents are not married, the general rule is that the mother has sole responsibility.50

Where the parents are married at the time of the birth of the child, it is assumed that the mother's husband is the father of the child.51 The child can, however, at any time bring a paternity action to either confirm or challenge the presumed paternity. There are various provisions in the children's Act governing the procedure for establishment of paternity.

50 The Children's Act § 35.
51 The Children's Act § 3. Para 1.
Where the parties are not married, there is no presumption of paternity—the man must acknowledge paternity. He may do so at the registration of birth or by reporting it (even before the birth of the child) to the National Population Registrar, to the Collector of Maintenance and Alimony, the county governor or to a judge. It is the child's interest that paternity must be established. If it does not follow from marriage or from recognition, it must be established by court decision by a paternity declarations issued by the authorities (The children's Act 11&13).

The children's Act contains principal provision on the substance of parental responsibilities. The rule entitles the child to physical and mental care, supervision, security, understanding of his or her special needs and capabilities, as well as to upbringing and education. In the event of gross neglect of duty of maintenance a prison sentence of up to two years may be imposed on the parents.

Thus, irrespective of the status of child, whether the parents are married or unmarried at the time of its birth, the best interest of the child is the main concern of law.

It is worth mentioning that the legal foundation where children are concerned, is to be found in the two Acts of 1956, "Act relating to children born in wedlock" of December 21 No:9 an "Act relating to children born out of wedlock" of December 21 Na: 10 and these two Acts were consolidated in one Act in pursuant to the draft bill prepared by the committee appointed in 1975 and its report appeared in 1977 in Norwegian Public Reports.

Thus, the Act does not distinguish between the marital status of the parents and the provisions have been designed to apply to all children. They shall have the same rights irrespective of the marital status of their parents. It seems that the legal attention is shifted from marriage to the child itself. The child is the center of attention.

52 Ibid., § 4.
53 Ibid., § 30.
54 Penal Code § 219.
AFRICAN COUNTRIES

2.12. South Africa

To start with, the children's Act, 1960 governed the status of children. Until 1961 there was a limited prohibition on marriage between collaterals by affinity. A man, for example, could not marry the sister of his former wife during the lifetime of his former wife. Intercourse between the two was incest. But after the death of the former wife, marriage becomes permissible. This prohibition was lifted in 1961. But the problem was still there as to whether "incestuosi" whose parents married before 1961 but after the death of the former wife and those whose parents married in response to the lifting of prohibition whether or not the former wife was deceased were legitimated per subsequens matrimonium.

The Children's Act 1960 was replaced by The Child Care Act 74 of 1983 which came into operation on February 1, 1987. It brought far-reaching provisions for the removal of children to places of safekeeping and heralded important changes concerning adoption.

This was supplemented by Intestate Succession Act 81 of 1987 which came into force on March 18, 1987 which made clear the rights of the adopted son to intestate succession to the parents and the relatives of the adoptive parents.

But the Children's Status Act 82 of 1987 which became effective on October 14, 1987, as hoped, did not remove the distinction between legitimate and illegitimate children but instead it changed the label describing these children as "extra-marital." Nevertheless, several important matters pertaining to children born out of wedlock and those of voidable marriages were regulated. Now Section 4 of the Children's Status Act provides that the marriage of the natural parents of a child always legitimates the child. Thus the doctrine of subsequens matrimonium without restriction is adopted.

There was a Guardianship Act by which a father is the guardian of the legitimate child and mother is the guardian of illegitimate child. The guardianship Act 92 (1993) changed the previous law by which father and mother both were considered as natural
guardians and whereas the mother being the guardian of illegitimate child maintained the status quo.

Section 6 of the Children's Status Act makes it clear that annulment of a voidable marriage does not render a child born during it illegitimate. The provision in the Divorce Act and the Mediation in certain Divorce Matters Act apply "mutatis mutandis" as if the proceedings for annulment were proceedings in a divorce action.

So in South Africa the concept of subsequent marriage legitimates the child and child of voidable marriage is legitimate. But the distinction is still there socially.

2.13. Kenya

There is a distinction between the illegitimate and legitimate children as is manifest in the Law of Succession Act. It is said that so called legitimacy of offspring's is important for inheritance purposes. Children born outside legally recognized marriages are at a disadvantage not only with respect to support and maintenance, but also with respect to inheritance from their putative or natural fathers. In a society where private property is the cornerstone of the social structure, inheritance is a vehicle for the perpetuation of the system. "Illegitimacy" is used as a pretext for males to escape social accountability for children they have fathered by failing to recognize such children in accordance with the law of Succession Act. So the new law of Succession Act has now a provision governing legitimation and their inheritance.

In addition to the provisions in the law of Succession Act, a child who is not the issue of a marriage may be legitimated by "legitimatio per subsequent Matrimonium" provided certain procedural requirements are fulfilled. There is another method of rebuttable presumption of legitimacy where a child is born of a woman who is married or within 280 days after the dissolution of her marriage provided the mother remains unmarried.

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58 Legitimacy Act, Laws of Kenya Ch. 145 §§ 3,4.
59 Evidence Act, Laws of Kenya Ch. 80 § 118.
Under most traditional laws, which are steadily being eroded by modern changes, the incidence of illegitimacy was very minimal. This was because of social practices according to which children born to married women were considered to be legitimate, irrespective of who the real fathers were; where there was uncertainty, such children were accepted upon performance of certain ceremonial rites where, however, children born to a married woman were not accepted by the woman's husband, the woman's parents normally accepted and adopted them. Children born of single mothers were either accepted or adopted by putative fathers or subsequent husbands of such mothers or by the mother's parents.

If still dispute about paternity arises, the courts resort to blood tests, which the Kenyan Courts follow by virtue of the Act.

As aforesaid the New Law of Succession Act which became operative on July 1, 1981 defines children of a deceased person as:-

(a) those conceived but not yet born (as long as they are subsequently born alive) and

(b) in relation to a female person, a child born to her out of wedlock, and (c) in relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

(c) In relation to a male person, a child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.

Children falling under this definition are entitled to inherit from their legal and / or natural parents, without discrimination as to sex or social origin. Such a child is designated as "dependent" and may in that capacity apply to the court for the variation of any will or gift made in contemplation of death by the parent or parents or of any

60 Gutto- The Status of Women (57).
61 Judicature Act-Laws of Kenya § 3(1).
provision of law relating to intestacy, should the same not make reasonable provisions for him or her\textsuperscript{62}. 

For both testate and intestate succession, then, subject to the limitation indicated above, the law requires that adequate provisions be made for biological children whether legitimate or illegitimate. 

Parents by virtue of their status qua they are responsible for providing material and emotional support for their children. Failure to do so may incur criminal sanctions\textsuperscript{63}. The children and Young Persons Act provides a penalty for natural parents and guardians who fail to take proper care of their children or wards\textsuperscript{64}. 

Besides, there are many other provisions like, the Subordinate courts (Separation and Maintenance) Act, Matrimonial Causes Act, Guardianship of Infants Act, Adoption Act, which have provisions governing the children. In Kenya though there still is shown distinction, the child is being seen as a human being and the stress is on the child. 

2.14. Congo 

Non-discrimination is based on principles of the Constitution. Article 11 of the constitution speaks of equality before law. Any act which grants privileges to citizens or limits their rights because of differences of race, origin or religion violates the constitution and is punishable in accordance with law\textsuperscript{65}. There is also a provision in the Constitution that parents have vis-à-vis their children born out of wedlock the same obligations and rights as they have vis-à-vis their legitimate offspring\textsuperscript{66}. 

In addition to these constitutional provisions, there are statutory provisions which give guidelines for education\textsuperscript{67}. Article 1 of this Act stipulates that every child living in Congolese territory without distinction as to sex, race, creed, opinion or wealth, has 

\textsuperscript{62} New Law of Succession Act §§ 25, 31 
\textsuperscript{63} Penal Code § 216 
\textsuperscript{64} Laws of Kenya Ch. 141, § 19, 23(1). 
\textsuperscript{65} Art. 11 of the Constitution 
\textsuperscript{66} Art. 19 of the Constitution 
\textsuperscript{67} Art No: 32-65, August 12, 1965
the right to an upbringing which will ensure the full development of his intellectual, artistic, moral and physical capacity and of his civic and vocational training.\(^{68}\)

Determination of paternity is governed by Article 312 and subsequent articles of the civil code inherited from the time of French Colonization which provide for a presumption of legitimacy for marital children, recognition (acknowledgement of ex-nuptial children) and the legitimation by the subsequent marriage of the parents of recognized children born out of wedlock. The code says, "The child conceived during the marriage has for father the husband.\(^ {69}\) According to this Article there is provision to disown the child if he proves that during the period from 300th to 180th day prior to the birth of the child, he was in a position of "Non Access" to the wife.

There are two instruments governing the right to inheritance. The first is Mandel Decree\(^ {70}\), which is based on the custom of the parties. In case of the deceased, the custom of the deceased shall apply in matters of inheritance. The second is Decree No: 69-190\(^ {71}\) which fixes the modalities of distribution of a deceased's estate. Article 2 of the said instrument provides that the successors in title shall be:

(a) the spouse or spouses not divorced or separated;
(b) the dependent children as defined by the regulations in force (including recognized natural children and adopted children);
(c) the child or children born alive within 300 days from the death of the head of the family.\(^ {72}\)

In addition there are provisions governing parent's obligations and rights. As regards the physical care it is governed by Art 203 of the 1959 issue of the Civil Code. Article 382 of the same code provides that the expenses of maintaining and bringing up minor children shall be borne by the father and mother and such ascendants as may be required to provide subsistence. Thus the parents are primarily responsible for the

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\(^{68}\) Ibid., Art. 1.
\(^{69}\) Code Civil Art. 312
\(^{70}\) Mandel Decree May 29, 1936 Art 51
\(^{71}\) Supplementary Decree No: 69-190, April 17, 1969
\(^{72}\) Ibid., Art. 2.
physical care, upbringing and support and maintenance of their children\textsuperscript{73}. Children means and includes recognized natural children and adopted children. There is compulsory declaration at the birth of the child in terms of 55 & 56 of the Civil Code failing which the person responsible for making declaration can be subject to imprisonment and the imposition of fine\textsuperscript{74}.

2.15. Mozambique

To know about the Mozambican child we have to look to the Domestic Legislation including the new Mozambican Constitution and the Mozambican Declaration of the Rights of the child. The children's rights are put into three categories i.e. political, economic and social rights.

Under political rights there is a guarantee of equal protection irrespective of race, religion, ethnic origin, age etc. The statement of equal protection can be seen in Law 2/77 of 27 September 1977 which instituted Uniform and non discriminatory criteria for health and medical assistance; in law 4/83 of 23 March 1983 which introduced the national education system and defined the fundamental principles of its application; in Resolution 23/79 of 26 December 1979 in which the principle of equal rights for all children was provided.

Equal protection is a constitutional principle. It ensures that in the Republic of Mozambique all citizens enjoy the same rights and are subject to the same obligations, regardless of color, race, sex, ethnic origin, place of birth, religion, level of education, social position, civil status of parents or profession\textsuperscript{75}.

Article 56 (4) of the Constitution restates this principle and further establishes that a child may not be discriminated, against, especially on account of his birth. Art 56(2) (3) of the constitution states that the family is responsible for the harmonious growth of the child and that his or her education will be based on the principle of respect and social solidarity and this is in line with the civil code currently in force.

\textsuperscript{73} Civil Code Art 303.
\textsuperscript{74} Code Penal (1956) Art. 346.
\textsuperscript{75} Art 66 of the Constitution
Article 55 and 56 of the Constitution mandate that the State protect the family, motherhood and infancy and this is in accordance with the principle three of the Mozambican Declaration of the Rights of the child. It means: "You have a right to live in a family .......... when you do not have a family, you have the right to live with a family that will love you like a son or daughter."

Principle Four of the said declaration states that the responsibility of the family towards child is: "You grow up strong and healthy, you have the right to be fed, sheltered, dressed and educated by your family.

Articles 1576 and 1578 of the Civil Code consider the parents to be one of the sources of legal family relations. Thus according to Article 1801 of the Civil Code the children born into a marriage are, as a rule, presumed to be the legitimate children of that family group. Children born outside of the legally recognized family can formally obtain this right through adoption procedures and / or investigation of the illegitimate paternity or maternity. Guardianship and adoption are the legal mechanisms available to guarantee orphaned or abandoned children's integration into family atmosphere.

EUROPE

2.16. France

The doctrine which gave birth to the French Revolution proclaimed, "That all men are equally free and Independent." The first thing which the Convention did after the French Revolution was to uplift the illegitimate child. The law of "12 brumaire, II" with the exception of adulterine children, put all illegitimate children at par with legitimate children, with equal right of maintenance and succession and with equal status in the family. The adulterine children were given full rights of maintenance.

77 Civil Code Articles, 1827, 1845, 1857
79 Dr. Paras Diwan, Children and Legal Protection, page 35.
and were entitled to 1/3 of what they would have got had they been legitimate children. The parents were free to make any gifts to them. But these illegitimate children are permitted, after compelling legal recognition by a court proceeding, to inherit 1/2 of the share to which a legitimate child would be entitled if the parents have also legitimate issues, 3/4 if there are only relatives other than descendants and whole of the inheritance if there are no other heirs.\(^{80}\)

No doubt the illegitimate child was legitimated but the distinction is kept. So the French Civil Code relegated the illegitimate child to an inferior legal position though filiations or recognition raised their status to almost legitimate children.

### 2.17. Germany

The German Civil Code provides that the illegitimate child has, in relation to the mother and to the relatives of the mother, the legal position of a legitimate child.\(^{81}\) The Status of legitimacy may be conferred by government declaration.\(^{82}\) Apart from this, if parenthood is established by judicial decree or by voluntary recognition, the child has the right to support and maintenance.\(^{83}\) The father is bound to support the child till the completion of sixteen years corresponding to the conditions of the mother in life.\(^{84}\) The father's duty to provide maintenance precedes that of the mother.\(^{85}\)

### 2.18. Spain

Under the Spanish Civil Code, all illegitimate children, where the paternity or maternity is sufficiently established, have a right to support and natural children who are defined as those born out of marriage of parents who, at the date of conception of the child, could have married with or without dispensation, receive, if recognized by

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80 Carpentier, Code Civil (Paris 1914) §§ 340, 341, 756-764 referred in current legislation
81 Civil Code Section 1705
82 Ibid., Section 1723
83 Ibid. Section 1717, 1718.
84 Loewy-Civil Code of the German Empire (1909) § 1708
85 Ibid., Section 1709
either parents, the right to bear that person's name and rights of inheritance corresponding broadly to those of the legitimate issues.\(^{86}\)

2.19. Switzerland

In Switzerland children born in breach of marriage or in incest may not be legally recognized, but other illegitimates, if acknowledged by the father or successful in suit to establish the paternity, may claim from the father maintenance to the end of eighteenth year as well as a limited inheritance from him; and if it is established that the father promised marriage to the mother, or was guilty of a misdemeanor as to her at cohabitation, or abused his power over her, the child may claim the father's Civil Status including his family name and domicile.\(^{87}\)

However, the 1976 reform of the Civil Code provisions dealing with the child parent relationship tried to put on equal footing children born from married parents and children born out of wedlock. This objective has not been fully realized; the later still suffer a number of minor disadvantages with respect to the former. The disadvantages especially concern the establishment of the child parent relationship, the appointment of a guardian to the child, the child's name and nationality, parental power over the child and the administration of the child property.

OTHER COUNTRIES

2.20. Greece

Children whose parents are not married are illegitimate. It is only towards their mother that they have the same legal status as legitimate children.\(^{88}\) The same legal relations bind the mother and such children as if they were legitimate and such children (son or daughter) have the right of maintenance and support and vice versa if the illegitimate child can afford to do so. The illegitimate child belongs to his or her mother's family and not to the father's even if he has recognized him or her. Such

\(^{86}\) Codigo Civil Espanol Arts 114, 119, 134, 139-143, 840-847.

\(^{87}\) Shick-Swiss Civil Code of Dec. 10, 1907 (1915) §§ 303, 304, 307-327

\(^{88}\) Civil Code Art 1530.
child inherits from the mother and her relatives as if he or she were a legitimate child but never inherits from the father's relatives.

If the illegitimate child is not recognized by his or her father he or she is not considered to be that man's child. If so recognized on the father's own volition (voluntary recognition) such child is deemed, in most respects, a legitimate child vis-à-vis that father 89.

He or she receives the father's surname, citizenship, and registration but not his residence 90. He or she has a right to maintenance and education as well as to dowry, if such child is a girl to be married or already married. However, the illegitimate child, even if recognized voluntarily, when a co-distributee of the father's estate with legitimate children of that father or with such father's parents or surviving spouse inherits one half of the share to which a legitimate child is entitled91.

When an illegitimate child is recognized involuntarily by the father by virtue of a judicial order, he or she only acquires the right of maintenance from him92.

A child born as a result of rape, as a result of abduction, or any other sexual offence, or the mother of the child was under the father's tutorship or had any dependence on him, the illegitimate child has all the rights and obligations of a legitimate child with respect to his or her father except that such rights as are covered under Article 153993.

The determination of paternity of the child is governed by Articles 1465 1,2 and 1466,1471.

2.21. Israel

Israel Law does not distinguish between children born out of wedlock and those born in wedlock. The legal status of the child is not dependent on whether or not the

89 Ibid., Art. 1537.
90 Ibid., Art. 56 § 3.
91 Ibid., Art. 1539
92 Ibid., Art. 1545
93 Ibid., Art. 1555
parents are married to each other\textsuperscript{94}. Israel law, therefore, rejects the distinction between "legitimate" and "illegitimate" children. In this respect, Israel law follows the traditional law, which also makes no such distinction.

However, there does exist to some extent a distinction. In a sense, those children who are born to parents in a situation where their relation was forbidden either on grounds of incest or because the woman was legally the wife of another man, such children are called "mamzer." A mamzer shall not enter the congregation of the Lord\textsuperscript{95}. Which has been interpreted to mean that mamzerim are restricted to marrying other mamzerim or converts to Judaism.

The possibilities of proving the mamzer status of a person are extremely limited and the judicial trend is in favor of legitimacy. Since Jewish Law applies to marriage of Jews Israelis in Israel, the status of being a mamzer in Jewish law will affect the person's right to marry in Israel. However, it must be emphasized that this is the only legal discrimination against such a person. All his other rights are absolutely equal to those of all other children.

The approach of Israeli legislation to a child's rights is to ignore the circumstances of the child's birth. From the perspective of this legislation, the determination of a child's paternity constitutes the determination of a biological fact only. Thus, for example, a father is obliged to support his child whether or not he is married to the child's mother. Similarly, a father's right to guardianship of his child and child's right to inherit from his or her father is not dependent on whether the father was married to the child's mother\textsuperscript{96}. A child born out of wedlock receives the mother's surname unless the mother desires that the child receive the surname of the father\textsuperscript{97}.

2.22. Japan

Relationships between parents and children are based either on natural blood relations or on adoptive relations. The former is further divided by the existence or non-

\textsuperscript{94}Succession Law, 19 L.S. I at 58 (1965).

\textsuperscript{95}Deuteronomy 23:3. Lectures on Holy Bible.

\textsuperscript{96}Succession Law Article (94).

\textsuperscript{97}Names Law of 1956 amended by 29 L.S. I at 185 (1975).
existence of marital relationship between parents with the consequence that a child born to them is either legitimate or illegitimate. Japanese family law places heavy emphasis on biological connections in parents-children relationship\textsuperscript{98}.

The Civil Code (Meiji-Minpo) enacted in 1898 is, with certain modifications, still in force to day. It contains two chapters on family and inheritance provisions which reflected the paternalistic "lye" (extended family) system of society at the time. However, after the IInd world war new provisions of the Civil Code came into effect in 1948, abolishing the "lye" (extended family) system. The focus of family law changed from parental "rights" to parental "responsibilities." To day it is generally said that the law of parents and children exists for the benefit of children.

Under the Civil Code a child born during marriage is presumed to be legitimate. A child born within 200 days of, or 300 days after the dissolution of marriage is presumed to be conceived during the marriage\textsuperscript{99}. This provision has two important aspects:-

(i) It is designed to establish the legal status of the child at a very early stage.
(ii) Presumption of legitimacy also applies to a child born to a married woman and a man other than her husband so long as the child is born during the woman's marriage. However, the rebuttal can be only through a lawsuit to challenge the father-child relationship.

Legal marriage is only established after registration in the Koseki (Family Registration System). The courts have ruled that where a couple fails to register their marriage dispute the fact that they have led a de facto married life, the marriage is legally effective and carries the same legal consequences as normal marriage. However; these precedents may not apply to inheritance rights or to the legitimacy of the couple's children.

\textsuperscript{98} Yukiko Matsushima, Controversies and Dilemmas: Japan Confronts the Convention-Children's Rights: A comparative study page 128.

\textsuperscript{99} Civil Code Art 772.
A child born to an unmarried couple is illegitimate. In this case a relationship between the father and the child is created either through voluntary acknowledgement by the father's registration in the "Koseki" or mandatory acknowledgement through court proceedings brought by the child or his legal guardian during the life of or within three years of the death of the father\textsuperscript{100}. A relationship between a mother and a child could also be established by voluntary or mandatory acknowledgement but the Supreme Court \textsuperscript{101} has held that the act of delivery is a conclusive fact. There is another alternative of adoption, which is of two types i.e. special adoption and ordinary adoption.

In the light of Article 2(1) Of the Convention, which prohibits discrimination against any child, in Japanese society and in its legal system discrimination still exists.

(i) In recording a child in Koseki and Jumin-hyo (resident's card) a distinction is made between legitimate and illegitimate children (although the Jumin-hyo system has been reformed very recently).

(ii) When a parent dies, an illegitimate child will only be entitled to inherit half of that to which a legitimate child is entitled.

However, the Government tried to meet the criticism but the fact remains that the distinction is still there which the illegitimate child suffers.

Not only that, in Japan the illegitimate child is socially discriminated also in respect of entry into private schools, marriage or employment opportunities. In 1979 an attempt was made to abolish the distinction but the law could not be reformed because public opinion favored the maintenance of distinction\textsuperscript{102}.

However, judicial view in terms of proviso to Art 900 (4) which speaks of illegitimate child to get 1/2 of what the legitimate child shall get was, when this

\textsuperscript{100} Civil Code Art 787.
\textsuperscript{101} Supreme Court Judgment dated 27 April 1962
\textsuperscript{102} Survey conducted showed that majority of the people is in favor of keeping intact the distinction, 48 in favor and 16 against i.e. 48: 16 or 3:1.
provision was challenged, that the distinction is constitutionally valid because its purpose was to protect legal marriage and to maintain social order.\textsuperscript{103}

However, in another case on 23 June 1993 the Tokyo High Court held that Proviso to Art 900 (4) is unconstitutional; reasoning based on the touchstone of equality and dignity of the individual and relied upon the Constitution of Japan and International Convention of 1989.

However, the Judgment \textbf{of Supreme Court on 5 July 1995} reversed this judgement by the majority of 10 to 5 taking the stand that the distinction is based on reasonable grounds. This decision has put a spoke and discouraged the trend of reforms.

\textbf{LATIN AMERICA}

\subsection*{2.23. Argentina}

Legislative improvements in the situation of children in their families have been a notable result of the establishment of democracy in Argentina since 1983. Concern for children's rights is part of the process of democratization as seen in the field of Family relations within the philosophy of the protection of human rights which may not also be violated by Governments but may also not be endangered within the privacy of the family and in other aspects of daily life. Several provincial constitutions enshrine the various rights of children to life, sufficient food, health, identity, education and recreation\textsuperscript{104} and likewise in 1985 reform of the law of filiations and paternal authority raised the status of child\textsuperscript{105}. Argentina has abolished one form of discrimination which gave greater rights to children of a marriage than to those born out of wedlock. Regardless of the status of their parents, all children have equal rights of filiations to both parents. Likewise, marital, extramarital and adoptive filiations have the same effect\textsuperscript{106}.

\begin{thebibliography}{9}
\bibitem{footnote1} Judgement dated 29-3-1991 Tokyo High Court
\bibitem{footnote2} Among these are Catamarca, Salta, Rio Negro, Tierra del Fuego
\bibitem{footnote3} Law 23. 264.
\bibitem{footnote4} Cecilia Grosman-Argentina-Children's rights in Family relationships: The Gulf between law and social reality-Children's Rights-A comparative study page 12
\end{thebibliography}
Maternity, in out of wedlock, is fixed by birth, with no requirement of an act of recognition. The mother's rights and duties attach by operation of law. All children, whatever the status of their parents, have equal rights and all can claim filiations on the paternal side without restrictions.

Treating the child as one's own, by caring, feeding, bringing up as a "child of the family" are equivalent to express recognition, in the absence of proof that there is no biological relationship analogous to the presumption raised by marriage, the fact of cohabitation with the mother in the conception period establish paternity, unless, of course, it is proved that there is no biological relationship. Article 240 of the Civil Code has removed all legal distinctions between children born in or out of wedlock.

However, when mother has no evidence to prove paternity and relies only on biological tests and the man refuses to undergo the test, the court has taken more drastic position affirming that refusal to undergo biological tests can raise a presumption of paternity which may only be rebutted if the defendant proves that he is not the child's father.

Another court held that a person cannot refuse biological tests on grounds of privacy, physical inviolability, control of one's own body or personal freedom since the child's rights to have his paternity determined and know his origin overrides those other rights.

Article 258 and 259 CC gives a right to the child to know his filiations and has a right to challenge in the court. Thus along with mother, child has also been given the right to seek redress in the matter of filiations.

In spite of this in Argentina, the children are abandoned and they are without family support. Social paternity is still undervalued and adoption is a matter of fear and shame.

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107 Civil Code Art 256.
108 Ibid., Art. 257.
109 Camara Nacional Civil dela Capital, Sala M 8/6/93. La Ley review 14 January 1994, Page 44.
110 Corte Suprema Pcia. De sunta Fe. 19/9/92 La, ley review 8 October, 1992, page 112.
Now the Convention of 1989 and express recognition of the paramountcy of the child's interests as a principle in Argentinean laws, the State must come forward to the rescue of the child where its identity or support is threatened and also to look to the interest of the family as a whole.

2.24. Mexico

The Code provides for children born of marriage and under Article 59, there must be registration of the parent's names, residence and nationality, the grand parents names and residence as well as the names of persons who have made the presentation\textsuperscript{111}. The code does not establish the baptismal name or the parental and maternal family names, other than speaking of the names of parents and of grandparents and of the persons milking the presentation. The law does not refer to the child who is being registered as the child of the marriage.

Then there is a process of Filiations Article 58 of the Civil Code provides "If any such (sic) is presented as the child of unknown fathers, the Judge of the Civil Register will impose a name and forenames and register the fact that he has done so \textsuperscript{112}.

Children of unknown mothers are governed by Article 60 "If, on the presentation of the child the mother's name is not given, the register will record that the one presented is the child of an unknown mother, but the investigation of maternity can proceed before the courts in accordance with the provisions of this code \textsuperscript{113}"

Article 62 of the Federal District Civil Code refers to adulterine children, "In the case of child of adultery, the name of the father, married or single, may be registered at his request but the mother's name cannot be registered when she is married and residing with her husband, unless the latter has disavowed the child and there is a court order declaring the child not to be his\textsuperscript{114}.

\textsuperscript{111} Guttron Fuentevilla act 61
\textsuperscript{112} Civil Code of Mexico 24
\textsuperscript{113} Ibid., Loc. ci t.
\textsuperscript{114} Ibid., Loc. cit.
Article 64 provides for the recognition of children of incest. However, "genetic parents recognizing the child have the right to have their names included in the register but it shall not there appear that the child is the result of incest."

Similarly, there are provisions governing affiliation of foundlings and orphans (Article 56) and children born in prison (Art. 66).

Article 77 orders, "If the father or mother of a natural child, or both of them, present him for registration of his birth; the act of registration shall produce all the effects of legal recognition in relation to the presenting natural parents."

If parents marry after having a child, they can legitimate child. Article 355 provides. "So that the child will enjoy the rights conferred on him by the preceding Articles—that he be treated as though born in lawful wedlock—the parents must expressly recognize him before the celebration of the marriage, in the act of registration of the marriage or during the celebration of the marriage itself and in any case the recognition must be by both parents jointly or separately."

Likewise there is a form of recognition for children born out of wedlock. This can be performed by the father or the mother or by both. To this effect Article 366 provides, "recognition on the part of one of them produces legal effects in relation to that parent and not in relation to the other."

Article 383 provides, "Children are presumed to be those of the couple living in cohabitation if:-
(i) They are born more than 180 days after the start of cohabitation
Or
(ii) They are born less than 300 days after the cessation of the living together of the couple in cohabitation."

115 Ibid., Loc.cit
116 Julian Guttron Fuentevilla-2, Article 355 of Mexican Code
117 Article 354
118 Federal District Civil Code, article 383.
The Code also provides for children born of marriage and under Article 59 there must be registration of the parent's names, residence and nationality. Thus registration of the child is mandatory.

The most important article is 389. It relates to children who have been recognized i.e. who are not of the marriage. Article 389 says, "A child recognized by his father, by his mother or by both has the right:-

(I) To bear the paternal family names of each of his natural parents or the two family names of the one who recognized him.

(ii) To be maintained by those who recognize him and.

(iii) To inherit the portion and to receive maintenance fixed by law.

Columbia Regarding birth status, every child whether born in or out of wedlock is entitled to the care and assistance of the Columbian State, which "will eliminate all forms of discrimination in the legal regime of the family and all distinctions of inferiority among children" child born out of wedlock is called a natural child and has the same prerogative as a legitimate (one born in wedlock) child, except with respect to inheritance. The ex-nuptial child receives one half of the share of a legitimate child, without prejudice to the spouse's share

A child conceived during the marriage of his or her parents is a legitimate child. One who is born after one hundred eighty days have elapsed after the marriage was contracted is deemed conceived in the marriage and has the husband as a father.

This presumption is rebuttable on the doctrine of "No Access" ven if it is a case of adultery; he husband cannot take the stand of not recognizing the child as his own son unless he proves that it is on account of adultery. Further, so long as the husband is alive no one can contest the legitimacy of a child conceived during the marriage, except him.

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119 Ibid Art 4
120 Law 45, 1936 on Civil reforms (filiations) Articles 1, 18.
121 Civil Code, Art 213.
122 Ibid., Art. 214.
123 Ibid.
124 Ibid, Art. 215
125 Ibid., Art. 216
A child born of parents who at the time of conception were not married to one another is a "natural child" whenever he has been recognized as such or declared as such. He also has this capacity with respect to a single or widowed mother merely by virtue of birth.\textsuperscript{126}

2.25. Columbia

Law provides that every child has the right as to his birth, to a name, nationality and right to know the identity of his or her parents and it is the duty of the State to provide opportunity to ensure responsible parenthood.\textsuperscript{127} The recognition of no marital children is irrevocable and can be affected.\textsuperscript{128}

The Columbian Law 75 of 1968 known as the responsible paternity law created a Colombian Family welfare institute and by virtue of this law, various procedures and alternatives were laid down for the filiations and presumption of natural paternity.\textsuperscript{129} The said law further speaks of right of the child of physical care and upbringing, support and maintenance, moral and intellectual development and socialization to legitimate and natural children.\textsuperscript{130}

\textit{(U.S.A.)}

2.26. United States of America

The laws of the different States differ widely as to the status and rights of illegitimates. Most, if not all, of the States enacted statutes mitigating more or less the rigors of the common law and conferring rights which that law denied and the general tendency seems to be one of increasing liberality.

The first question that arose was as to whether the words such as "child", "children," "Blood relatives," "issue," "heirs" dependents etc as used in statutes, wills, Deeds and other .instruments also include "illegitimates." While the judicial decisions are not wholly uniform upon this question, it may be said in general that in most jurisdictions

\begin{itemize}
\item \textsuperscript{126} Law 45, 1936, Art. 1.
\item \textsuperscript{127} Law 7, 1979, Art. 5.
\item \textsuperscript{128} Law 75,1968 Art. 1
\item \textsuperscript{129} Ibid., Articles 2,3,6,11
\item \textsuperscript{130} Decree 2820,1974 and various provisions of civil code and Law 75,1968
\end{itemize}
when the word "child" or "children" used in a statute (unless the statute clearly reflects the contrary) it means a legitimate child or children.

The issue of a valid marriage, of course is legitimate. At common law the issue of a void able marriage is considered legitimate\(^{131}\). But the issue of an illegal or void marriage is illegitimate\(^{132}\).

The rigor of this rule has, however, been relaxed by Statute in many jurisdictions which make the issue of void marriages legitimate\(^{133}\) though they sometime, except certain void marriages from their operation\(^{134}\).

Many States have adopted legislations providing for the legitimation of illegitimates by the subsequent marriage of their parents or by an acknowledgement made in public or in writing by the father. There are some statutes which do not purport to legitimate the persons to whom they relate but only to enable illegitimates to take by inheritance. In some jurisdictions the legitimation of a natural child may be sought by petition in judicial proceedings. The prayer may be both for legitimation and adoption\(^{135}\) and in such cases the court may; if such a cause is proper under the facts, render a decree for adoption with capacity to inherit without legitimating the child.

In many jurisdictions, statutes provide that legitimation of the illegitimate child be effected by its recognition and acknowledgement by a putative father. The effect of the legitimation of such a child largely depends upon the terms of the Statute under or by which the legitimation takes place i.e.

(i) Right to custody of child
(ii) Right to take under devise or bequest to children
(iii) Right to inherit.

\(^{131}\) Hynes v Mc Dermott 91 NY P 379; Sneed v Ewing S.J.J. Marsh (KY) 460.
\(^{132}\) Evatt v Miller 114 Ark 84.
\(^{133}\) Mund v Rehaume 51 Colo 129 (incestuous marriage).
\(^{134}\) Peerless Pacific Co V Burckhand 90 Wash. 221.
\(^{135}\) Murphy v Partrum 95 Tenn 605
Some of the Statutes provide that on the fulfillment of the requirements enumerated therein the illegitimate child shall become, for all purposes, legitimate from the time of its birth. They are construed to put the child at par with children born in wedlock.

A Statute may, however, make an illegitimate child legitimate only to limited extent. In such case the child and father relationship shall consist of rights, duties and obligations as if the child is born in lawful wedlock. Such a statute does not render the child capable of inheriting as the legal representative but only legitimates it with respect to the father.

The severity of the common law rule regarding the right of illegitimate has led to the passage of Statutes in many jurisdictions modifying it or abrogating it completely. These statutes rest upon the principles that the relationship of parents and child ought to produce the ordinary consequence of consanguinity and that it is unjust to punish the offspring for the offence of the parents.

Due to Federal setup of U.S.A., we had taken a general view of the law as prevailed in different federal States which differed from State to State in some respect or the other depending upon the nature of the social moorings therein.

In the earlier stages, there came a statute called Uniform Illegitimacy Act which included substantially the provisions of most "illegitimacy" legislation up to that day, but it was adopted in four states only. This law was taken in narrow sense by which it dealt exclusively with the compulsory support of the child. Section 1 lays down the morally obvious proposition that the parents of the child born out of wedlock owe the child necessary maintenance, education and support and also imposes on the father a liability to pay the necessary expenses of the mother's pregnancy and confinement.

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136 Blythe v Ayres 96 Cal. 532.
137 Brisbin v Huntington 128 Iowa 166.
138 Pfeiffer v Wright 41 F 2d 464; Hardesty v Mitchell 302 Ill 369; Morrow v Morsow 289 ill 135; Wilson v Bass 70 IND APP. 116.
139 Brewer v Blougher 14 Pet (U.S.) 178.
Another noteworthy provision is Section 35 under which the relation of the mother and the child shall not be described in public records in such terms as to make the illegitimacy obvious. Though this Enactment is a well-drawn Statute but it is restricted in scope of bastary proceedings and did not incorporate provisions of many radical statutes\textsuperscript{141} of other States then in force.

Although not properly classified as "Legitimation" statutes, the provision in Arizona and Oregon deserve special attention due to the sweeping nature of their application. Ariz. Rev. Stat. Ann § 14-206 (1956)

**Legitimacy of children; power to inherit**

(A) Every child is the legitimate child of its natural parents and is entitled to support and education as if born in lawful wedlock except that he is not entitled to the right to dwell or reside with the family of his father, if the father is married.

(B) Every child shall inherit from its natural parents and from their kindred heir, lineal and collateral, in the same manner as children born in lawful wedlock.

(C) This Section shall apply although the natural father of such child is married to a woman other than the mother of the child as well as when he is single (Emphasis added\textsuperscript{142}).


**Legal status and legal relationships when parents are not married**

The legal status and legal relationships and the rights and obligations between a person and his descendants, and between a person and his parents, their descendants and kindred, are the same for all purposes, "whether or not the parents have been married" (Emphasis added).

A far more common statutory provision may be found in States which have adopted the Civil law concept of legitimation per subsequens Matrimonium. With the

\textsuperscript{141} Ariz Laws 1921 C 114 Section 1; Iowa Compo Code (1919), S. 7916; Oregon, Laws (1920) S. 2563.

\textsuperscript{142} Indian Law Journal Vol. 36 (1960-61)-Legitimate children and conflict of laws.
exception of Kansas, Arizona and Oregon where such a statute is not necessary, all fifty states have such a statute and these statutes may be categorized according to the presence or absence of the requirement of acknowledgement. Some states require only subsequent marriage, others requiring marriage plus acknowledgement of paternity. The former is the Wisconsin legislation and latter is the Illinois legislation.


In any and every case where the father and mother of an illegitimate child or children shall lawfully intermarry ..... .... such child or children shall thereby become legitimated and enjoy all the rights and privileges of legitimacy as if they had been born during the wedlock of their parents ............

**III. Rev Stat Ch 3 § 163 (1959)**

An illegitimate child whose parents intermarry and who is acknowledged by the father as the father's child shall be considered legitimate. However, acknowledgement procedure is different in different states. There are some twenty states in this category having different forms of acknowledgement and provision governing inheritance also differently. One of the illustration of inheritance is given below:-

**Cal. Prob Code § 255**

Illegitimate children, inheritance rights, limitation.

Every illegitimate child is an heir ............... of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father by inheriting any part of the estate of his father's kindred, either lineal or collateral, unless before his death, his parents shall have inter-married and his father, after such
marriage acknowledges him as his child or adopts him into his family; in which case such child is deemed legitimate for all purposes of succession (Emphasis added\textsuperscript{143}).

There are statutory and constitutional provisions that have taken care of the discrimination against the illegitimate child. There is \textbf{Uniform Parentage Act promulgated in 1973} and this model Act has been enacted in part or full by only sixteen states from 1980 to 1988.

The Act requires that a child whose parentage is in question be joined in any legal proceedings addressing parentage and if a child is minor he or she be represented by a guardian\textsuperscript{144}. The appointed guardian would look out for the best interest of the child and guard against any abuse of the judicial system by the mother\textsuperscript{145}. By this, it is not only best for the child but also for the putative father. A paternity determination should provide putative fathers with some assurance of finality.

Then there is a constitutional provision of "\textbf{Equal Protection Clause}" of the Fourteenth Amendment, which has greatly asserted its impact on the treatment meted out to illegitimate children.

Discrimination against children on the basis of "illegitimacy' is not explicitly prohibited by constitutional or statutory law. However, in a series of decisions the United States Supreme Court has struck down as violation of the "\textbf{Equal Protection Clause}," state laws which have discriminated against the children of unmarried parents by denying them the right to parental support\textsuperscript{146} Public assistance\textsuperscript{147} the right to sue for wrongful death of a parent\textsuperscript{148} as well as worker's compensation\textsuperscript{149} disability insurance\textsuperscript{150} and certain social security benefits\textsuperscript{151} from their parents.

\textsuperscript{143} Ibid., III Gutron Fuente villa at 61.
\textsuperscript{144} Uniform Parentage Act § 9, 9 B U.L.A. 312 (1987).
\textsuperscript{145} Ruddock v Obis 91 Cat. App. 3d 271.
\textsuperscript{146} Gomez v Perez 409. U.s. 535 (1973).
\textsuperscript{148} Levy v Louisiana 391 US 68 (1968).
\textsuperscript{149} Weber v Actna Casualty & Surety Co 406 U.S. 164 (1972).
\textsuperscript{150} Jimenez v Weinberger 417 U.s. 628 (1974).
Even many states have adopted the language of Uniform Parentage Act which provides: "The parent and child relationship extends equally to every child and to every parent regardless of the marital status of the parents."\(^{152}\)

Illegitimacy is not the result of a child's own action. Laws that discriminate against the illegitimate child do so upon his or her status. Therefore, the Supreme Court has held that laws may discriminate against illegitimacy only when the laws substantially relate to an important Government interest.\(^{153}\) The weight of that interest has been the center of much constitutional litigation. While examining a statute that discriminates, the Supreme Court questions whether a governmental interest justifies the classification. The Supreme Court has determined that interests that justify classification of illegitimates including promoting family life, the likelihood of dependency at death and the orderly disposition of a deceased's property.\(^{154}\) The Supreme Court has now propounded a maxim "Is the classification sufficiently related to a legitimate legislative aim?"

2.27. England

At Common law a child was only legitimate if his parents are married when he was born or conceived. A child born to unmarried parents was a "filius Nullius" or "filius populi", thereby meaning that no legal relationship is recognized with his mother, father nor with any other relatives. Hence he had no legal right to succeed to their property to receive maintenance\(^{155}\) and other benefits deriving from the status of parent and child.

In the twentieth century two separate developments mitigated the harshness of Common law. First, the definition of illegitimate was narrowed by allowing children whose parents married after their birth to be legitimated. **The Legitimacy Act 1926** allowed legitimation if the father was domiciled in England at the date of the marriage and neither party was married to anyone else at the date of the child's birth. The

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Legitimacy Act 1959 allowed a child born of adultery to be legitimated. The legitimacy Act 1976, Section 8, provided that a legitimated person should have all the rights as a legitimate one has but it did not affect honours nor dispositions made before January 1, 1976. The Legitimacy Act 1959, replaced by Legitimation Act 1976, Section 1, treated such children as legitimate provided the father was domiciled in England at the time of birth and at least one parent believed at the time of marriage that the marriage was valid. Thus some children born of void marriage were also recognized.

Secondly, rights accorded to legitimate children were extended to the illegitimates. The Fatal Accidents Legislation virtually eliminated the distinction between legitimacy and illegitimacy for the purpose of "dependency" claims brought under it and the law of inheritance was changed to enable an illegitimate child to claim under a will\textsuperscript{156} his father's intestacy\textsuperscript{157} or to seek family provision\textsuperscript{158}. This process culminated in the Family Reform Act 1987 which has, with two major exceptions\textsuperscript{159} ended the distinction between the legitimate and illegitimate children\textsuperscript{160}.

The Family Reform Act 1987. Apart from making important changes in the status of some children born as a result of AID and amending the provision dealing with children of void marriages, the 1987 Act has left untouched the basic concept of legitimacy. The only change appears to be that instead of reference to the children, reference be made to the parents. This general approach is set out by Section 1 of the 1987 Act\textsuperscript{161}.

Section 1(1) provides that references in the 1987 Act and any succeeding Act or statutory instrument to "mothers" or "fathers" or "parents" refers, unless the contrary intention appears, to all such persons regardless of whether they have or had been married to each other at any time.

\textsuperscript{156} Family Law Reforms Act 1969, Section 16
\textsuperscript{157} Ibid., Section 14 (The Legitimacy Act 1926 allowed succession under the mother's intestacy).
\textsuperscript{158} Ibid, Section 18, Inheritance (Provision for Family and Dependents) Act 1975, Sections 1, 25(1).
\textsuperscript{159} The Status of Father and the child's citizenship (which affects his rights to enter and remain in UK.)
\textsuperscript{160} S.M. Cretney and J.M. Masson-Principles of Family Law 5th Ed. 1990 page 447
\textsuperscript{161} P.M. Bromley and N.V. Lowe-Bromley's Family Law 8th Ed. 1992, Page 188
Section 1(2) refers instead to a person whose parents were not married to each other at the time of the child's birth.

Section 12 is made subject to Section 1(3) so that references to a person whose father and mother were not married to each other do not include (and correspondingly, references to a person whose parents were married to each other at the time of his birth do include) cases where the child is:

(a) Rendered legitimate by Section 1 of the Legitimacy Act, 1976 even though his parent's marriage is void, (b) Legitimated by reason of his parent's subsequent marriage, (c) Adopted and, (d) Otherwise treated in law as legitimate.

There is a criticism that law appears to be complex and it is suggested that instead the parents should have been referred as being legitimate or illegitimate or also suggested to call unmarried father or mother.  

1991 was a landmark year for child law for it was on 14-10-91 the Children Act 1989 was fully implemented (save for Section (11) & (12)). It brought about the most fundamental changes in child law and has been fairly described by Lord Mackay L.C. as "the most comprehensive and far reaching reform of child law which had come before the Parliament in living memory."  

The process began with a review of childcare law set up in 1984 and the review amongst others undertook a full-scale review of the private law. That process began with a review of the law dealing with the consequences of birth outside marriage and the resulting legislation, the family law Reform Act 1987 removed most of the remaining differences between children whose parents were married to each other and those who were not.

This Act is radical restructuring of both the Private Law and Public Law. It makes few changes in the law of Adoption but otherwise contains major innovations in all areas.


of child law. There are now, new orders, new concepts, new terminology and new principles.

The Act encompasses public childcare law dealing with services to prevent family breakdown; and with child protection; private disputes between parents about the future of their children, and children with disabilities previously provided for by Health and Welfare legislation.

Part I of the Act contains some fundamental principles. The first principle is that the child's welfare must be the "paramount consideration" of the court. There is a checklist of factors which the courts must consider before reaching a decision about a child.

A second important principle is that where a court is considering whether or not to make one or more orders under this Act with respect to a child, it shall not make the order or any of the orders unless it considers that doing so would be better for the child than making no order at all. Another principle is that it is recognized that delay in decision-making is likely to prejudice the welfare of the child. In this Act there is change in terminology used. It constitutes a shift in emphasis and perception. "Parental Rights" is replaced by "Parental responsibilities."

Part II of the Act deals with "contact order," "a residence order," "a specific issue" and "a prohibited order." It also deals with Family Assistance order. In short in this Act the whole stress is on the child.

In Re B (1992) 2 FLR 1, 5. Lord Justice Butler-Sloss Commenting on Cleveland Report said that "children are persons and not objects of concern." In Re C (1991) 2 FLR 168, it is said that even in wardship, where the golden thread is, "that the child's welfare comes first, last and all the time," the courts have found questions relating to children which are not governed by the paramountcy rule. In (1986) A.c. 112, House

166 § 1(1).
167 § 1(2). Also refer § 32.
of Lord's Gillick decision in 1985 which ruling has now statutory force in Scotland, Lord Scarman's words, "Parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision. However, the Gillick test has not worked. Rather now it is suggested that the U.S. Convention of Rights of child 1989 be incorporated into English law as Spain and Sri Lanka have done it and breach of a provision of the Convention should be an infringement of English law with all the implications that this would have. It is further suggested that U.K. should follow Norway, Costa Rica, New Zealand and Sweden which have introduced the concept of an ombudsman for children. Much is being done, has been done and much more is needed to be done so that the child be considered a person and not an object.