Introduction

Summary of the Chapter

0.0. Introduction
1.0. Origin of Concept (Status of the Child)
1.1. Middle Ages
1.1.1. English Law
1.1.2. Mohammadan Law
1.1.3. Hindu Law
1.2. Modern Time – Era of legislation
1.2.1. France
1.2.2. Germany
1.2.3. USA
1.2.4. Communist World
1.3. Concept of legitimation
1.3.1. Conferring the status of Legitimacy
1.3.1.1. Elevation of Status
1.3.1.1.1. Subsequent Marriage
1.3.1.1.2. Legitimation by Acknowledgement
1.4. Adoption
1.4.1. Hindu Law
1.4.2. Roman Law
1.4.3. Legislation on Adoption in Modern world
Chapter 1

Introduction

विवेकयोगीकल्पक्या, लघुत्तमपापिपंशतु।
आसिंचतुप्रजापिरिध्यता गर्भ दधातु ते॥
गर्भ धेहि सिनीवाली, गर्भ धेहि सरस्वति।
गर्भ ते अग्निगादेवाताध्यातं पुष्पारक्षता॥

Rigved 10th Mandal
184 Sukt

“May Vishnu (the presiding deity of ether and nerve force) expand thy uterus, may Tvashta (the presiding deity of head and metabolism) bring about the full differentiation of the limbs and the sex of the foetus, may Prajapati (the presiding deity of the ovum) sprinkle thy uterus and mayst thou conceive through the blessings of the Lord of Human destiny. May Sarasvati (goddess of intellect) and the Ashvins, the Surgeons of the gods (the presiding deity of fission) help thee in taking the seed.”

Origin of Concept [Status of child]

For any society, childhood is an opportunity through which a man attempts to realize its vision. In every religion child is considered as the incarnation of divinity and its bringing up in a congenial atmosphere is not only a social intervention or cultural reconstruction but also a religions perception and moral duty.

In the past we may discern considerable variation between and within cultures about the social image of the child, yet we cannot ignore the past that it draws its status from the parents and that natural right of the child cannot be denied.
Illegitimacy has not always been a social problem only. It has been a personal problem, a family problem, a community problem, a religion problem and a legal problem. The nation that illegitimacy is bad for society is distinct from and more recent than these other problems. There was a time, before nineteenth century, when it did not occur to middle class, educated men and women interested in questions of social and individual well being that illegitimacy had to be measured, understood or solved. People, who considered themselves respectable were, of course, concerned about the birth and legal status of illegitimate children, and disapproved of illicit heterosexual behaviour which an illegitimate pregnancy inevitable signalled. But it took a particular constellation of intellectual and political development in late eighteenth and early nineteenth centuries to make people start to think of illegitimacy as more than an individual failing or an issue of concern for the legal community, to think of it, intended as a problem of national and international significance.

The notion of birth, either legitimate or illegitimate is present in most known human cultures. However illegitimacy can mean something different, or not mean as much, to non–Europeans. Among the adult members of some contemporary aboriginal communities, it makes people shame, if an adolescent girl has a baby, but it is even more shameful for her to enter into a ‘not straight’ marriage, that is, marriage that disregards traditional cultural laws governing who may marry whom? Some mothers forbid their pregnant daughters to marry if the father is not a correct marriage partner¹, working class African-American women don’t necessarily view marriage and the stable presence of a male head –of –household, as essential to the maintenance of strong families and legal relationships.

One study found in a group of such mothers ‘an ideal’ of community based independence involving shared care giving and not-marital partnership with men². In Japan (where the category ‘illegitimate birth’ was invented only when European system of registration were introduced in 1868) it is possible to indicate that someone is the child of a concubine, but there is no equivalent of the English ‘bastered³’ Under Jewish Law, the offspring of any marriage contracted between prohibited relatives

² Joseph Jackson, Law relating to children and young persons – 1st Edition – Page 131
such as between relatives by marriage, is deemed a mamzer, or illegitimate child. Jewish law regarded extramarital (illegitimate) relationship as almost equivalent to legitimate relationships, with the acknowledgement of the father being sufficient proof of descent. A mamzer can be a bastered, but the Talmud tends to limit the term to the offspring of incest, adultery of forbidden marriage. Any child of a Jewish marriage, which is subsequently dissolved in a civil divorce, but not a religious divorce, is considered illegitimate even when the woman remarries.

Before the middle Ages, illegitimacy was not strongly associated with immorality. In ancient Roman society the terms used to distinguish between different classes of illegitimate produced legal—not moral or social categories of person, and little shame or secrecy was attached to illegitimate births. Illegitimacy primarily designated the lack of father in the eyes of law. Being born illegitimate was to exist outside, the web of family rights and responsibilities and therefore to process less then full rights to the support of a father. As the responsibility for the support of the illegitimate child in pre-Christian Rome rested with the mother or her family and not the state, illegitimacy was not viewed as a social problem. Ancient Greco-Roman Construction of illegitimacy revolved around problems of inheritance and the importance of passing on the family name through legitimate male heirs.

Middle Ages

In the Middle Ages illegitimacy was associated with both property transmission and a religious concern for purity and until the end of eighteenth century sexual practices were governed by Canonical law, the Christian pastoral and civil law. These codes determined the division between licit and illicit sexual activity. A ‘deployment of alliance ‘based on the system of rules defined what was permitted and what was forbidden. Marriage, the fixation and development of kinship ties and transmission of names and possessions were central to this alliance. Any child conceived or born as a consequence of illicit sex was not only legally problematic but inevitably tainted with his parent’s sin of debauchery. In England, the distinction between legitimate and

5 Universal Jewish Encyclopedia 1948, Page 309,376.
7 Ibid 3, 4.
illegitimate offspring was enshrined in the canon and common laws, and in provision for the poor.

The English common law and Mohammedan Law have taken to the logical end the notion that an illegitimate child has no status by calling him 'fillius nullius', no body's child, neither of the father nor of the mother.

**English Law**

In English law recognition of the natural parents was made under the **Poor Laws Acts**: but then the parents were recognized to have certain obligations towards children and not rights. It was at equity that some rights of de facto parents in respect to the illegitimate children were recognized. **Sir George Jessel, M.R.** said: “In equity regards was always had to mother, putative father...”9. **Lord Herschell** said that in regard to an illegitimate child it was only the desire of the mother that was considered10. **Cockburn, C.J.,** said that the ‘father of an illegitimate child is not recognized by the law of England as to civil purposes11. Before 1925 the putative father could be compelled to provide for maintenance of his children only under an affiliation; order obtained by the mother under the bastardy12 laws. The mother was bound to maintain her illegitimate children under statutes13. As late as 1955, **Denning, L. J.** said: “The truth is that the law does not recognize the natural father at all”14. That statement was made in connection with adoption statutes15. A year earlier **Viscount Simonds** said that as it was in' 1857 so it is to-day a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament that 'child' prima facie means 'lawful child' and," 'parent' means 'lawful parent'16. Although 'the received interpretation of the word, 'child' as propounded by the Court of Appeal17 was upset by the **House of Lords**18 in respect to proceedings under the Matrimonial Causes Act, 1950, the courts have not been able to go that far in other respects; not even under; the **Guardianship of Infants Acts**. In the matrimonial law the English law

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8 English Common Law by Sir William Blackstone also National Assistance Act, 1948;Ss. 40 and 64(f).
10 Barpardo v. McHugh, (1891) A.C.7.
12 The Bastardy Act, 1872, under which the putative father is made liable to pay weekly sum for the maintenance of any child after affiliation proceedings.
13 The Obligation was further strengthened by the affiliation Proceedings Act, 1957 and by the National Assistance Act, 1948.
14 In re M. (1955) 2 All E.R. 911.
15 The case arose as to the interpretation of the word, 'parent' in S.2(4) (a) Adoption Act.
18 House of Lords report 1956.
has taken the full turn, but in guardianship proceedings the English law is still hesitant, faltering.

The Matrimonial law has been doubly fortunate: the provisions of the Matrimonial Causes Act were given progressive interpretation; and it has also the benediction of another Royal Commission on Marriage and Divorce.

The English matrimonial law has taken a full turn: the putative father and illegitimate children are recognized, the only condition is that the mother and the putative father of the illegitimate children should be husband and wife to each other. Pursuant to the Report of the Royal Commission, the Matrimonial Proceedings (Children) Act, 1958, was passed which also recognizes step-parent and step-child for the purpose of, 26, Matrimonial Causes Act, provided the step-child has been accepted as that of the family by the step-parent.

The Putative father and illegitimate child have not been so fortunate under the guardianship of Infants acts.

Doubts were first expressed in Re Carroll which took the view that the Acts were confined to proceedings between parents. In re G, the court gave custody to the natural mother as against the putative father; the case is clearly based on the right of the natural mother of an illegitimate. Then came In re C. T. & Re J. T where Roxemburg, J., in a very elaborate judgment, after discussing practically all the authorities, came to conclusion that the "prima facie meaning of the terms 'mother' and father" is not to be departed from unless compelling reason can be found in "the statute for doing so". And the learned Judge did not find any 'compelling reason' anywhere in the Guardianship of Infants Act, 1925, to depart from the prima facie meaning.

19 In 1845 in re Totley (1845) 7Q.B.596, Denmann, L.J. observed: "The law does not contemplate illegitimacy, the proper description of a legitimate child is 'child'". Almost the same view was reaffirmed as late as 1954 by Viscount Simonds in Galloway vs. Galloway (1954) 2 All E.R. 429 First break through was made in Langworthy v. Langworthy, 55 L.J.P.33, the final break was made in Galloway v. Galloway, (1955) 3 All E.R. 429.
21 (1931) 1 KB 317.
22 In fact the court held that putative father is no body and has no say in the proceedings under the Act.
23 (1956) 2 All E.R. 376.
24 (1956) 2 All E.R. 500.
The Legitimacy Act, 1959, now, purports to apply the Guardianship of Infants Acts to illegitimate children.

In re Carroll the putative father did not figure anywhere in the proceedings. But in *In re A*, the putative father desired to have the custody of the child as against the mother who desired to have the custody of the child with a view to give it away in adoption. Declining to give custody to the mother Sir Reymond Evershed, M. R., said that if the mother's wishes of giving away the child were to be fulfilled, it would mean the total 'Abandonment and extinguishment for all practical purposes of all the natural rights towards the child'. This was a case under the inherent jurisdiction of the Chancery Division.

The courts have consistently taken the view that under the Adoption Acts, the word, 'parent' does not include a putative father, and have declined to give custody to the putative father as against the mother who has desired to give away the child in adoption.

The decisions in adoption cases imply that if a legitimate child is proposed to be given in adoption, any parent can veto it, as consent of both the parents is necessary, but if an illegitimate child is proposed to be given in adoption, only parent whose consent is necessary is the mother and the putative father cannot veto it, though the court may decline to pass an adoption order, if considers it desirable in the welfare of the child. Under the Hindu law also, the putative father is no body if the mother desires to give away her child in adoption and under Hindu law the power of the mother is absolute, as no order of the court is necessary.

Mohammedan law

Under Mohammedan law also an illegitimate child is considered as *nullius filius*, owning no nasab to either parent. Mohammedan law does not recognize the putative

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25 Guardianship of Infants Act, 1886 (Sec 5), and S 16 of the Administration of Justice Act, 1928 have been made applicable to proceedings in respect to illegitimate children.
26 (1931) I.K.B. 317.
29 The Hindu Adoption and maintenance Act, 1956, S.9.
father for any purpose and therefore the putative father has no right of guardianship or custody over his illegitimate children. Thus, Mohammedan law also carries the notion of nullius filius to its logical conclusion by laying down that an illegitimate child is neither a child of his father nor of his mother. Under Mohammedan law neither parent has any obligation to provide maintenance for such a child. Shia law is very explicit on this point. In comparison to the Shia law, the Hanafi law may be considered as liberal, as an illegitimate child is considered related to the mother and mutual rights of inheritance of the child and mother are recognized. That continued to be the position of the illegitimate child both in India and Pakistan. Only ameliorating feature of Mohammedan law is that provisions relating to paternity are extremely liberal.

Hindu Law

In Hindu law the illegitimate child and putative father and natural mother have never been considered as strangers to each other. The putative father of a dasiputra can exercise all paternal power over the illegitimate child and he can exercise some control over the mother. Before and after 1955 the mother has been recognized as the natural guardian of her illegitimate children. During the life-time of the mother the putative father was not entitled to guardianship of the illegitimate children, though his obligation to maintain them has always been recognized. However in certain cases a different view was taken. In Prem Kumar Vs. Benarsidas, the court took the view that since the putative father has an obligation to maintain his children, that obligation entitled him to the custody of his children. Of course, if mother herself places the children in the custody of the putative father and allows him to bring them up, then the court would not enforce her right of guardianship or custody to the prejudice of the children.

30 Baillie II, 14; Macnaughten : Principles of Mohammedan Law, Page 298.
31 Baillie II, 14.
32 Baillie I, 439.
33 Mohammedan Jurisprudence by Abdul Rahm, p.341.
34 Rig. Ved. 1.64, 14.
35 Prem Kumar Vs. Banarasi Das (1934) 15 Lahore 630.
The modern Hindu law recognizes the putative father as natural guardian of his illegitimate children after the death of the mother.\textsuperscript{37} His obligation to maintain them has now been given statutory recognition\textsuperscript{38}.

Under Hindu law an illegitimate child has never been considered as \textit{fillius nulius}. In some cases he has been considered to be a member of the family. Illegitimate sons under Hindu law may be classified under two heads: (a) an illegitimate son born of casual connection, and (b) an illegitimate son born of a dasi i.e. of a permanently and exclusively kept concubine. Though the texts are not very clear but daughters may also be classified similarly. Then the former category was not considered to be the member of the father's family. But he was entitled to maintenance against the father\textsuperscript{39}. The same to, be the position of the daughter.

The illegitimate son of a dasi known as \textit{dasiputra} was considered to be a member of his father's family, though not as a coparcener, and he has full rights of maintenance\textsuperscript{40}. The \textit{dasiputra} among the Sudras enjoyed still a higher place. His position is covered by special texts\textsuperscript{41}. An illegitimate son has the status of a son and he is a member of his father's family\textsuperscript{42}, although his rights are limited as compared to a legitimate son. He has no Birth-right in the family and consequently he is not a coparcener and cannot ask for partition. During the life-time of the father if partition takes place it depends upon the father's choice as to what share he would get\textsuperscript{43}. But on the death of the father, his position is that of a coparcener along with the legitimate son. He had both the rights of partition and survivorship. On the death of the legitimate son he takes the entire property. In the event of the death of the father leaving behind a widow, daughter or daughter's son, he is entitled to half a share. If none of the females is there, then he takes the entire property\textsuperscript{44}.

\textsuperscript{37} Hindu Minority and Guardianship Act, 1956, S.6.
\textsuperscript{38} Hindu Maintenance and Adoption Act, 1956, S.20.
\textsuperscript{39} Rahi Vs. Govind Bom, (97) Parichat Vs. Balim singh, (1879) 159; Muttuswami Vs. Vencatasware (1868) 12 Madras 203;Kuppa Vs. Singsvelu, 8 Mad. 325; Chamaya Vs. Irya, 1931 Bom-492.
\textsuperscript{40} Mitakshara, 1,12,3.
\textsuperscript{41} Manu IX, 179; Yajnavalkya, II, 133-134; Mitakshara, I,12; Dayabhaga, IX, 28; Mayukha, IV, iv, 29-31; Dattaka Chandrika V,30,31.
\textsuperscript{43} Ibid, 41.
\textsuperscript{44} Singhai Ajit Kumar vs. Uuyayar, 1961 S.C. 1334.
The Dasiputra is entitled to a share in the inheritance of his father as a member of his father's family, in his status as a son and not merely in lieu of maintenance\textsuperscript{45}. If a sudra dies leaving behind a widow and an illegitimate son, both share equally\textsuperscript{46}. On the death of the widow, he succeeds to the half share taken by the widow\textsuperscript{47}. Only distinction that exists between him and a legitimate son is that on partition he takes only half a share of what he would have taken had he been a legitimate son\textsuperscript{48}.

A dasiputra is entitled to maintenance so long as he lives and he is entitled to full maintenance and not merely compassionate maintenance in recognition of his status as the member of his father's family and by reason of his exclusion from inheritance among the regenerate classes\textsuperscript{49}. A dasiputra is entitled to maintenance even if at the time of his conception his mother was a married woman whose husband was alive and therefore her connection with the putative father was adulterous\textsuperscript{50}.

Though the case of an illegitimate daughter is not covered, but it seems that she is entitled to maintenance till she is married, and her marriage is also the responsibility of her putative father\textsuperscript{51}.

Under the modern Hindu law, the position of dasiputra has deteriorated. From the point of maintenance, all legitimate and illegitimate children have been put at par. Every Hindu male or female has an obligation to maintain legitimate and illegitimate children\textsuperscript{52}. The obligation comes to an end on the child's attaining majority\textsuperscript{53}. But under the modern law the dasiputra cannot claim maintenance beyond his minority. Further, an illegitimate child, son or daughter, of any class is not entitled as an heir to inherit any property of his or her father (in fact now classes do not exist for the

\textsuperscript{45} Vallaiyappa Chetty vs. Natarajan 1931. P.C. 294.
\textsuperscript{46} Kamulammal vs. Visvanathaswami, 1923 P.C.8.
\textsuperscript{47} Singhai Ajit Kumar vs. Uyyayar, 1961 S.C. 1334.
\textsuperscript{48} Jogender vs. Nittanund, (1891) 18 cal. 151 (P.C.).
\textsuperscript{49} Ratnaraja Kumar Vs. Narayana Rao, 1953 S.C. 433; Ammireddi Vs. Ammireddy, 1961 A.P. 131 : the decision is confirmed by the supreme Court in 1965 S.C. 1970
\textsuperscript{50} Ammireddy Vs. Ammireddy, 1965 S.C. 1970 : Yajnavalkya in XXIV, 290 lays down that any person who would intercourse with dasis and others who are avarudha or bhujishya is liable to a fine of fifty panas. Vijayneshwar in his comments in this verse explains the term, avarudha, as a woman 'prohibited' by the master from intercourse with other men with an injunction to stay at home with the object of avoiding any lapse of service, he explains bhujishya as a woman 'restricted in the matter of sexual intercourse to certain persons. According to Vijayneshwar even veshya (harlots), swairinis (wanton woman) and sadharamastris(common prostitutes) who are bhujishyas are included and then adds:"Having been kept by another, they are as good as his wives." In support of this view he cites a text of Narada. Akku Prahalad vs. Ganesh Prahalad, 1945 Bom. 217 where the matter is fully discussed
\textsuperscript{51} Vallaiyappa v Natrajjan, 581, I.A. 407
\textsuperscript{52} Hindu Adoption and Maintenance Act. S.20(1)
\textsuperscript{53} Ibid., S.20(2)
purpose of inheritance). An illegitimate child now inherits only the property of its mother.

In Roman law the position of an illegitimate child has not been uniform in its different periods of development. In early Roman law, the illegitimate child had no family, no country, no name, no ancestor and no god; he was under the potestas of no one. He had neither a father nor a mother. However, he was not made a non-entity because of any idea of sin was involved in procreating such children, but the Roman family, the Roman society and the Roman state were constituted in such a manner that he did not fit in anywhere: In an agnatic Roman family such a child could not be related to the father, and, legally speaking, a woman under Roman law could not have any descendants and therefore he could not be related to his mother.

With the emergence of the theory of cognation under the influence of the natural law, all children, whether legitimate or illegitimate, became cognated to their mother, having rights of maintenance and succession in the property of the mother. Thus, the illegitimate children were given the status of the mother. This continued to be the position till the end of the Roman period.

Before the advent of Christian influence, obligation of the putative father to provide for the aliment was also recognized and the putative father could make gifts to his illegitimate children.

With the coming into power of the Christian Emperors and the ideas of Christian morality, the institutions of concubinage and illegitimate children became a horror, an enigma. The first talk with Constantine assigned to himself was to discourage concubinage. Pursuant to that, he forbade all gifts to illegitimate children by the putative father. The rights of aliment and of succession of illegitimate children were also done away with.

54 Under the Hindu Succession Act, 1956, in respect to inheritance to a Hindu male only legitimate relationship is recognized: S.3(j)
55 Hindu Marriage Act, 1955, proviso to S.3(j)
57 By the Lex Minicia modified his rule by laying down that if one parent was a peregrine and the other a citizen, the issue would have an inferior status. But this was in turn modified by a senatus consultum of the Emperor Hadrian which again laid down that in such a case, the child will have the status of mother.
After Constantine, we find that only two categories of illegitimate children—adulterine
and incestuous—were denied all rights, while others were granted several rights against
the putative father. Their right of aliment was recognized. The putative father could
also make some gift of his property.58

In the times of Justinian we find that the position of illegitimate children (liberi
naturales) comes very near to that of a dasiputra of a sudra under Hindu law. The
Liberi naturales have the right of support against both parents, right of succession in
the mother's property and right of partial succession in the property of the father.59
Apart from liberi naturales, the other illegitimate children were not recognized.

Modern Time, Era of Legislation

The doctrines 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, 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 and were
entitled to 1/3 of what they would have got had they been legitimate children. The
parents were free to make any gift to them. Thus, we find that for the first time in
Europe—or rather first time in the entire West the illegitimate child was considered as a
member of the family of his father: in fact for the first time he existed in the family.

This 'radical' legislation did not find favour with the framer of the French Civil Code
and he is relegated to an inferior legal position. Apart from the filiation or recognition
of the child which raises their status to almost legitimate children/ the illegitimate
children60 are only entitled to aliment which should be in accordance with the social

58 He could give 1/12 of his property and in case he has no legitimate child, upto 1/4 of property
59 On failure of legitimate child, the father could give upto 1/2, and he could inherit upto 1/6 of the property
60 This entitled the child to maintenance, to the use of the name of the parent to whom it is filiated or who has recognized him,
the rights of mutual succession. But the child’s right of succession is restricted to parents: he cannot succeed to ascendants
or collaterals or his parents. S.16 of the Hindu Marriage act, 1955, is to the same effect.
position and station of-the-parents\textsuperscript{61}. Such rights are conferred on the adulterine and incestuous illegitimate children also\textsuperscript{62}.

**Germany**

The **German Civil Code** provides: "The illegitimate child has in relation to the mother and to the relatives of the mother the legal position, of a legitimate child\textsuperscript{63}." The status of legitimacy may be conferred by governmental declaration\textsuperscript{64}. Apart from this, if parenthood is established by a judicial decree or by voluntary recognition, the child has the right to support and maintenance\textsuperscript{65}. The father is bound to support the child till the completion of sixteenth year corresponding to the conditions of the mother in life and including maintenance, education and training\textsuperscript{66}. The father's duty to provide maintenance precedes that of the mother\textsuperscript{67}.

The most radical provisions among the non-communist countries of Europe are contained in the Norwegian law of 1915. Under that law the status of an illegitimate child in respect to both the parents is the same an illegitimate child is entitled to the name of both parents, he is entitled to maintenance, education, training and support from both. The type of education and training that a child may have is determined by the situation of financially better placed parent\textsuperscript{68}.

**U.S.A.**

Probably the most radical law in the non-communist world is found in some of the states of the **United States**. Arizonian law of 1921 provides "Every child is hereby declared to be the legitimate child of its natural parents and as such is entitled to support and education to the same extent as if it has been born in lawful wedlock. It shall inherit from its natural parents and from their kindred heirs lineal and collateral in the same manner as children born in lawful wedlock." If the father is married to

\textsuperscript{61} Article 762

\textsuperscript{62} Article 763

\textsuperscript{63} S. 1715 German Civil Code.

\textsuperscript{64} S.1723

\textsuperscript{65} Ss. 1717-1718

\textsuperscript{66} section 1708

\textsuperscript{67} S 1709: If the mother has paid for the maintenance of the child she has the right to subrogation. The claim may be satisfied by triennial payment (S. 1710); the claim continued against the estate (S 1711).

\textsuperscript{68} Norwegian Law of Illegitimacy, (1918)
another woman, only difference that exists is that the child cannot claim to live with him. The state of North Dakota has similar law. Under the law of, Mississippi, a recognized illegitimate child is placed at par with a legitimate child. Other states follow the English common law. A decision of the New York Court puts it very tersely: "Illegitimate children are not favoured by law and have only such property rights as are expressly granted by statute". The New York Domestic Law recognizes the right of support and education of illegitimate children.

**Communist World**

Probably the most radical law in the **communist world** is that of **People's Republic of China**. Article 15 of the Marriage Law provides: "Children born out of wedlock shall enjoy the same rights as children born in lawful 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 Peternity of a 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 bear the 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.

**U.S.S.R.**

Equally radical has been the law of Soviet Union. 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. Not merely this, the governments purported to wipe out all social stigma attached to illegitimacy and it was a duty imposed on the courts to see this policy succeeded. The 1918 Code imposed a duty on the putative father to provide maintenance to the illegitimate children. The 1944 law

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69 Bell v. Terry & Trench Co., 163 N.Y. Supp. 733
70 S. 120 New York Domestic Law
71 Union of Soviet Socialist Russia Code of 1918, Article 133.
72 In the early period of the 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. Article 144 provided that when several persons had relations with the mother during
abolished the duty of providing maintenance to illegitimate child of the putative father which was replaced by the State duty of providing education, maintenance 'etc. for such children.

**Concept of Legitimation**

The process of blurring distinction and differences between legitimate and illegitimate children has begun at a fairly early time.

**Conferring the Status of Legitimacy**

One method has been to *confer status of legitimacy* on children born under certain circumstances and could not ordinarily be legitimate children. The early Hindu law recognized a class of sons known as 'secondary sons'. In some of these cases the father was not at all responsible for their birth: they were Kanina, Sahoda, krita, punnarbhava, svayam-datta and shaudra. Of these only the punnarbhava and shaudra were the sons begotten by the father. Even among the 'primary sons' he was not responsible for the birth of a majority of them. For instance, the khetraja, the dattaka, Kritima, were not begotten by him, but in a sense he had accepted them himself as his sons, and therefore they were considered to be his Sons and given the status of primary sons. In a majority of cases these children were born out of lawful wedlock. In the later development of Hindu law all of them became obsolete and were not recognized with the exception of aurasa, i.e., the legitimate son begotten by one on his lawfully wedded wife, and the dattaka son or adopted son.

In the modern law also this method of conferring the status of legitimacy; on children born in certain circumstances have been used. Certain children born of invalid marriage have also have been made legitimate children by legislation. Take for instance under the Matrimonial Causes Act, 1950, the child of voidable marriages

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73 Manu Smriti Vol. V, 159-160(Dr. Jha’s Translation, Page 145); Also for texts in other smritis : Dr. Jha’s Manu Smriti, Comparative Notes, Part III, Verses 2, 132 (Vajnavalkaya)
which are annulled have been recognized as legitimate children. Under the Legitimacy Act, 1959, the children of a void marriage have also been recognized as legitimate children provided at the time of the 'act of intercourse resulting in the birth [or at the time of celebration of marriage if later], both or either of the parties reasonably believed that the marriage was Valid. The Hindu Marriage Act, 1955, also confers status of legitimacy on the child of voidable marriages which are annulled and the child of void marriages which are declared null and void. But on such children an inferior status has been conferred is as much as it has been laid down that such children can inherit the property of the parents alone and of none else. The same is the position under the Special Marriage Act, 1954.

**Elevation of Status**

Another method of elevating the status of illegitimate children to that of the legitimate children came into existence in Roman law known by the name of legitimation per subsequens matrimonium. The rule was first introduced by Constantine in A. D. 335 as one of the methods to do away with the institution of concubinage. According to Justinian legitimation by subsequent marriage was possible whether the concubine was ingenua or libertina provided the marriage was attested by instrumentum dotis or other writing, the woman was capable of marriage at the conception or birth and the child, if consented. The other methods known to Roman law by which an illegitimate child could be legitimated were legitimation by imperial rescript and legitimation by presentation to the curia.

**Subsequent Marriage**

The institution of legitimation by subsequent marriage of parents descended from Roman law to the Continental Europe. Under the French Civil Code illegitimate children may be legitimated by the subsequent marriage of their parents provided the

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74 Matrimonial Cases Act S.9 1950.
75 S.2. Legitimacy Act 1959.
76. S.16 Hindu Marriage Act 1955.
77. Proviso to S. 16
78 Section 26 : the language of S. 16. Hindu Marriage Act, 1955 and this section is identical
79 Originally it applied to a concubine who was ingénue. Emperor Zeno abrogated it. Justinian restored it: Code. 5, 27, 10.
80 Ulpian Code 5,27,8,10,11
81 Ibid-80
82 Ibid-80
children were recognized before marriage. The institutions of legitimation by subsequent marriage of parents is also recognized in Germany, Italy, Spain, Japan and some of the states of United States of America. Some states of South America also recognize the institution.

Although in Scot law the rule came into existence at an early time, in English law, legitimation by subsequent marriage of parents came into existence by the Legitimacy Act, 1926. Under the Act. It is necessary that the father is domiciled in England or Wales at the time of marriage. The provision does not apply to children of adulterous unions. The Royal Commission on Marriage and Divorce by majority recommendation declined to extend the provision to the children born of adulterous union as, according to the majority Report it would result in a serious weakening of respect for "marriage."

In Indian law, or in the personal law of any community in India, legitimation by subsequent marriage of parents is not recognized.

On the pattern of the Roman *legitimatio per rescriptum principis* legitimation by acknowledgment or recognition is recognized in several systems of law. In several states of Continental Europe, South America and in some of, the States of the United States of America a putative father is permitted to legitimate his child by formally recognizing it to be his own son. The law of Spain and Italy provide for legitimation by royal rescript. Under English law also Parliament can by passing a law legitimate a child.

Under the French law either parent or both the parents may recognize the child. The effect recognition is that the child gets the right to use the name of the parent.

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83 Article 331 Franch Civil Code.
84 S. 1719-22, German Civil Code
85 Civil Code, 194 Italian Civil Code
86 Civil code 120 Spanish Civil Code
87 Civil code, 836 Japanese
88 Albania, Indiana, Kentucky, Massachusetts, New York, Ohio, Pennsylvania, Taxes, Vermont, Virginia
89 Mackenzie Roman Law, Page .130;
90 S.1(1) English Legitimacy Act 1926
91 Ibid
92 Para 1179 Royal commission Report on Marriage and Divorce.
93 Italian Civil code, 194 Spanish Civil code, 120
94 The one outstanding example (and probably the sole) is the statute of Richard II conferring legitimacy on children of John of Gaunt.
recognizing him; the child has the right of maintenance. The parent and the child also have mutual rights of succession\(^{95}\). But the child cannot succeed to the property of the parent's ascendants or his collateral other than his natural sibs. However, recognition cannot be made for the benefit of an adulterine or incestuous child. Thus, a recognized child is very much near a legitimate child, though he has slightly inferior status\(^{96}\).

Under the German Civil Code a father who states in his petition that he recognizes the child as his own may obtain a governmental declaration declaring an illegitimate child as legitimate\(^{97}\). Under the Code it is immaterial that in fact the petitioner is not the father of the child\(^{98}\) but in every consent of the guardian or the child and also of the mother, if the child under twenty-one, is necessary\(^{99}\). However, such a declaration cannot be made if at the time of conception of the child the marriage of its parents could not legally take place\(^{100}\).

It is interesting to note that the provision of recognition of illegitimate children under the 1964 Code of Family Law of Communist Poland are very much akin to the German Civil Code. Under the Polish Code 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\(^{101}\).

Mohammedan law confers legitimacy on a child by acknowledgment of him as his child by the father. The Muslim doctrine applies to cases where the legitimacy of a child is uncertain. If he is known to be an illegitimate, child, the doctrine does not apply. In other words it applies only to case, where either the fact or the exact time of the alleged marriage is a matter of uncertainty that is neither proved nor disproved\(^{102}\). It is required that the acknowledgment must be not merely as a child but as a legitimate child, the age of the child and the person acknowledging should be such as to admit of the acknowledger being the father of the child, the child must not be an

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\(^{95}\) Articles 332-336 French Civil Code.

\(^{96}\) Article 335 Ibid-95.

\(^{97}\) Their position resembles with children under s.16 Hindu Marriage Act

\(^{98}\) ss. 1736 and 1725 German Civil Code

\(^{99}\) s. 1735 Ibid

\(^{100}\) s. 1726 Ibid

\(^{101}\) A recognized held under the code acquires all the rights of a legitimate child S 1736

\(^{102}\) Bailie 406: Hedaya, 439; Md. Alladad Vs. Muhammad, (1888) 10 All 289
offspring of *zina*, incest or fornication, the child acknowledged must not be known to be the child of another and the acknowledgment must not be repudiated by the child.  

1. Hindu Law

Originally, when adoption came into existence in Hindu law or Roman law, the purpose was certainly not to confer the status of legitimacy on illegitimate children. Its main purpose was to continue the family by means of all; artificial relationship, or to confer spiritual benefit. Thus, the institution of adoption fall in the realm of private law. Even in the modern law that continued to be one of the chief purposes of the adoption, though another; purpose is coming up: the purpose of conferring status of legitimacy on illegitimate children and of providing home for the homeless. The former seems to be the main purpose even under the Modern Hindu law, while the latter seems to be the main purpose of adoption in the Soviet law.

Under the old Hindu law only a male Hindu could adopt and an orphan child could not be adopted. Then there were the restrictions of caste and gotra. Female child could not be adopted. Under the old Hindu law only the male Hindu had the right to make an adoption and the consent or dissent of the wife to the proposed adoption was immaterial. Only a sonless Hindu male could adopt and only one son could be adopted.

Under the modern Hindu law, every Hindu, male or female, has capacity to make an adoption provided he or she has attained the age of majority and is of sound mind. A Hindu married male can adopt only with the consent of his wife. A

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103 Bailie 408; Hedaya, 408; Habibur Rehan Vs. Altaf Ali, (1921) 48 I.A. 114
104 Mayne : Hindu law (11th Edition) Page 184-88, where the entire matter is discussed, Religious motive was at least one of the considerations
105 Vasihi said: "Not let a woman give or accept a son unless with the assent of her lord." (XV, 1-6) Paras Diwan. Adoption of an Orphan under Hindu law, The Law review (1963) XV No. 1 where all the texts have been discussed. Manu IX 168; Yajnavalkya, II 131, Baudhavann, I 2, 3, 20, Vishnu, XV, 19; Vasihi VIII, 28-29
106 Dattaka Mimansa, II, 74; Matakshara, I, XI, 9; Mayukha IV, 5, 9; Dattaka Chanrika, I, 16
107 Ganghali vs. ananta, 13, Bom, 690; Guddatti Vs. Ganapati, 23 M.L.J.493, Ganguly Vs. Sarkana, 1961 M.P. 173
108 Dattaka Mimansa, I, 22; Soundheparandian Vs. Paragwara, 1933 Med. 550 (F.B.); runganna Vs. Atchamma, (1846) 4 M.I.A. I
109 Dattaka Mimansa, I, 4, 13; Dattaka Chandrika, I, 4, 6
110 Hindu Adoption and Maintenance Act, 1956
111 Hindu Adoption and Maintenance Act, S 8 (a), 8 (b), and S.7
bachelor, widower, virgin or widow can make an adoption. But a married woman cannot adopt even with the consent of the husband\textsuperscript{113}. A married woman can adopt during the life-time of her husband and a married Hindu male can adopt without the consent of his wife if the husband or wife, as the case may be, has ceased to be a Hindu, has completely and finally renounced the world or has been declared by a court to be of unsound minds\textsuperscript{114}. An adoption of a male child can be made only when the adopter has no Hindu son, son's son, or sons' son's son, and adoption of a female child can be made only when there is no Hindu daughter or son's daughter\textsuperscript{115}. When the child of opposite sex is adopted the adopter must be senior by at least twenty-one years to the child\textsuperscript{116}.

During the life-time of the father he alone has the right to give the child in adoption though consent of the wife is necessary\textsuperscript{117}. After the death of the husband, or if the husband has ceased to be a Hindu or has renounced the world or is of unsound mind, the mother of the child can give the child in adoption\textsuperscript{118}. After the death of the parents, the guardian can give the child in adoption\textsuperscript{119}. The term guardian has been so defined so as to include a de facto guardian\textsuperscript{120}.

Under Hindu law for any proposed adoption no order of the court is necessary. Only in case when a guardian gives the child in adoption prior permission of the court is necessary and no court would accord permission unless it finds that the proposed adoption would be for the welfare of the child\textsuperscript{121}.

Only a Hindu child can be adopted\textsuperscript{122}. An already adopted child cannot be adopted\textsuperscript{123}. The child must be below fifteen and unmarried unless a custom permits the adoption of an older or married child\textsuperscript{124}. The same child cannot be simultaneously adopted by

\begin{footnotesize}
\begin{enumerate}
\item Proviso to S.7 Ibid
\item Section 8 (c) Ibid
\item Proviso to S.7, & S.8(c) Ibid
\item Section 11 (i) and (ii)
\item Clauses (iii) & (iv) of S- 11, only relationship by legitimate blood and adoption is recognized
\item S.9(2) Ibid
\item S.9(3) Ibid
\item S.9(4) Ibid
\item This has been done by the Hindu Adoption and Maintenance Act, 1962. Now Clause I (a) to Explanation to s.9.
\item S.9(4). Ibid
\item S.10(i) Ibid
\item S.10(ii) Ibid
\item S.10,(iii) & (iv) Hindu Adoption and Maintenance Act 1956
\end{enumerate}
\end{footnotesize}
two or more persons\textsuperscript{125}. An orphan can be adopted. Any legitimate or illegitimate child who has been abandoned by his parents or a child whose parentage is not known can also be taken in adoption\textsuperscript{126}. Consent of the child is not necessary.

The result of adoption is that for all intents and purposes the child becomes the child of the adoptive family his position is that of a born son in the adoptive family; which implies that he can not only inherit his parents but from all other relations in his new family\textsuperscript{127}. On the hand, his relationship with his natural family comes to an end\textsuperscript{128}.

Thus, a Hindu cannot adopt more than a son and daughter consent of the child is not necessary; nor an order of the court is necessary. Thus it seems that the concept of adoption under Hindu law continues to the transfer of dominion from one person to another. The basic purpose' adoption is to perpetuate the line by creating artificial relationship. Only advance that has been made is that now illegitimate children, orphans, abandoned children and children whose parentage is not known can also be adopted.

2. Roman Law

Under Roman law also the purpose of adoption was to continue family by means of artificial relationship, and thus adoption was a source power. Adoptio in Roman law meant the transfer of dominium from one person to another and therefore adoption could be made only of a alieni juris\textsuperscript{129}. However, Justinian enacted that adoption ordinarily not confer any paternal power on the adopter\textsuperscript{130}. Prior to Justinian the adopted child had no right of succession in his natural family, though he succeeded in his adoptive family. Justinian laid down that the child retained his right of succession in his natural family\textsuperscript{131}.
Until the later Roman law only a male had capacity to adopt, and females could not make adoption. In A. D. 291 this power was conferred on females also. Justinian in his institutes said: "Women cannot adopt, for not even their natural children are subject to their power; but by Imperial clemency they are enabled to adopt, to comfort them for the loss of children taken from them." The adopter was required to be senior to the adopted child at least by eighteen years. Then it was also required that the adoption must also imitate nature. Thus in Cicero's time an unmarried man or even a married man who had not yet lost all hopes of offspring could not adopt.

In early law the consent of the child was not necessary. Classical law is as to consent of the child. It seems that express consent of the child needed even in the later Roman law. Under Roman law it was to adopt one's own child who was not in one's potestas. An adoptive could not be re-adopted.

Roman law also recognized another form of adoption known as adrogatio was the adoption of a person sui juris who was independent. In the Roman law adrogation could be accomplished only by a lex curiata. In later Roman law it could also be accomplished by a will, though probably such an act needed confirmation by Comitia Curiata. In Imperial Roman "Law and even in Justinian's time it was superseded by rescript. On adrogation the child adrogated lost his independence and passed under the power of adopter. If the child was below twenty-five, the consent of the guardian was necessary.

Thus under Roman law also the adoption was primarily made to perpetuate one's line by creating an artificial relationship.

From Roman law the institution of adoption spread to Babylonians, Greeks and Egyptians and to the Continental Europe including Czarist Russia and to the countries of South America and some of the States of the United States of America, and

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132 Justinian Code 8,47,5
133 Ibid 1,11,10
134 Ibid 1,2,4
135 Ibid 8,47,10
137 French Civil Code, 348-63; German Civil Code, 1741-1772; Italian Civil code, 202-19; Spanish Civil code, 173-9
Japan\textsuperscript{138}. The Civil codes basically follow Roman law and the institution of adoption has the same purpose as it has in Roman Law\textsuperscript{139}.

**Legislation on adoption in Modern World**

Hitherto the purpose of law of adoption has hardly been the welfare of the child; nor was it intended to benefit the illegitimate children. It is essentially meant for the benefit of the childless person.

In England though \textit{de facto} adoptions came into existence in the latter half of the nineteenth century, legal adoption came into existence as late as 1926. The purpose of the Adoption Act, 1926, was to prevent natural parents from claiming back their children whom they have given in \textit{'de facto adoption'}. Then a comprehensive statute was passed in 1950. Further modifications in the law were made by the Adoption Act, 1958,' section 13 (i) of which lays down: "Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and to consent or give notice of dissent to marriage shall be extinguished and shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock." English law of adoption comes very much near to Hindu law of adoption in-as much as it lays down the child for all intents and purposes the adopted child becomes like a natural child in the adoptive family and his ties in his natural family are severed\textsuperscript{140}. An adoption order can be made by the High Court, Country Court or Magistrates' Court. The applicant should be domiciled and resident in England. The child should also be resident in England\textsuperscript{141}.

\textsuperscript{138} Japanese Civil Code, 837-76. In the states of Massachusetts, Indiana, Missouri, Louisiana, California, Texas adoptions were legally recognized at a fairly early period American Statute Law by stemson, 6640-51

\textsuperscript{139} Take for instance the age of adopter under German Civil Code is required to be at least eighteen (s. 1744); Under French Civil code it should be at least fifteen years (Art 343), the same is under Spanish Civil code (Art 173); Japanese Code provides that a relative in the ascending line or a person older than the adopter cannot be adopted (Art 838). In the matter of succession rights of the child there is a marked similarity: German Code, 348,350; Japanese and German Codes give him status of legitimate son of the adopter; German Civil code, 1757, 1764; Japanese Civil Code 860

\textsuperscript{140} The Act repeals the Adoption Act, 1950

\textsuperscript{141} Adoption Act, 1958, SS 16 and 17
Under the Adoption Act, 1958, a child cannot be adopted simultaneously by two persons unless they are husband and wife. The adoption can be made by the mother or the father of the child or by a relative of the child who is at least twenty-one years, or by a third person who is at least twenty-five years old, when adoption is made jointly by husband and wife both of them should be at least twenty-one years old.

The Act also requires that the child should have been continuously in the care and possession of the applicant at least consecutively for three months, immediately preceding the presentation of the petition. Consent of the parent or guardian of the infant is necessary, and if one of the spouse is the applicant, the consent of the other spouse is necessary. If adoption is made in Scotland, the consent of the child is also necessary. In certain cases consent may be dispensed with. Nothing can be given or promised to be given or promised to be received in consideration of giving or taking the child in adoption except such as the court may sanction. No order shall be made unless the court finds that the proposed adoption shall be for the welfare of the child. In finding out what is for the welfare of the child the court would take into consideration the health of the applicant, and wishes of the child, having regard to his age and understanding.

When a child who has been adopted by the father or mother alone has been subsequently legitimated on account of the subsequent marriage of his parents, then...
on the application of any party concerned, the adoption order can be revoked\textsuperscript{152}. Otherwise the adoption order once made is final and irrevocable.

Some of the most important provisions of the Act, it is submitted, are those which related to the role of local authorities and adoption societies and provisions relating to care possession of infants awaiting adoption and provisions relating to supervision of children awaiting adoption or placed with strangers\textsuperscript{153}. In the modern law of adoption such of the United States and now also of England great importance is attached to social investigation by properly qualified officers into the circumstances of the adoption\textsuperscript{154}.

Immediately after the Revolution adoption was abolished\textsuperscript{155} from the Soviet law, but from March 1, 1926\textsuperscript{156} it is reintroduced. The present law requires that the child should be less than eighteen years the consent of the parent should be obtained, though it may be dispensed with if the parent has been deprived of his parental rights. If the child is above ten years old, its consent is also necessary. Only those persons who are qualified to be guardians can alone adopt; those persons whose interest was adverse to the child cannot adopt. The request for permission to adopt is to be made to the guardianship authority of the local Soviet and approved by it. Registration is also necessary.

Under the Soviet law the adopted child is entitled to all rights and subject to all duties of a natural born child, including the right of maintenance and education during minority or even after attaining majority if unable to work. He has also the right of inheritance.

Ordinarily an adoption is irrevocable. But if it is found that the new status is proving harmful to the child the adoption might be revoked\textsuperscript{157}.

\begin{flushleft}
\textsuperscript{152} Ibid S.7(1)(b) of English Adoption Act 1958
\textsuperscript{153} Ibid S.7(2) 1958
\textsuperscript{154} Ibid S.8 1958
\textsuperscript{155} Ibid S.26 1958
\textsuperscript{156} Ibid Parts II,III & IV, of English Adoption Act 1958
\textsuperscript{157} Friedmann: Law in a Changing Society, p.254
\end{flushleft}
Childlessness is a condition of adoption under Hindu law and under various Civil Codes. Under the statutes in the common law countries childlessness is not a condition precedent to adoption. Nor is there any limit as to the number of children to be adopted such as it is under Hindu Law.

The position in the modern law improved in this respect that the illegitimate is not considered *fillius nulius* as he was under English Common law. In some systems of law the putative father is considered as guardian of his children after the death of the mother. But during the life-time of the mother, the putative father's status is not recognized in most of the systems of law. In our submission in those cases where the putative father does not disown the child and has always been ready and willing to come forward to help the child and take over the responsibility, why the mother wishes should be considered so paramount as to reduce the putative father to nullify. This is nothing but the continuation of the old doctrine of absolute right of the parent in respect to children. This doctrine has been done away with in respect to legitimate children, why should it continue in respect to, it legitimate children.

The modern law has tried to improve the position of illegitimate children by raising their status to legitimate children in certain cases. But still a vast majority of children will still remain unaffected. In those cases where the putative father is known and feels his responsibility, the hardship attached to illegitimate birth may be avoided, but still there will be large majority of cases where either the putative father is not known at all or where the paternity cannot be established unless some measure of public responsibility is assumed at the governmental level, the condition of illegitimate children would not improve. Associated with it is also the problem of abandoned and neglected children. In fact the question assumes importance only when an illegitimate child is neglected. And it makes no difference whether the neglected and abandoned child is legitimate or illegitimate.

158 U.S.S.R. Civil Code of 1918, Article 183 Soviet Law
159 (1926) Sov. Uzak, RSFSR, No 13, Item 101
161 Take for instance, this has been done by the Hindu Minority and Guardianship Act, 1956.