Chapter 2

ILLEGITIMACY IN ANCIENT LAWS

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0.0. **Introduction**

"Humanity shows itself in all its intellectual splendor during this tender age as the sun shown itself at the dawn and the flower in the first unfolding of the petals; and we must respect religiously, reverently, these first indications of individuality."

*Maria Montessori*

So, a child, who is an incarnation of divinity, is given a status and it is known from that status only. Then it is to be seen as to what this status of illegitimacy denotes. So to know the basic concept of illegitimacy, we have to go to the Ancient Law first.

1.0. **Jewish Law:**

As is well known, scripture has prescribed certain unions between the sexes but nowhere indicates what would be the condition of the issue of prohibited marriages. However, in the Mishanah (Kiddushin III, 12) four basic principles are laid down with respect to this situation¹.

(i) If the marriage is **valid and sinless**, the children born of such a union follow the status of the father.

(ii) If the marriage is **valid but sinful**, e.g. where a priest marries a divorcee, the children born of such a union follow the status of the inferior parent.

(iii) If the marriage is **invalid, Because the parties to the marriages can have not conubium** with one another because it is an incestuous relationship then the children are illegitimate.

(iv) If the marriage is **invalid because the mother can never have conubium** then the children follow the mother e.g. if the Jew Maries a Gentile woman or a slave girl.

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Besides the a foretasted four principles we have to look to the Hebrew terminology used in this regard to throw light on the status of child in different situations, Broadly speaking Jewish children born out of wedlock were not illegitimate as regards their right and status within the family. Illegitimacy indeed was a concept foreign to Jewish Law. Jewish notion was rather of “Fit” (Kasher) or unfit (Pasul) for certain purposes outside the family group and the “Memzer” (usually translated ‘bastard’).

1.1 Children fit (Kasher).

If an unmarried women (‘Penuyab’) declared that her child was from an Israelite father (not within the prohibited degrees), the child was “Kasher”. Even through the putative father denied the paternity. Similarly, a child born of a betrothed woman was “Kasher” if she declared that it was from her betrothed man and he did not deny it. However, there is proviso to it that if the betrothed repudiated the child it was a “mamzer” for it was considered presumably the issue of adultery.

1.2. Children Unfit (Pasul)

If we take a different situation when a fondling \(^3\) an abandoned child, whose parents were unknown, was not conclusively presumed a “mamzer” or otherwise unfit (pasul), then the condition in which it was found and other circumstances aided to determine its status in that regard are to be looked into. If there were evidences that it had been abandoned willfully and forever, if doubtful “bastard”. If abandoned due to poverty or only temporarily it was “kasher”.

1.3. Children Foundling (Asufit)

After it has been declared a foundling \(^4\) (asufit, ‘taken in’), no body could claim the child as his of her own , except in a time of famine, when it was plain that its parents were only waiting for some body to take it so that it might have a home. However, a claim to a child while it was still exposed was always to be credited, and the child was to be presumed the offspring of lawful marriage \(^5\). When from all the circumstances a foundling was adjudged

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2 George Horowitz. The spirit of Jewish Law. Ed. 1963(page 446)
3 Fondling means a person fondled or caressed.
4 Foundling means an infant found after its unknown parents have deserted it.
5 Kiddushin 73b-M.T. Forbidden Unions xv. 30,31-EH.4.31,32.
a "bastard". It was outside the fold and might not marry an Israelite not ever another foundling other than a "mamzer". They were usually limited to marrying proselytes or liberated slaves.

1.4. Children From Abandoned Father (Shetuki)

A child not born a lawful marriage who had not been abandoned, but whose father was not known was called "silent one' (shetuki). Its status was like that of an "asufit". If its mother declared that its father was "Kasheer" and a person who she might lawfully have married she was to be believed and the child was 'fit' and might inter marry ever with priests 6

It must be noted that according to the TORAH a priest was forbidden to marry beneath his dignity.

"They shall not take a women that is a “Hariot” or “profaned” (Halalah) neither shall they take a women put away from her away from her husband.

1.5. The Bastard (Mamzer)

A mamzer was the offspring of a father and mother between whom there could in law, no binding betrothal the issue of either an adulterous union between a married woman and man not her husband or of an incestuous union within the forbidden degrees.

There was a hot debate among the early Tannaim and even later on Palestine and Babylon that whether the offspring of a daughter of Israel and Gentile-slave or free was a mamzer. It was finally established that such a child was not a mamzer. However, a mamzer was not to enter the congregation of the Lord: that is, not to marry an Israelite.

"Nor his tenth generation enters which included also the female mamzer."

These harsh commands were narrowed down in scope by the Rabbis that the mere

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6 Profaned—means the offspring of any such forbidden marriage.
7 Leviticus 21.7 chapters of Holy Bible.
8 Kiddushin M.T.Forbidden Unions xv,3-E.H.4,19.
declaration of wife or mother could not stigmatize her child as a mamzer\textsuperscript{11}. A man's admission was not permitted to stigmatize his grand children. His own admission was accepted to disqualify himself and his child and even with his child it was not admissible if that child already had children of his own\textsuperscript{12}.

\textbf{1.6. Summing Up}

So the \textbf{Jewish Law} has gone to the extent that in the absence of conclusive evidence to the contrary every Jew or Jewess was a "kasher". So in short, \textbf{Jewish law does not fully subscribe to the concept of illegitimacy and appears to be heavily inclined towards legitimacy except that mamzer had the only disqualification to marry within the household of Israel}, otherwise he is vested with all other rights. But whatever it may be, a distinction still exists may beHot that horrible carrying along a social stigma. But some inner disqualification imposed keeps the distinction alive.

\textbf{2.0 Roman law.}

In Roman law, in de statu Liberorum, on the status of children the same four principles of Jewish law are the basis but provided some allowances for certain deviations in the Roman law due to different family setup.

\textbf{2.1. Children born of a Justum matrimonium (Equal Marriage)}

Children born of a Justum Matrimonium are in the power of the father. \textbf{Ulpian}\textsuperscript{13} says that children who are the issue of a marriage approved by the "ius civile" are in the potestas of their parents. \textbf{Ulpian}\textsuperscript{14} further explains Justum Matrimonium, a marriage is Justum (i.e. approved by the ius civile) when there is conubium between the contracting parties, when the man has reached puberty and the women become marriageable, and when both of them of \textit{sui juris}, or their parents if they be in potestate, given their consent \textit{conubium}\textsuperscript{15} is further explained as capacity for marrying a wife according to law.

\textsuperscript{11} M.Kiddushin III,13.
\textsuperscript{12} Kiddushin Forbidden Union xv; 78b.
\textsuperscript{13} Ulpian (v-i) code of Justinian on 1-10-13, Digest (1-5-20-1-2).
\textsuperscript{14} Ulpian (v-i) code of Justinian on 2.4.6.
\textsuperscript{15} Ulpian (v-3) code of Justinian 3.1.5.
Gaius\textsuperscript{16} observes that Roman citizens are held to have contracted a marriage approved by the "ius civile" if they have taken Roman citizen for their wives, or Latin's or Peregrines with whom they have conubium (or right of inter-marriage). For as it is a consequence of this right of inter-marriage that the children follow the condition (or status) of their farther, it thus comes to pass not only that they become Roman citizens, but that they are in their father's potestas. So the rule holds that one may not become betrothed to a person one may not marry.

2.2. Children Born of a Peregrin (Unequal Marriage)

_That in certain marriages the children followed the status of the inferior parent e.g. the child born of an alien father and of a Roman mother. This was in accordance with the Lex Minicia. Ulpian\textsuperscript{17} says that if there be conubium between the parents, the children always follow the father. In the absence of conubium they follow the condition of the mother except that the issue of a peregrine father and Roman citizen mother is by birth a peregrine, for the \textbf{Minician Law} ordains that a child born of parents of who either is a peregrine shall take his status from the inferior one. Gaius\textsuperscript{18} to this effect states that where a marriage had been contracted between a Roman citizen and a peregrine, the issue will be a \textit{peregrine}\textsuperscript{19} (is made on the authority of the Minician law, according to which the child born of an unequal marriage) follow the condition of the parent (of lower status).

2.3. Children Promiscus (Spurii)

If any one takes for a wife, women whom he has no legal right to marry, he contracts an incestuous marriage; his children are not subject to his authority and are Illegitimate as if conceived in promiscuous inter-course. Ulpain\textsuperscript{20} says that if a man marries a woman whom it is not lawful for him to marry, his marriage is incestuous, his children, therefore are not in his potestas, but are spurious as if conceived in promiscuous intercourse.

\textsuperscript{16} Gaius The Roman Law of Marriage, Oxford 1930 (page,1-56).
\textsuperscript{17} Ulpian (1-8) code of Justinian
\textsuperscript{18} Gaius (1-87) The Roman Law of Marriage, Oxford 1930 (5-87)
\textsuperscript{19} "Pergrin" the word peregrine in the Minician Law has been held to include not only strictly foreign nations and people but also those who pass by the name of latins.
\textsuperscript{20} Ulpian (v-7) Code of Justinian 7-10-16.
Gaius\textsuperscript{21} says that he who contracts a nefarious and incestuous marriage is held to have neither wife nor children; therefore the issue of the connection, while indeed they are held to have a mother, yet are not held to have a father, and, and so are not in his potestas. They are in in much the same position as those whom a woman has conceived in promiscuous intercourse, for these are not regarded as having any father, his identity being uncertain. Whence it is that they are called spurious children, either (from a Greek work) as being, as it were conceived here and there, or being children without a father.

2.4. Children Born to a Slave

_Salves possess no conubium and consequently a child born of a free person and a slave follows status of the slave mother. Ulpian\textsuperscript{22} says that with slaves there is no conubium. Ulpian\textsuperscript{23} further says that the child of a Roman citizen father and at Latin mother is a Latin. and a child of a free man and a slave woman is a slave: for, as in these cases there is no conubium between the parents. the child follows its mother's condition.

2.5. Summing Up

.In Roman law, as aforesaid, the position of an illegitimate child appears to be complicated. In the early Roman law the illegitimate child had no family, no country; no name no ancestor and no sod he was under the potestas of no one. He had neither n 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 any where. In an Fanatic Roman Family such a child could not be related to the father, and, legally speaking a woman under Roman Law could not have arty descendants and therefore he could not be related to his mother\textsuperscript{24}.

What has been stated by Ulpian (v.7). Gaius (1-64) and Institutes of Justinians 1-10-12) has been als odeduscussed by the French Jurist Domat (1625-1696) and in his discussion of legitimacy observes as follows Les infants contracte, et les batards sont ceux qui maissent

\begin{itemize}
  \item Gaius (1-64) the Roman Law of Marriage, Oxford : 930 page 412.
  \item Ulpian (v-9). Code of Justinian 9-10-3.
\end{itemize}
hors d'un marriage legitime” In support of this observation he refers to the authorities namely, the Digest 1.5.23, the Vulgate Deut 23.2, and an Ordinance de Charls vi, 1386 which he cites in full. The passage is the Digest informs that they are said to be born in promiscuity who cannot point to their father or of they can, then he is their father unlawfully, and are therefore called “spurii” With regard to the Vulgate the quotes “non-ingredietur mamzer, hoe est de scorto natus in ecclesium domini”. Dormat interpreted this verse to mean that not only the child of the prostitute, but any child born out of wedlock, would be a bastard, for in either case the father is ordinarily not known. Ulpian also says that children of a known mother but unknown father are called spurious.

3.0. Spanish Law.
In Las Siete Partidus a Spanish Code of the thirteenth century, several types of illegitimates is enumerated. The wise men of the ancients called those children natural and illegitimate who are not born of marriage according to law, as for instance, those born of concubines, and bastards born of adultery or of a female relative, or of a woman belonging to religious orders. These are called natural children for the reason that they are begotten contrary to law and in opposition to natural order. Moreover, they are children called in Latin “mamzeros”

3.1. Mania Scelus (Infernal Sin)
Which means infernal sin. For those calls “mamzeros” are born of women who live in prostitution, and give themselves to all who visit them, and for this reason they cannot know to whom the children born of them belong. There are men who state that “mamzer” means contaminated, because a person of this kind was wickedly begotten, and was born in some vile place.

3.2. Spurii (Children Born Out of Promiscuity)
These are another kind of children, called, in Latin, “spurii” which means those born of

25 Ulpain V-II code of Justinian 2-10-20-4.
women that men keep as concubines out of their houses and they are such as give themselves to other men, in addition to those who keep them as their "friends," and for this reason, it is not known who the father of a child born of such a woman is.

3.3. (Notos) Children born out of Adultry

There is still another kind of children called "notos\textsuperscript{28}" and these are such as are born in adultery. They are called by this name because they appear to be the acknowledged children of the husband who has them in his house, when they are not so.

3.4. Summing up

Though the concept of Roman law finds its importation in other civilizations, yet according to the peculiar situation therein, there is some deviation but with the base solidly intact. In Dutch law a bastard has no lawful father and therefore no rights of succession "ex parte paterna" But with the mother it is different and her illegitimate issue succeeds to her and her blood relations.

The aforesaid discussion of Raman Law and its importation in French, Spanish, Greek, Dutch and Latin is basically to show that the problem of concubine in Roman Law is quite complicated and the children born of such mothers are usually termed as "Liberinaturales", "filius naturalis," spurious" but the concept of "vulgo conceptus" in Roman Law signifies one who is born out of wedlock Thus roman Law though speaks of varied Phrase about illegitimacy yet the basis is\textsuperscript{29}, In potestate sunt lberi parentum exjusto matrimonio nati" and "qui matre quidem patre autem incerto nati sunt, spuriī appellantur"

4.0. English Law.

The English term bastard "one who is born out of wedlock" signifies the "vulgo conceptus" in Roman law. The word bastard has been defined as "By our Law\textsuperscript{30} are as such children as are not born in lawful wedlock or within a competent time after its

\textsuperscript{28} As Quintilian (inst. III. 6-97) points out "notus is the Greek word for an illegitimate son. Latin as Cato testified on one of his orations, has no word of its own and therefore borrows the foreign term". On Latin "notus" is found only in non-juridical sources and means one born out of wedlock of a known father, in contrast to spurious, of an unknown father.

\textsuperscript{29} Ulpain (v-I), Code of Justinian 1-10-13.

\textsuperscript{30} John B. Saunders, Words and Phrases legally Defined 2nd Ed. 1969. Pp. 12,16
determination 

4.1. English Common Law

A child is legitimate if his parent were married at the time of conception or at the time of his birth and Blackstone (1723-1780) inflect, cites the statement of Paulus from the Digest (11.4.5) as the source for this view “pate rest vquem nuptiae demonstrant” and he makes comments on “who are bastard”. A bastard by our English Laws, is one that is not only begotten but born, out of lawful matrimony. The civil and cannon laws do not allow a child to remain a bastard, if the parents afterwards intermarry and herein they differ most materially from our law; which though not strict as to require that the child shall be materially from our law; which though not strict as to require that the child shall be begotten, yet makes it an indispensable condition, to make it legitimate that it shall be begotten, yet makes it an indispensable condition, to make it legitimate that it shall be born after lawful wedlock.

4.2. Comparision Between English Common Law and Roman Law

The reason of English Law to be surely much superior to that of the Roman, if we consider that principal end and design of establishing the contract of marriage taken in a Civil light, abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage therefore being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance and the education of the children should belong, this end is undoubtedly better answered by legitimating all issues born after wedlock than by legitimating all issues of the same parties even before wedlock, so as wedlock afterwards ensues. Because of the very great uncertainty there will generally be in the proof that the issue was generally begotten by the same man; whereas by confining the proof to the birth and not to the begetting, our law has rendered it perfectly certain what child is legitimate, and who is to take care of child. Thus Blackstone speaks of the superiority of English Common law over Roman law. According to him, English constitutions guard against the indecency of Raman law and at the same time give sufficient allowance to the frailties of human nature. For, if child be begotten while the parents are single and the will

31 Institute of Justinian 1.10.13
endeavour to make an early reparation for the offence, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, through not begotten in lawful wedlock, for this is an incident that can happen but once, since all future children will be begotten, as well as born, within the rules of honor and civil society. Upon reasons like these we may suppose the peers to have acted at the Parliament of Merton, when they refused to enact that children before marriage be esteemed legitimate.

4.3. Rights and Incapacities of Bastard in English Common Law

Sir William Blackstone while dealing with the rights and incapability of bastards again laid stress on the fact that a bastard is “fillius nullius” when he said that its rights are very few, being only such as he can acquire, for he can inherit nothing, being looked upon as the son of nobody; and sometime called “fillus nullius” sometimes “filius populi”. The incapacity of a bastard consist principally in this, that he cannot be heir to any one, neither can he have heirs, but his own body, for being “nullius filius” he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.

4.4. Summing Up

Thus is short, Sir Blackstone called the bastard to be nullius fillius, the son of nobody, for the maxim of las is qui ex damnato cuitu nascuntur, inter liberos non computatnfun” s English common law openly declared an illegitimate child as nullius filius. Viscount Simonds said that common law of England did not contemplate illegitimacy and descried the illegitimate child as “Filius Nullius”. Not only that in Re Hod’s Maule J. has said. “How does the mother of an illegitimate child differ from a stranger? So it is clear that by English common Law the test of legitimacy is birth differ from a lawful wedlock. It is sometimes contended that birth in lawful wedlock is the test of legitimacy not only by the internal law but also by the Private International Law of England. Cheshire speaks of two concepts i.e. “construction” and “status”. If an English “will”

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33 Ibid. 32
34 Galloway v Galloway (1953) 3 All E.R. 429.
bequeaths a legacy to the "legitimate children" and if the legitimacy is disputed the firstly it is a question of construction and this is a matter for English Domestic Law as the law governing succession but if the reference is particularly to "Legitimacy" then it is a matter of status determinable by the law of their domicile- the only law is entitled to pass upon his status\textsuperscript{36}. Thus to conclude, a reference can again bemaid to Sir Blackstone's commentaries where a logical conclusion is drawn that a bastard can never be divested of his illegitimacy whereas the subsequent marriage of the parents wipes out the stain and strain of illegitimacy.

5.0. Muslim Law:

Western family laws relating to legitimacy and parentage reflect certain paradoxes creating tension between law and life. On the one had we notice the influence of the philosophy of original sin and the fall from the grace and the policy of maintaining the stability and integrity of the family unit that can justify the continuing discrimination against the illegitimate child. On the other hand, there is a philosophy that law should not discriminate against any child or impose disabilities on him by the reason of the accident of his birth. In spite of our relaxed and tolerant social attitude towards disabilities of the illegitimate child of the past, still the Islamic law of rigidity to adherence to the old notions prevails. Islamic law embodies the principal of strict enforcement of sexual morality by prohibiting, at the pain of various punishments, sexual relationship except when it is between husband and wife (or master and slave girl in the old days) The Muslim Law insists on the purity of conception. A child conceived out of wedlock cannot be legitimated. A child, if it is the result of fornication, adultery, incest or of any description of illicit union is held illegitimate to his natural father\textsuperscript{37}.

5.1. Presumptions about Parentage

5.1.1. Sir R.K. Wilson\textsuperscript{38}

speaks of three presumptions about parentage:-

\textsuperscript{36} Re. Andros (1883) 24 Ch. D 637 at Page 639 where the position is stated with great clarity.
\textsuperscript{37} Baillie, Digest of Mohmmadan Law. pp 391-92.
\textsuperscript{38} Hedaya vol. III. page 360-371
(i) It is conclusively presumed that a child born within less than six months after the marriage of the mother cannot have been begotten by her husband in lawful wedlock.

(ii) If a child is born from women during the subsistence of a lawful marriage and more than six months after its Commencement, the burden of proving that it was not lawfully begotten by the husband is on the person who asserts it.

(iii) If the birth took place after, but within two years of, the termination of marriage by death or divorce the presumption is still in favor of conception in lawful marriage but it may be rebutted by proof that mother had announced the completion of her iddat at least six months before the birth of child or by proof the mother confessed to having in the mean time a sexual connection with some other man.

5.1.2. Baillie

Speaks about parentage (Nusub\textsuperscript{39}) thus:

"Paternity does not admit of positive proof, because the connection of a child with its father is secret. But it may be established by the word of the father himself or by a subsisting "firash\textsuperscript{40}" that is, a legally constituted relation between him and the mother of the child"

So Bailie says, referring to various original authorities, that there are three degrees in the establishment of paternity.

(i) the first, is a valid marriage or an invalid marriage, comes within the meaning of one that is valid, because an invalid marriage that has been consummated is joined to valid one in some of their efforts, among which is the establishment of paternity.\textsuperscript{41} The shortest period of gestation in the human species is six months. And if a man should marry women, and she is delivered of child

\begin{itemize}
\item \textsuperscript{39} Hedaya vol. III. Ibid, 377
\item \textsuperscript{40} Hedaya and Kifayah vol ii p 465, Hedaya vol. I pp 482.
\item \textsuperscript{41} Sirajiyyah and Shureefca P. 186. Also Hedaya vol I Book IV chapter xiii page 136.
\end{itemize}
within six months from the day of marriage, the paternity of the child from him is not established because conception must have taken place before the marriage.

(ii) The second degree in the establishment of paternity is the child's mother being an "oom-i-wulud" to master, and the effect of her being so is that the paternity of her child is established from her master without any claim on his part. That is, if she were in such a condition that he might lawfully have had intercourse with her. Alternatively, if he had made her a "mookatubah" which would render his intercourse with her unlawful, the child's paternity would not be established from him without a claim on his part.  

(iii) The third degree in the establishment of paternity is the child's mother being a mere slave and the effect of her being so is that the descent of her child from her master is not established without a claim on his part.

Coming to the period of gestation, as already stated the shortest period of gestation in the human species in six months and the largest period is two years

5.2.3. Abu Huneefa

who assigned the maximum on the authority of Ayesah who is reported to have said, as having received it from the Prophet himself that a child remains no longer that the two years in the womb of its mother, even so much as the turn of a wheel.

5.2.4. Summing up

The aforesaid versions of the authorities based on original works, the following points come on the surface:-

1. Conception during a lawful wedlock determines the legitimacy of a child.
2. The minimum period of gestation is six months. A child born within six months of its parent marriage is illegitimate and born after the expiry of six months from

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42 Claim means acknowledgement.
the date of its parent marriage is presumed to be legitimate.

3. The above presumption is subject to the principle of “Lian” (imprecation) and “iqrar” (acknowledgement)

4. The acknowledgement must fulfill three conditions:
   
   (a) the child in question should be of uncertain paternity
   (b) It must not Knowingly be an issue of illicit intercourse and
   (c) There must not be any circumstance rebutting the possibility of its paternity being acknowledged by the father.\(^{44}\)

5. A child born after the termination of its parent’s marriage, whether by husband’s death or divorce, is legitimate if born
   
   (a) Within 10 Lunar months in Shia Law
   (b) Within 2 lunar years in Hanafi Law
   (c) Within 4 lunar years in shafei or Mahki Law

In this regard (b) and (c) above reference is made to the Hedaya\(^{45}\). The largest term of Pregnancy is two years, because of the declaration of Aysha “the child does not remain in the mother’s womb beyond two years” and the shortest term is six months, because the sacred text says, “The whole term of pregnancy and weaning is thirty months” and Ibn Abbas has said that the longest term of pregnancy extend to four years, but the text here quoted and the opinion of Ibn Abbas as above testify against him. It is probable that Shafei may have delivered this opinion upon here say as this is a matter which does not admit of reasoning.

Regarding (b) the rule has now been reformed in several Islamic Countries. In Egypt, Syria, Sudan, Tunisia and Morocca, the maximum period of gestation has been fixed to be one solar year\(^{46}\). However, In India both the minimum and maximum period of gestation as laid down in the traditional Muslim law remains untouched.


\(^{45}\) The Hedaya, vol I, Book IV, Chapter XIII page, 137.

5.2.5. Legal Interpretations and Judicial Pronouncements

The aforesaid discussion is fortified with judicial pronouncements Mahmood J. in Allahabad vs Ismail\(^{47}\) after quoting from original Arabic texts such as BIRJINDI, AJNI SHARAH, KANZ, DURRUL, MUKHTAR, ASHBAH, FATWA-i-ALAMGIRI FATWA-i-KAZI KHAN, FATHUAL, QADIR, etc. said that the intercourse with a woman who is neither his wife nor his slave is unlawful and prohibited. When there is neither the validity nor the semblance of either of these relations between the parties, their intercourse is termed Zina. The offspring of Zina is necessarily illegitimate. It is an undoubted proposition of Muslim Law of inheritance that in no case can an illegitimated child be entitled to inheritance from his father or through him because it is regarded as “Nullius Filius” i.e. a person whose “nusub” or descent from the father is wanting.

Privy Council in Habibur Rahman vs Altaf Ali\(^{48}\), went further and commented on acknowledgement and pointed out the distinction between legitimacy and legitimation and said that legitimacy is a status which results from certain facts. Legitimation is a proceeding which creates a status which did not exist before. By the Mohammedan Law a son to be legitimate must be the offspring of a man and his wife of his slave, any other offspring is the offspring of Zina, that is, illicit connection, cannot be legitimate

6.0. Hindu Law (Sastrik)

Hindu law exhibits a very peculiar but understandable situation While strictly believing in the sacrament of the institution of marriage and through it the sacredness of the institution of son ship, nothing is to degrade the son ship otherwise created than through the sanctity of marriage it depicts the Ability of thought that chastity and morality of a wife is given paramount priority alone with a sacred desire to have a mate offspring for the spiritual benefits as well as for the continuation of the family. To fully understand the

\(^{47}\) Allahabad v/s Ismail (1888) 10 A1ER 289.
\(^{48}\) Habibur Rahman v/s Altaf Ali (1921) 481 Lahore. 114.
concept of illegitimacy we have to dwell a bit at length on the concept of "desi" and "General Law of son ship."

H H. Wilson explained the meaning of 'Das' or "dasa" as a fisherman. a servants" a slave, Sudra or man of the fourth tribe He further says it is an Affix to the names of sudras and adds that his occasionally employed to indicate "a person to whom it is proper to make gifts and "a sage-one to whom the proper nature of the soul is known" Das or Dasa is the masculine noun and Dasi is the feminine and according to him 'dasi means "a female servant or slave, the wife of a slave or sudra..

Prof. Monier Williams describes "dasa" a fisherman a boatman and dasi as a female servant or slave, servant maid, whom, harlot. Mr. Burnell in the introduction to his translation of a Hindu scripture says that in southern India the word Dasi signifies also a female dancer attach to a temple. Devanda Bhatta in speaking of a wife married in the Asura from observer; "That women, who has been purchased for value paid is not styled a Patni, she associates neither in rites relating to duties nor in rites relating to manes. The learned call her a dassi.

There appears to be affinity between slavery and condition of sudra. A sudra though emancipated by his master, is not released from a state of serf do, for, of a state, which is natural to him, by whom can he be divested? This view is found in a text from Manu in the Digest Culluca Bhatta has commented on this text saying, "Emancipated by him to whom he had become a slave by, capture in war or the like, sudra is not released from a state of servitude to Brahmans, since servitude is natural to him,of a state of slavery proper to the servile class? Hence it is necessary that obedience be paid by a sudra to a Brahman or twice born man. This is intended else the subsequent enumeration of slaves would be nugatory. If we look to Colebrook's translation of the text of Yajnavalkya

49 Sanskrit and English Dictionary published at Calcutta in 1819.
50 Sanskrit and English Dictionary published at Oxford in 1872.
51 Daya Vibhaga of Madhaviya 12 M.I.A. 203.
52 Smriti Chandrika XI sl, pl, 10, 11.
53 Manu in the second volume of the Digest, Book III, Ch. 1.s2 page. 36
54 Cited in Rahi v Govinda I Bom (1875) page 73.
we find his remarks that issue by a concubine is described in the law as a son by a female slave or by a sudra woman. If the father were a sudra he might have allotted a share to his illegitimate son.

Though slavery is extinct now, but when slavery was prevalent, a female slave would be permanently attached to a family as a dependent member thereof, and a son begotten on her by male members would likewise be an inferior member. There are instances that such dependent female slaves were called concubines and living as members of the family of the man keeping them. Thus Colebrook has spoken of “son by a female slave or by a sudra woman,” mean the son by a concubine. There appears to be some misconception when we refer to the right of illegitimate son.

6.1. Brihaspati

“The virtuous and obedient son, born by a sudra woman to a man who has no other offspring should obtain a maintenance and let the kinsmen take the residue of the estate. The text is explained to refer to a son of a twice born person by a sudra woman not married by him”

6.2. Manu

It means, a son begotten by a sudra or “on a female slave of a slave, may take a share (on partition) if permitted (by the father), this is a settled law. A.N. Sarkar commenting on it.

55 Digest vol. III, Book V, Chapter III page 143.
56 Dayabhaga IX,28. Speaking on a female slave.
has said that a Sanskrit rule of construction says that a repetition of the particle “or” here may be taken to imply “or any other similar woman”

6.3 Yajnavalkya

6.3.1 Interpretations of Yajnavalkya

6.3.1.1 Colebrook
Colebrook has translated this passage as follows:

“But of a sudra a-son-by-a-not-married female-slave or-the-like-sudra-woman, may share equally with other sons, by the father’s permission” A.N. Sarkar Commenting on it says that the words connected by the hyphens stand for a compound word in the original. The word “unmarried” appears to be ambiguous. It can be “maiden” or “not married by that man’. Further the word “Dasi and “Adi” can also be understood in two ways i.e. “a female slave or other” or “a female slave or the like”

6.3.1.2 Jugnnatha
On the text of Yjnavalkya translated by Colebrook, referring to Jumutavahana says that “
the son of a sudra by a female slave or other sudra woman not lawfully married shall, with his father’s consent, have an equal share with other sons”

6.3.1.4 Vachispat Misra
Purporting to quote Yajnavalkya says that “a son of a sudra by an unmarried woman, may receive a share by the permission of his father, but if the father be dead, he will have share half of what the sons born out of married wives. If no such brother, the legitimate son will take the whole in default of son of daughters.”

6.3.1.5 Sir William Macnaughton’s Hindu law.
The author gives his opinion that if the women not his female slave, the son begotten on her by him would have no-right to the inheritance but only a claim to maintenance but this view is not accepted by other authors and the view in Dayabhaga is different where it is said, “Sudrasyan aparinita dasyadi, Sudraputra” which means the son born to a sudra, by an unmarried dasi or other sudra female, may share equally with other sons by consent, of the father.

6.4 Katyayana
Katyayana says that “if a man approaches his own female slave and she bears him a son, she must in consideration of her progeny, be enfranchised with her child.” accepted by the commentator Jagannath with some reservation, Nil Kantha also

6.4.1 Interpretations of Katyayana

6.4.1.1 Devala says that “the son begotten on a sudra woman by any man of a twice born class is not entitled to a share of land, but one begotten on her, being of equal class, shall take all the property. Thus is the law settled. He further says that a son by a sudra woman not legally married, does not obtain a share even of the movable property. So

6.5 Nil Kandha and Jimutavahana

57 Digest Book III Verse 14 Page 49.
58 Vyavahara Mayukha, chapter IV Page 28.
Nilkantha and Jimutvahana are of the view that in order to entitle the illegitimate offspring of a sudra woman by a sudra to inherit the property of the letter or a share in it, should be an unmarried woman. Summing up the views of the various authorities and authors, through the concept of inheritance, we find four situations

(i) Illegitimate\(^{59}\) sons of Hindu belongings to one of the three higher classes by a "Dassi".
(ii) Illegitimate\(^{60}\) sons of a sudra by a "Dasi"
(iii) Illegitimate\(^{61}\) sons of a Hindu by a Hindu woman who is not a dasi.
(iv) Illegitimate\(^{62}\) sons of a Hindu by a non-Hindu woman

Alternatively we can also infer as follows:-

(i) The\(^{63}\) illegitimate son of a sudra is the son (putra) of a dasi, that is Hindu Concubine in the continuous and exclusive keeping of his father at the time of his birth.
(ii) He\(^{64}\) is not the fruit if an adulterous or incestuous intercourse.
(iii) It\(^{65}\) is not necessary that his mother should remain a permanent concubine till the day of his father’s death.
(iv) A\(^{66}\) Brahman mistress of a sudra does not become a sudra herself and their son

\(^{59}\) 1. Roshan Singh v Balwant Singh (1900)22 All ER 191.
2. Chooturya v Purpupad (1857) 7 All ER. 18.
5. Nilmoney Singh v Baneshur (1879) 4 Cal. 91.

\(^{60}\) 1. Vellayappa ChettyvNatrajan AIR 1931 P.C. 254 affirming AIR 1927 Mad. 386. Mit. (Chepter 1st Sec 12. Verse-2)
3. Ramchandra Doddappa v Hananmaik AIR 1936 Bom.1
is not a dasipurta.

(v) If\(^{67}\) it is not necessary that to constitute a woman a dasi that she should have not been married women.

(vi) She\(^{68}\) may be a widow when the illicit connection begins.

(vii) She\(^{69}\) may even be a married woman when such connection begins, provided that in this case the connection ceased to be adulterous when the son is conceived as where the husband dies before the conception.

(viii) The\(^{70}\) condition of adulterous or incestuous intercourse is not found in the texts but it is a condition of imposing a law of general morality and it can be inferred from the 19\(^{th}\) chapter of the Vuavahara Mayukha and the ancient smriti texts that adultery was regarded and punished by Hindu law as a crime of grave character and such situation has been strengthened by judicial provision as already given supra.

Thus having traversed the area of Dasi and Dasiputra, it becomes incumbent to study Dasiputra in

7.0. **General Hindu Law of sonship**

Wherein 12 or 13 types of sons have been recognized ignoring totally the concept of "Nullius filius".

7.1 **Manu** has spoken 12 types of sons recognized under Hindu Law.

Though they have been treated differently so far as inheritance is concerned Rather Aurasa son is the only primary son and all other sons are subsidiary. They are\(^{71}\)

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67 Rahi v Govind (1876) I Bom.97.
68 Gangabai V Bandu (1916)40 sa 369.
69 Tukaram v Dinkar AIR 1931 Lahore 221.
70 Sudarajan v Annuchalam AIR 1916 Mad. 1170 (Law and custom of Hindu Castes 1st Ed. P. 182. He says that the children of a woman living in adultery have no caste.
71 Manu IX 166-175, 177 & 178, Also Vishnu XV 4, 1 to 27 Gautma XXVIII, 32,33, Vasistha XVII-12, Baudhayana II 2.3.
1. Him whom a man begets in his own wedded wife let him be known to be a legitimate son of the body (Aurasa) the first in rank.

2. He who was begotten according to the peculiar law (of the niyoga) on the appointed wife of a dead man, of a eunuch or of one diseased, is called son begotten on a wife (Kshetraga).

3. That (boy) equal (by caste) whom his mother or father affectionately give, (confirming the gift) with (a liberation of) water, in times of distress (to a man) as his son, must be considered as an adopted son (Datrima).

4. But he is considered a son made (Kritrima) whom (a man) makes his son (he being) equal (by caste), acquainted with (the distinctions between) right and wrong (and) endowed with final virtues.

5. If (a child) be bom in a man's house and his father be not known, he is a son born secretly in the house (Gudhotpanna) and shall belong to him of whose wife he was born.

6. He whom (a man) receives as his son, (after he has been) deserted by his parents or by either of them, is called a son cast off (Apa viddha).

7. A son whom a damsel, secretly bears in the house of her father, one shall name the son of an unmarried damsel (Kanina and declare) such offspring of an unmarried girl (to belong) to him who weds her (afterwards).

8. If one marries either knowingly or unknowingly, a pregnant (bride), the child in her womb belong to him who weds her, and is called (a son) received with the bride (Sahodha).

9. If a man buys a (boy), whether equal or unequal (in good qualities) from his father or mother for the sake of having a son that (child) is called a (son) bought (Kritaka).

10. If a woman abandoned by her husband or a widow of her own accord contracts a second marriage and bears (a son) he is called the son of a remarried woman (Paunarbhava).

11. He who, having lost his parents or being abandoned (by them) without (just) cause, gives himself to a (man) is called a son self given (Svayamdatta).
12. The son whom a Brahaman begets through lust on a sudra female is (though) alive (prayam), a corpse (sava) and hence called (Prasava), a living corpse.

Manu has brought all categories of children within the embrace of Hindu Law and considered them as family members but other slokas also speak of the distinction between the aurasa son and other sons when he says.

Among the twelve sons of man whom Manu, sprung from the self existent (svayambhu). Enumerates six are kinsmen and heirs and six not heirs (but) kinsmen.

The legitimate son of the body, the son begotten on a wife, the son adopted, the son made the son secretly born. And the son cast off, (are) the six heirs and kinsmen.

The son of an unmarried damsel, the son received with the wife, the son bought, the son begotten on a remarried woman, the son self given and the sudra females (are) the six (who are) not heirs (but) kinsmen.

The legitimate son of the body alone (shall be) the owner of the paternal estate, but, on order to avoid harshness let him allow maintenance to the rest.

7.2 Apastamba does not recognize or approve this kind of sonship as given by Manu and is vehemently of the strong view that "sons" begotten by a man who approaches in the proper season a woman of equal caste who has not belonged to another man and who has been married legally have right to (follow) the occupation (of their caste) and (to inherit) the estate, If a man approaches a woman who had been married before on was not legally married to him, or belongs to a different caste, they both commit a sin. Through their (sin) their son also becomes sinful. Apastamba does not take it politely but uses very strong language that transgression of the law and violence are found amongst the ancient

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72 Manu IX 158.
73 Manu IX, 159.
74 Manu IX 160.
75 Manu IX 163.
76 Apastamba II, 6.13, 1-5.
sages. They committed no sin of account of the greatness of their luster. A man of the
latter times who seeing their deeds follows them “falls”.

7.2.1. Interpretation of Apasthamba

7.2.1.1. Rajkumar Savadhikari\(^{78}\) commenting on it said that Apastamba was of the
view that the practice followed by the ancient sages was condemnable if they practiced.
These sages were the giants of a former generation who were privileged to do things
which men of the present time, weak and imbecile as they are, must not for a moment
attempt, we do not possess their super human powers, why then we should appeal to them
and take them as standard of their actions. A pigmy cannot be compared to a giam. If you
follow them, you are sure to fall. Their laws were not meant for you, You are inferior to
them in every respect. You must have your own set of laws for guidance. According to
Raj Kumar saravadhikari, Apastamha must be referring to the society in the state of
ferment on account of the revolutionary doctrines of this great teacher.

7.3 Vasishtha

Vasistha furnishes the old weapons and comes forward with a large array of Vadic texts
and approved legal precedents. He appeals to immemorial customs and to the antiquity of
the institutions of his time. According to Vasishtha, the application of eleven kinds of
substitute mentioned by Gautma and Baudhayana being condemmed by Apathamba is not
correct. This condemnation is unreasonable and disrespectful to the ancient sages. There
are\(^{79}\) certainly twelve kind of sons, there cannot be the least doubt about it. They are
approved by the ancient sages. Thus, as propounded by Manu, Gautma laid down the law
Budhayan supported him Apastamba attacked their arguments. Vasishtha advocated the
law laid down by the former legislators as certainly true and there could be not doubt
about it.

\(^{77}\) Apastamba II, 6.8-10.
\(^{79}\) Vasishtha XVII, 15-12.
7.4. **The summing up** is that according to Baudhayana then society is bound to recognize the illegitimate sons of wives and to give them the same rank as the sons of the body, born in lawful wedlock. There is no impropriety in the usages and attaches no stigma to such offspring. Vasishtha sides with Baudhayana but speaks on the subject by asserting that there is a dispute between the wise, some say that the son belongs to the husband of the wife and some say that the son belongs to the begetter. Baudhayana has made a compromise and give the son so begotten both to the begetter and the husband of the wife. Apastamba has taken the stand that “If a man approaches a women who has been married before or has not been legally married to him, they both commit sin. A son also who is begotten of such a women is exceedingly sinful.”

But we have to bear in mind that if there is any difference in the samritis, the view taken in Manusmriti shall prevail. So it can be safely concluded that there was no concept of “Fillius Nullius” in Hindu Law. Rather every type of son was recognized and approved through in the matter of inheritance; a distinction has been kept between a legitimate and an illegitimate son. Illegitimate sons in the three higher classes never take as heir but are only entitled to maintenance. The illegitimate son of a sudra may inherit jointly or solely according to the text of Yajnavalkya.  

> “Even a son begotten by a sudra on a female slave may take a share by the father’s choice. But if the father is dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter’s son”.

### 8.0 Gestation Period and Illegitimacy

The distinction between legitimate and illegitimate, child is the conflict between marital

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80 Apastamba II 6.13, 4-5.
81 Yajnavalkya II 133, 134.
sanctity and non-material reality. Legitimacy requires a legal marriage as a necessary condition and where it wants it is hard to seek how the issue can be legitimate. There is another element related to legitimacy. “born in wedlock” and /or conceived in wedlock. To understand it again we have to peep very briefly, into the various old legal systems where we find that the main stress was on lawful wedlock.

8.1 Greek, Roman Jew English, Muslim and Hindu concepts

The Ancient Greeks had elaborated the distinction by rules relating to inheritance. Roman law added its contribution of “Patri Potestas” and the notion of family. Jewish Law inclined heavily towards legitimacy except imposing some inner disqualifications on children born out of concubium. English common Law adopted a contract) and gestation period. Hindu Law stuck to the doctrine of “conception and Birth during Lawful wedlock.” English Law has brought section 112 in the Evidence Act which speaks of presumption of legitimacy (Indian Evidence Act 1872).

9.0 Presumption of Legitimacy

9.1 Section 112 of the Evidence Act, 1872.

The section provides the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

This section firstly speaks of a valid marriage and secondly it speaks of two situations of time relating to birth that it must take place during the continuance of a valid marriage. The second moment of time is relating conception which is based on the doctrine of “Non Access to disprove the presumption of legitimacy.

The critical moment is birth. For the application of the section, it is immaterial that the

82 Potter-Antiquities of Greece, pp 655-659.
parties were not married at the time of conception. Hence it is infect involving the
docine of "Legitimatio per subsequence matrimoniun". Thus even in the case of a
child born to a woman so shortly after marriage, will be presumed legitimate through it
must have been conceived before the marriage took place. Thus the situation under the
section is

(i) Where the child is conceived and born during marriage.
(ii) Where the child is conceived outside marriage but bow within it.
(iii) Where the child is conceived during marriage but, born after the marriage has
been terminated by judicial decree or death.

So this section follows the English Common Law, which in its turn, followed, potanto,
the Roman law that the marriage of the parents at any time renders legitimate their,
children, whether born before or after such marriage.

In the latter half of the Section, the gestation period given is “within 280 days” i.e.
roughly 9 month and 10 days which is gynecological and physiologically appears to be
on well laid foundation. Thus this is an outer limit given in the Section because with the
termination of marriage by judicial decree or by death, the doctrine of “Non Access”
becomes rigidly enforced. However there is clash between Section 112 and the personal
law of Muslims and Hindus.

9.2 Muslim Law

Under the Islamic Law gestation period is shown as follows:-
The minimum period of gestation under all the schools of Muslim Law is six months. So
a child born during the first six months of its parent’s marriage will be illegitimate. In
other words a child born after the expiry of six months from the date of its parent’s
marriage is legitimate.

1. A child born after the termination of its parent’s marriage (whether by divorce or
by husband’s death) is legitimate in classical Muslim Law if born-
(a) within 10 lunar months in Shia Law
(b) within 2 lunar years in Hanafi Law
(c) within 4 lunar years in Shafei or Maliki Law.

Now there is difference between Section 112 of the Evidence Act 1872 and Islamic Law. Under section 112 it is the birth and not the conception of child which is propounded which can be even less than six months whereas in Islamic Law birth within 6 months if its parent’s marriage renders the child illegitimate.

9.3 Judicial Approach

Regarding Latter part of Section 112 of the said Act and Muslim Law judicial approach gives some conflicting opinions. In Ashraf Ali v Ashad Ali, Calcutta High Court had to decide the case where the child was born after 19 months which satisfies the Muslim Law but not section 112 and the court held that it is contrary to the course of nature and impossible. However, in Allahabad v Muhammad Ismail Justice Mahmood did refer to Section 112 and Muslim Law, but left the question open merely taking a stand that Section 112 has its roots in English Law.

Again this point was agitated in Sibi Mohammad v Muhammad and the High Court held the view that Section 112 of the Evidence Act did apply to the Muslim and this view was followed by Lahore High Court in Mt. Rahim Bibi v Chirag Din and Ghulam, Moby-ud-din vs Khaizan.

9.4 Critical Examination of Judicial Approach

9.4.1 R.K. Wilson
He held the view that Section 112 is a rule of substantive law. It can have no application to Muslim Law as it conflicts with the rule of Muslim Law under which a minimum of 6 months of post weeding gestation is absolutely necessary. However, he disfavored the rule of 2 years after the termination of marriage by Divorce or by death of the husband.

9.4.2. Mr. A.A.A. Fyazee

He was of the opinion that gestation period of two years or four years is not a general law. It is to meet abnormal and extraordinary cases or due to imperfect knowledge of gestation and pregnancy prevalent in early times.

9.4.3. K.P. Saxena

He referred to two cases Zakir Ali vs Sugrbi 15.N.I.R.-I and Sibi Mohammad v Muhammad (1926) 48 All-625, in the former case the High Court field that Section 112 does not apply to Muslims and in the letter case it is held that section 112 applies to the Muslims. The author has categorically stated that the decision in (1926) 48 all 625 is not correct. Hence his view is that Section 112, does not apply to Muslims.

In Abdul Ghani v Talah Bibi the Lahore High Court dissented from the decision in Sibi Mohammad’s case (1926) 48 All 625 and held that section 112 does not apply to Muslims.

Though Justice Mohmood as long back as 1888 foresaw the conflict between the provisions of section 112 of the Indian Evidence Act 1872 and the principals of Muslim Law, kept the question open and even to-day that conflict exists and thereby the application of section 112 regarding Muslim Law needs in-depth scrutiny to see how for the Rule of English Law shall continue hovering over Muslim Law.
9.0. Hindu Law.

Section 112 is also in conflict with the principle of Hindu Law and ever the codified Hindu Law is silent in this regard. Hindu Law speaks of both conception and birth of the child during the continuance of lawful wedlock. In the Ancient Hindu Law 12 (or 13) types of sons are mentioned but one of them is “aurasa” son

9.1. Manu

“Him whom a man has begotten on his own weeded wife let him know to be the first in rank as the son of his body”.

9.2. Apastamba, Vashista, Gaudhavana, Vishnu and Yajnavalkya

The author of Mitakshara seem to be in agreement with Manu in hold that procreation as well as birth both must have taken place after marriage in order to confer the status of legitimacy on a son.

9.3. Kulluka Bhatt

He too, in his commentary on the Manusmriti describes as “aurasa” son that a man himself begets on his wife married as virgin.

9.4 Judicial Approach

Privy Council took a different view in Pedda Amanu vs Zamindar of Marungapuri, Sir Bames Peacock while delivering the judgment retied upon the concept of sahodhaya son (if one marries either knowingly or unknowingly a pregnant bride), the child in her womb belongs to him who weds her and is called a son received with the bride) and held that the Hindu Law is the same that respect as the English Law and held that only the birth of the child during a lawful wedlock was enough in Hindu Law for conferring on it the status of legitimacy and expressed an opinion that the Sastrik rule to this effect that, the nuptial texts should be confined to virgins was merely a moral percept and not an imperative rule of law.

94 Manu IX-166.
95 Yajnavalkya. II-128; Mitakshara I, XI.2.
97 (1874)I.A. 293
9.5. Critical Examination of Judicial Approach

9.5.1 Sir Goordas Bannerjee

questioned the correctness of this decision

9.5.2 Babu Gulab Chand Sarkar Shastri

He Strongly dissented from the decision and said that the appellants could not cite an authority for the proposition that in order to render a child legitimate the procreation as well as birth must take place after the marriage and hence their Lordships held that the Hindu law is the same in that respect at the English Law. Judge as Sir Barnes Peacock was led to such a conclusion from want of assistance at the bar. The only natural son recognized by law and custom is the aurasa son. The aurasa son is defined as the one begotten by the man himself in his lawfully wedded wife and not on the woman who was subsequently married by the begetter. Moreover such a son was never recognized even by custom.

The above view is also shared by Dr. Priyanath Sen commenting on various kinds of sons mentioned in the Sastras. He writes: - The concept or son ship has undergone an important change and now a son means primarily a true legitimate son begotten by the father upon his lawfully wedded wife. From the altered conception of son ship it follows that legitimatio per subsequens matrimonium which was recognized by Roman law can no longer be recognized in the Hindu Law for the alone is the aurasa son who is begotten by the father upon his lawfully wedded wife.

10. Comparative picture of the principle observed in Section 112.

Hindu Law and Muslim Law.

By this comparison, it is clear that Section 112 of the Evidence Act cannot be applied either to Muslim Law or Hindu Law. Muslim Law is not codified and preserves it orthodox identity through some Muslim countries have fixed the gestation period of one

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98 Marriage and Stridhana, Tagore law Lectures 5th Ed. 1925)pp 176-177.
99 Hindu Law, p. 136(8th Ed. 1940).
100 Hindu jurisprudence by Priyanath Sen, p. 122 (2nd Ed.) 1955.
year and these Muslim countries, Egypt, Syria, Sudan, Tunisia, Morocco, Algiers have fixed 9 to 10 months as prescribed under Shia Law. Under codified Hindu Law, there appears to be no provision and as such the principle of the Sashtrik Law will apply because the new Acts are only to amend and codify. Hindu Law and as per overriding provisions in the Acts, what is not provided in the Acts, should be taken as not amended and still has a legal force. So conception and birth during the continuance of lawful wedlock is still the principle of Hindu Law and is applicable.

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<td>It assumes the existence of valid Marriage</td>
<td>Lawfully wedded wife</td>
<td>There must be a Sahih marriage not bati.</td>
</tr>
<tr>
<td>2. Birth of a child</td>
<td>A child born during the continuance of marriage is legitimate</td>
<td>Child both conceived and born during the continuance of marriage is legitimate</td>
<td>The child born six months from the date of marriage is legitimate</td>
</tr>
<tr>
<td>3. Period of Gestation</td>
<td>It limits the period of gestation to 280 days after the dissolution of marriage. The child shall be illegitimate if born after 280 days</td>
<td>A child born 280 days after the death of husband shall be kshetraja in Hindu law</td>
<td>The natural period of gestation is 9 to 10 months in Shia Law. In Hahafi Law the maximum period is 2 years &amp; in Maliki &amp; Shafei Law it is 4 years.</td>
</tr>
<tr>
<td>4. Doctrine of Non-Access</td>
<td>Absolute non-access is the consideration for considering illegitimacy</td>
<td>Child conceived before marriage will be the child who married its mother (Kanina or Sahadhoya)</td>
<td>It is good ground for disclaiming paternity</td>
</tr>
</tbody>
</table>

Moreover, Madras High Court in V. Krishanappa v T. Venkappa rejected the argument as absurd "that since marriage was a religious sacrament (samaskara) in Hindu Law, Section 112 of the Evidence Act should have no application".

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101 Presumption of Legitimacy under the Evidence Act a century of Action and Reaction: JIL-76. (Special issue) (1972).
In view of this decision of the Madras High Court, the conflict between Section 112 is imposed and its application has blurred the conflict legally. Section 112 is only a presumption and personal laws are substantive law and cannot be sacrificed under the rule of evidence which is purity of English origin and as such necessary amendments are needed to suit it to the principles of Hindu and Muslim Law.

Further, even medically it is stated that the average period of pregnancy is 40 weeks or 280 days but this is only a mean value taken from the date of the missed period. Even where pregnancy occurs as a result of a single act of intercourse, the resulting length of pregnancy may vary by a number of days, the date of coitus is not necessarily the same as that of conception as viable spermatozoa remain in the female genital tract for a number of days.\(^\text{102}\)

Period of gestation is not inflexible. In the well known English case of \textit{re Clark}\(^\text{103}\) days was accepted and during this case medical evidence cited a number of cases up to 336 days gestation. \textit{Mckeown and Gibson} have well documented cases up to 328 days. Even in one English case a divorce suit was allowed on appeal by the House of Lords where 360 days was the alleged time of gestation. Dr. Bornard Knight is of the opinion that it is difficult to know where to draw the line between the authentic cases and those which are apparently impossible but it would seem to be hard to dispute a maximum of around 330 days assuming that the child showed evidence of post maturity at the time of birth. Thus, rather it is a guideline to the court to answer gestation period of 280 days as provided in the Evidence Act and not a thrusting section to be followed rigidly. This gestation period of 280 days is basically a presumption of legitimacy. It can be variable according to the medical condition and situation and the courts should not be simply swayed by the provision because the issue involved is the human life and its future course.

\(^{102}\) Dr. Bernard knight, Medical Jurisprudence and Toxicology, 6th Ed. 1990. p454.
\(^{103}\) Clarke V/s Clarke, All -ER 112 (1968).