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**COMPARATIVE ANALYSIS OF PRESUMPTION OF LEGITIMACY IN
HINDU AND MUSLIM LAW**

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ABSTRACT

In various actions and processes, the question of whether a kid is legitimate or illegitimate arises. It usually comes up in suits to determine a person's land ownership or in proceedings to entice a person to support an illegitimate child of which the alleged father, but it can also come up in other types of cases, such as a divorce action or a nullification of marriage because the child was not born from his nether regions. In general, the law's policy is to pronounce a kid legitimate when there is a certainty.

Keywords: *legitimacy, Hindu, Muslim.*

INTRODUCTION

"Maternity is always certain. Paternity is a matter of inferences."

In India, a woman's fidelity and a child's paternity are highly prized and considered honorable. In a society like India, the presumption of legitimacy not only decides a child's future, but the absence of such legitimacy can lead to societal harassment of the mother associated with the child. The issue of children's rights has arisen as one of the most hotly debated topics in the 21st century. *Section 112 of the Evidence Act, Section 16 of the Hindu Marriage Act, 1955, and a part of Mohammedan law* talk about the concept of presumption of legitimacy of a child.

Children are generally physically, intellectually, and financially reliant on others. Taking care of children's rights at every step has taken a back seat in this age of globalization, where things are changing at a quick pace. This impacts their entire value system and current social and economic necessities. The main issue before courts and framers of law while deciding such cases is the aftermath which has to be

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faced by the parties concerning the societal prejudice related to illegitimacy and unchastity.

With the advancement in medical science, it is now more accessible for one to prove legitimacy through DNA tests. However, it is only allowed at the courts' discretion. The non-inclusion of medical technology has been a considerable debate over the years, especially since it is rarely allowed in cases where the child is born during wedlock and cohabitation of both partners.

In the present paper, the researcher aims to analyze the presumption of legitimacy as read under the Hindu and Muslim personal law applicable in the country. The paper also looks at various legislations regarding the presumption of legitimacy to ascertain a relative position and gain a different perspective. The researcher has analyzed several case studies to understand the evolution of the *presumption of legitimacy* over the years.

2.1 THE HISTORY AND EVOLUTION OF PRESUMPTION OF LEGITIMACY

Section 621 of the California Evidence Code reads:

"Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."²

California has had a varied history of presuming legitimacy, especially when proving legitimacy through blood tests. In the notorious case of *Berry v Chaplin*³, Charlie Chaplin was held to be the father of an illegitimate child even when the blood tests showed that he could not be. It was sustained that blood tests are not conclusive evidence in matters of concluding paternity. The rule has now been modified in the *Uniform Act on Blood Tests To Determine Paternity*.

After that, in cases that lack a conclusive presumption of legitimacy, blood tests are allowed as conclusive evidence. However, it was still not allowed in cases where the

² CAL. EVID. CODE § 621 (West r966).

³ *Berry v. Chaplin*, 74 Cal. App. 2d 652, 169 P.2d 442 (2d Dist. 1946).

other essentials – proof of marriage, cohabitation, and the absence of impotence – are present since the physical proof of legitimacy is deemed unnecessary⁴.

In the case of *Jackson v Jackson*⁵, the lady left her husband less than four days after their wedding, and the wife gave birth to a child roughly nine months later. As part of the divorce deal, the husband was compelled to pay medical costs and child support and pay for the children's schooling. Blood tests were administered, where the possibility of the husband being the biological father was ruled out.

When the case moved to the Supreme Court of California, in a 4-to-3 decision, it was ruled that the blood tests should have been admitted. However, the majority reinstated the rule of *Kusior v Silver*⁶ that the blood tests cannot be considered conclusive evidence of presumption of legitimacy.

Blood tests are excluded from conclusive presumption procedures because biological paternity is immaterial when the presumption prevails. However, the presumption only applies if the conception happened when the husband was cohabiting with his wife; the time of conception is a factor. The assumption does not apply when the husband can establish that he was infertile during the time of probable pregnancy, according to *Hughes v. Hughes*⁷.

A statute of limitations would eliminate the existing injustice of denying a spouse irrefutable proof of nonpaternity—blood tests—in some situations when paternity is the decisive issue.

2.2 HINDU LAW AND PRESUMPTION OF LEGITIMACY

Section 16 of the Hindu Marriage Act, 1955, stood amended vide Amendment Act of 1976 and the amended provisions read as under:

⁴ See *Supra note 6*.

⁵ See *Supra note 2*.

⁶ *Kusior v Silver*, 54 Cal. 2d 603, 354 P.2d 657, 7 Cal. Rptr. 129 (1960).

⁷ *Hughes, v. Hughes*, 125 Cal. App. 2d 781, 271 P.2d 172 (4th Dist. 1954).

"Legitimacy of children of void and voidable marriages - (1) Notwithstanding that a marriage is null and void under section 11, any child of such marriage who would have been legitimate if the marriage had been valid shall be legitimate...

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be theirs would have been incapable of possessing or acquiring any such rights because of his not being the legitimate child of his parents."

The Supreme Court held in *PEK Kalliani Amma v. K Dev*⁸ that subsection (1) of section 16 stands alone because of the terms "notwithstanding that a marriage is null and invalid under section 11, this provision is independent of section 11." The amended clause, which was intended to give legitimacy to children born of an invalid marriage, will apply despite section 11's provisions, which have the effect of nullifying only marriages that took place after the Act went into effect, and that is in violation of section 5.

According to legal fiction, children born of a void marriage must be treated as legitimate for all purposes, including succession to their parents' property. The net effect is that any child born before or after the modification date benefits from legitimacy.

The offspring of a voidable marriage for whom a decree of annulment may be given under section 12 is covered by subsection (2). Even if either partner challenges the marriage's legitimacy and is not annulled, it would be considered valid. It would be a void marriage, and the parties' children would be orphaned. The children born of such marriage are the children of either side by operation of law. Under paragraph (3), such children are not permitted to claim any rights in or over the property of anybody other than their parents.

⁸ *PEK Kalliani Amma v. K Dev*, 1996 AIR 1963, 1996 SCC (4) 76.

Section 16(2) requires proof of conception before the deeming rule may be used. The issue was claimed to be different under the Evidence Act, which did not need proof of conception but did require proof of conception.

There is no provision in the *Hindu Marriage Act*, the *Indian Evidence Act*, or any other legislation that empowers a court to make a directive compelling a party to matrimonial or other cases to submit to a blood test. The opposing party cannot claim that he would challenge the law's conclusive presumption of paternity by establishing directly by a blood test that the spouse is not the kid's biological father since this would effectively nullify the present provision of *section 112*.

In *Gautam Kundu v. State of West Bengal*⁹, the Supreme Court established the following rules for the admissibility of paternity tests:

1. Blood tests cannot be ordered as a matter of course by Indian courts.
2. When such prayers are requested to conduct roving investigations, the request for a blood test is denied.
3. The husband must show non-access to dispel the presumption arising under section 112 of the Evidence Act, which requires a solid prima facie case.
4. The court must carefully consider the repercussions of conducting the blood test, including whether it would brand a youngster as a thug and his mother as an unchaste woman.
5. No one can be forced to provide a sample for testing.

In *Gautam Kundu*¹⁰, the Supreme Court also concluded that "the purpose of *section 112* of the Act was to combat the evil of illegitimacy and protect blameless infants from being "bastardized. "

2.3 MUSLIM LAW AND PRESUMPTION OF LEGITIMACY

⁹ *Gautam Kundu v. State of West Bengal*, AIR 1993 SC 2295.

¹⁰ *Ibid.*

The Muslim Personal Law has introduced 'acknowledgment of paternity', which is the declaration made by the father that a child is his legitimate child. However, it is not a process of legitimizing an illegitimate child¹¹.

Legitimacy refers to a child's legal status under Islamic law. If the legitimacy of a child is questioned but not contested, the father's acknowledgment of the child, whether verbal or implied, confers legitimacy on the child. Thus, if the illegitimacy of a child is proved, no acknowledgment can do the opposite. Therefore, it is safe to say that there is no legitimation under Muhammadan law.

In Islam, there is no such thing as legitimacy. It can only be shown via many (*Sahi nikah*) or even irregular marriages (*fasid nikah*). Adoption, on the other hand, cannot establish it.

To a mother, a kid is always genuine. As a result, Islam forbids any other criteria for legitimizing an illegitimate kid. Maternity is always sure, whereas paternity might be disputed. As a result, an illegitimate child has the right to inherit the mother's property in almost all circumstances.

In *Mohammad Khan v. Ali Khan*¹², the Madras High Court held that the doctrine of acknowledgment could only be applied in cases where the factum of marriage or the precise time of marriage could not be established and not in cases where the child's parents' lawful union could not be established, such as in cases of incestuous intercourse or an adulterous connection, and where the marriage required to make the child legitimate was disproved.

The status of legitimacy is conferred on a child by a Muslim who has reached the majority and is of sound mind and expresses or implies doubt in his legitimate child or that the child's mother is his legally wedded wife.

According to *Mohammad Azmad v. Lalli Begum*¹³, the recognition might be vocal or implied. A Mohammedan's acknowledgment of a child as his child can be inferred

¹¹ See *Supra note 6*.

¹² *Mohammad Khan v. Ali Khan*, AIR 1981 Mad 209.

¹³ *Mohammad Azmad v. Lalli Begum*, (1881)9 IA 8.

from his open treatment of him as such, without the necessity for proof of an express acceptance.

*Mohammad Alladad v. Mohammad Ismail*¹⁴ is a landmark case on paternity recognition. Moti Begum was married to Ghulam Ghaus in this instance. However, the actual date of their marriage concerning the birth of their first son, Md. Alladad remained unknown. Moti Begum and Ghulam afterward had four more problems, one of them was Md. Ismail. Moti Begum cohabited with Ghulam Ghaus for a significant period during which Md. Alladad would have been born, according to the facts on the record. Ghulam Ghaus always treated her as his rightful wife, and there was never any obstacle that would make their marriage illegal.

Following the death of Ghulam Ghaus, Mohd. Alladad claimed to be the eldest son of his father and sought an inheritance. However, Mohd. Ismail and the other three children of the late Ghulam Ghaus maintained that Mohd. Alladad was born before Moti Begum's marriage to Ghulam Ghaus, and it was unknown who was Mohd. Alladad's father. Ghulam Ghaus recognized and regarded Md. Alladad as his son, according to the facts. Mohd. Ismail and the other children of Ghulam Ghaus received similar recognition.

The whole bench of the Allahabad High Court found no proof that Mohd. Alladad was *Zina's* offspring (illicit intercourse). Despite the lack of proof of Mohd. Alladad's paternity, the presence of a marriage at the birth of Mohd. Alladad may be presumed because Ghulam Ghaus' marriage to Moti Begum was lawful, and they lived together for a long time. Furthermore, Ghulam Ghaus always accepted Moti Begum as his wife and Mohd. Alladad as his son, Mohd. Alladad inherited with Mohd. Ismail and the other deceased children.

CONCLUSION & RECOMMENDATIONS

In India, a woman's loyalty and the paternity of her kid are highly valued and respected. In a nation like India, the presumption of validity not only determines a child's destiny, but the lack of such legitimacy can result in societal harassment of

¹⁴ Mohammad Alladad v. Mohammad Ismail, ILR (1888)10 All 289.

the child's mother. The question of children's rights has become one of the most contentious issues in the twenty-first century. The issue of presumption of legitimacy of a child is discussed in *Section 112* of the *Evidence Act*, *Section 16* of the *Hindu Marriage Act, 1955*, and a section of *Mohammedan law*.

The Hindu law mentions the presumption of legitimacy under Section 16 of the Hindu Marriage Act, 1955. However, in Muslim law, the concept does not hold any ground. There is no such thing as legitimacy in Muslim law. However, case laws show both the laws that it is up to the court's discretion as per the facts of the case.

In the case of *A.G. Ramachandran And Anr. v. Shamsunnissa Bivi*¹⁵, it was held that Section 112 of the Indian Evidence Act, that "...S. 112 of the Evidence Act, is very general in its terms and it applies to all person including Mohamedans who may have a personal law of their own relating to legitimacy as there is no provision exempting them from the application of S. 112." Therefore, both the personal laws shall be subjected to the applicability of Section 112 of the Evidence Act.

Personal laws shall consider adding provisions regarding the inclusion of DNA and Blood Group tests in case of insufficient evidence to establish presumption. This will reduce the chances of discrimination against husbands concerned with such cases and, therefore, shall revive the purpose of the legitimacy tests – welfare and maintenance of the ones in need.

¹⁵ A.G. Ramachandran And Anr. v. Shamsunnissa Bivi, AIR 1977 Mad 182, (1977) 1 MLJ 482.