Legal Presumptions on legitimacy of child in the era of medical science

Submitte by-

Saraf Anjum

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Supervised by-

Nadia Rahman

Lecturer, Department of Law

East West University

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Abstract

This research work mainly deals with the existing provisions in Bangladesh related to the presumption of legitimacy of child. It shows some critical analysis of the traditional laws and statutory laws. This paper also has discussed the laws with various case principles and also tried to show how the Courts are taking decisions regarding this sensitive issue. The issues of presumption of legitimacy of child remained same for long period of time on the basis of religious excuses. Hence this works have tried to show some inconsistency by comparing the relevant laws with the medical science. This research work also has discussed the perspective of other countries and tried to give a comparative study regarding the issue of legitimacy of child. In this work I have tried to show that law shall not be based solely on the former concept because such concept are conflicted with each other and cannot meet the need of this modern age. Both morality and protectionism of law will be assured for ensuring proper justice. This paper mainly focuses on the analysis of legal presumption of legitimacy of child according to the Muslim Laws and section 112 of the Evidence Act, 1872 in the light of modern scientific techniques.

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Chapter I

Introduction:

'Legitimacy of Child' is a very sensitive issue in Bangladesh. People in our country are not very comfortable to raise the issue or do not discuss frequently on this topic but where there is a doubt regarding this, it is essential to determine the parentage as it affects a child's rights of inheritance or any case of maintenance, custody, guardianship etc.Whether a child is the legitimate offspring of a husband and wife or not often creates hurdles to ascertain when the paternity of the child is denied by the husband. There is no presumption as to maternity since maternity is a question of fact[1]where paternity is to be proved with evidence.Legitimacy is the acceptance of a governing law or a regime. Therefore legitimacy of a child is basically means the status of a child born to parents who are legally married to each other. In Bangladesh, paternity related issues can be solved by the rules of Mohammedan law and by thesection 112 of the Evidence Act, 1872 but these laws are conflicting with each other and inconsistent with the medical science as well.

Literature Review:

A vast research works on Muslim Laws and Evidence Law is widely available. But research work focused on the part presumption regarding legitimacy of child is not widely available. Though concern contemporary opinions and literature related to few papers and few books are reviewed due to paucity of time and purview. However, few topical discussions which are essential for the study can be reviewed.

Asaf A.A. Fyzee (1974) opined that the peculiarity of the Sharia Law is that in some certain cases where it is doubrful whether a person is child of a certain person and the acknowledgement of the father confers on the cgild the status of legitimacy.

1*Geeta Rani Dasi vs. Shamina Khatun vs. Bangladesh 5* BSCD 176.

DF Mulla stated that Acknowledgement is not Legitimation and as per the Muslim Law an acknowledgement of legitimacy, is a declaration of legitimacy, and not a legitimation.

Tahir Mahmoodsays that section 112 which insists only birth after marriage, the conception itself must take place afterthe marriage in the case of Muslim Law.

Dr. Muhammad Ekramul Haque analyses in his book about legitimacy issue is that the feature of the Islamic Position is that mere birth after the marriage is not sufficient rather than the child also must be conceived after marriage.

MahendraAgatraoLomte& Dr. SR Katari (2017) havediscussed the importance of DNA testing for determining paternity. They said that the Legislatures had not consider the advancement of modern techniques while enacting section 112 of The Indian Evidence Act, 1872 but the Law is considered to be dynamic one and not static, it should keep changing according to needs and development of the society without compromising its basic principles.

Sadiqul Islam Sagor&Talukder Rasel Mahmud discussed thatas per the section 112 of the Evidence Act,1872 that a child is born during wedlock is sufficient to establish legitimacy and shifts the burden of proof to the party who seeks contrary.

Scopes:

The work is mainly based on the existing provisions regarding the presumption of legitimate child in Bangladesh and showing some criticism about the existing system. Modern technologies and medical science are taken into consideration while discussing this issue.

Objectives of the study:

1. The objective of this study is to analyse the relevant laws regarding the issue.
2. To show the conflicting circumstances between the traditional and statuary laws
3. To compare the existing laws with medical science
4. Enlighten the importance of medical technology
5. Comparing our laws with other country's laws
6. Suggesting better ways to resolve disputes regarding legitimacy of a child

Methodology:

This research can be said as a theoretical research or a descriptive research which includes relevant theories, different opinions of individual or as a group. On the basis of these, I add my own hypotheses or choice of research methods with addressing the questions of why and how. I conduct this research by describing what exists and also, I have tried to discover new meanings as well.To conduct this research, I mainly use secondary data. The methodology is depending on some secondary sources by searching websites, different blogs, various books, online journals, newspaper and differentjournal articles. I also collected data from various Acts, Statute Laws etc for performing this work.

Limitations:

These critical assessments on this issue might be able to get better outcome if there is no limitation of time. Doing this research, I was not able to find enough materials regarding this topic. There are lacking of case laws in Bangladesh and resources for research is not enough.

Research Question:

A number of questions can be framed on this research topic. However, this research has been limited to following question.To fulfill the purpose of the research following question will be addressed:

Whether the existing laws regarding the presumption of child in Bangladesh are ensuring justice and better welfare of the child?

Chapter II

Critical Analysis of the Relevant Provisions regarding the Presumption of Legitimacy of Child

Analysis of Sharia law:

Basically, in Muslim law there two major schools of law. One is the Sunni school and another one is the Shia School of law. There are four more schools of Sunni law, Namely:i) Hanafi school, ii) Maliki school, iii) Shafei school and iv) Hanbali school. The Shia school of law is divided into three categories. Such as: i) IthnaAsharias, ii) Ismailyas and iii) Zaidyas.These schools are governed by their own law.

Determining the legitimacy of a child, issues can be raised regarding the marriage.According to Muslim law, marriage is a contract which is undertaken with the object of procreation of children and legalizing of children. On the other hand, "*zina*" means fornication or adultery. It is that type of sexual intercourse between a man and a woman which is not permitted by the Muslim law and that the offspring of such an intercourse are illegitimate and such children can never be legitimized by acknowledgement.[2]

As perMuslimlaw, theHanafischoolthere are two types of invalidmarriage. One isvoid(batil)andother is irregular(fasid), childrenofall voidmarriagesareillegitimate,butchildrenoffasidmarriagesareconsideredlegitimate.[3]The children born out of Muta marriage are legitimate and can inherit property.[4] The marriage can also be presumed by an acknowledgement by the man that the woman is his wife.[5]

2Akshaya Shukla "*Evaluation of the presumption of legitimacy of a child and the Muslim law*" International Journal of Law,ISSN: 2455-2194, RJIF 5.12 Volume 3; Issue 3; May 2017; Page No. 117-119 <www.lawjournals.org> accessed 17th February 2019

3Fyzee, Outlines of Muhammadan Law 190 (1974) 112-115

4*ShazadaQanum Vs Fakher Jung* [1953] Hyd.6

5*Mohd Amin Vs Vakil Ahmed* [1952] A.S.C 358.

According to Muslim law if a child is born after six months of marriage then the child will be declared as a legitimate child unless the father denies it and with the acknowledgement, subject to *lian* if a child is born within less than six months then the child shall be declared as legitimate one.*Lian* means a Qur'anic Institution governing cases where a husband accuses his wife of adultery without supplying witnesses.

If the child born after the dissolution of the marriage is legitimate subject to the time period as per the different schools. According to Shia Law the time period is within 10 lunar months, according to Hanafi Law it is within 2 lunar years and Shafi Law and Maliki law it is 4 lunar years. ForHanbali the time period is 7 years.

According to the Shia School of law a child who is born outside the lawful marriage has no legal parents. The Sunni Hanafi School of law states that the mother of an illegitimate child or a "*filius nullius*" has an obligatory duty to maintain the child till the illegitimate child attains the age of seven years.[6]Under the IthnaAshari Law the child who was born out of a lawful union is provided full protection but in case of lawful union the woman is regarded as his mother and as per this law where the woman is not married to the begetter at the time of the child's conception, she will not considered as mother of that child.[7]No school of Muslim law recognises the right of an illegitimate child of inheritance in the property of his father.[8]

Concept of Acknowledgement:

6Akshaya Shukla "Evaluation of the presumption of legitimacy of a child and the Muslim law" International Journal of Law,[2017] Volume 3; Issue 3; Page No. 117-119

7Fyzee, Outlines of Muhammadan Law (1974) 112-115

8Akshaya Shukla "Evaluation of the presumption of legitimacy of a child and the Muslim law" International Journal of Law,[2017] Volume 3; Issue 3; Page No. 117-119

The doctrine of *acknowledgement* can only be used in a situation where the factum of marriage itself or the exact time of marriage could not be proved and not in cases where the lawful union between the parents of the child was not possible as in case of incestuous intercourse or an adulterous connection and where the marriage necessary to render the child legitimate was disproved.[9]

There are some conditions of a valid acknowledgment of legitimacy of a child in accordance to the Muslim law: -

1. The acknowledger must not any incapacity to enter into a valid contract.
2. That the child is must not be offspring of zina (illicit relationship).
3. The acknowledgement may be either express or implied. That means the acknowledgement can be in words spoken or written or in terms of express conduct of the father. [10]
4. The acknowledger must have distinct intention to confer the status of legitimate sonship.
5. That the child to be acknowledged should not be a child of someone else and that the age of the acknowledger should be possible of that of a father and it must be 12.5 years difference between the child and the father.

6.. The legal marriage should be possible between the mother and the acknowledger.

7. The child who is acknowledged should confirm the acknowledgement.
8. The acknowledgement once granted cannot be revoked.[11]

Analysis of Section 112 of The Evidence Act:

Section 112 of the Evidence Act,1872 statedthe 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

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9*Mohammad Khan vs Ali Khan* AIR 1981 Mad. 209

10*Mohd Amin vs Valil Ahmed*, AIR 1952 SC 358.

11*AsharfodDowlah vs Hyder Hussain*, [1866] II MIA 94

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.

The section is based on the principle that when a particular relationship such as marriage, is shown to exist, then its continuance must prima facie be presumed.[12]If the man whom the child's mother is married with, denies the paternity of that child the burden of proof will be lied on him. He has to prove the no access between him and his wife otherwise the court will presume the child is a legitimate child of that man as it is considered as a conclusive proof according to the section.

In the case of *Nasrin Jahan (Parul) vs Kabir Ahmed (Civil),*[13] it was held that the evidence on record proved that the plaintiff Nos. 2 and 3 were born of the wed lock and that since the children were born during the subsistence of the marriage, they were legitimate children.

In another case of *Sethu v. Patani,*[14], the court held that if the child is born after three months of the second marriage is legitimate son of the second marriage in the eyes of law unless the legitimacy presumption is rebutted by the evidence of non-access of the mother with the second husband at the time child would have been begotten.

Arguments can be based on this principle that if the child is bornwithin 280 days of dissolution with the first husband, but after the second marriage it will be presumed to be the legitimate child of the second marriage. Hence, it is possible that the second husband is not the biological father of the child and not being a biological father, the said husband is deemed as the legitimate child if he cannot proof the no access.

Thus, it can be seen that in these two cases the Court considered the direct provision of the law and we can understand the practice of the court in this regard by these case laws.

Conclusive proof regarding legitimacy of child

12*Bhima v. Dhulappa*, [1904] 7 Bom LR 95.

13 61 DLR (HCD) 697

14 95 IC 317

The expression “conclusive proof” shall have to be read along with Section 112 of the Evidence Act, 1872.According to the said Act there are 3 types of presumptions. One is May Presume, Shall Presume and Conclusive Presumption. As per the section 4 the expression “conclusive proof” means when one fact is declared by this Act to be conclusive proof of another, the Court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. The other presumption namely, ‘may presume’ and ‘shall presume’ are rebuttable presumptions but the conclusive proof is irrebuttable. The presumption under section 112 is a conclusive presumption of law which can be rebutted only by proof of non-access between the parties to the marriage at a time when as per the ordinary course of nature that the husband could have been the father of that child. The presumption under the section is conclusive, though rebuttable.[15]

Importance to prove no access for rebutting the presumption

In a civilized society it is imperative to presume the legitimacy of a child born during continuation of a valid marriage and whose parents “have access” to each other and S. 112 is based on presumption of public morality and public policy."[16]This presumption can only be displaced by a strong preponderance of evidence, and not by mere balance of probabilities."[17] Non access can be proved by direct or circumstantial evidence though the proof of non-access must be clear and satisfactory as the presumption of legitimacy is highly favored by law.[18]For proving no access, evidence can be shown that the man is impotent, infancy, having some physical disabilities or far away from him wife such as he is in abroad or he was in jail or he was working in a ship on seas etc.

15SagorSadiqul Islam & Mahmud Talukder Rasel; *The Evidence Act* ; Shams Publications ; First edition; p.242

16*Sham Lal v. Sanjeev Kumar*, [2009] 12 SCC 454.

17*Gautam Kundu v. State of West Bengal* [1993] Cri LJ 3233,

18*Chilukurivenkatewara v chilukurivenkatanarayan* , [1954] sc R 424

Proposition against Section 112:

Above all the discussion some points can be observed that,

i) Presumption of legitimacy as stated under this section can only be rebutted when there is strong proof of non-access but it is immaterial whether the wife has had sexual intercourse with other man than her husband. An argument can be made that if a child is born as a result of that intercourse even though as per the law the said husband will be presumed as the legitimate father because the child born in a lawful wedlock and evenif after the parents of a child are getting divorced and within 280 days a child is born because of that intercoursethen the wife is entitled to compel the husband to give the maintenance of the child with whom the husband has no biological relation though the husband can give proof as his defense which is "Non-Access" but the applicability of this exception under the section is too narrow and sometimes it is too difficult to proof the no access.

ii) This section pays no attention to an immoral conduct of a woman which is considered as an offence under the section 497 of the Penal Code, 1860 which is adultery.

Conflict between the Personal Law System and the Statutory Law:

There are one circumstances when these two systems can collaborate with each other:

A child born after six months from the date of the marriage and within 280 days after thedissolution of the marriage is legitimate in either system. Former is subject to lian and the latter issubject to proof of non-access.

Inconsistency can be explained by these two circumstances:

First of all is that according to section 112, A child born after the first day of marriage is presumed to be legitimate unless proof of non-access is claimed by the husband though this proposition can be rebutted by the invocation of section 114 where court has the discretionary power to presume anything from the perspective of common course of natural events and human conduct. But according to Muslim Law if a child born after the first day of marriage the child shall be considered as an illegitimate child.

The other situation is that according to section 112 of Evidence Act, a child born after 280 days of the termination of marriage if the mother remains unmarried but as per the Muslim Law a child born after dissolution of the marriage is presumed to be legitimate up to 4 years after the termination of marriage is legitimate which is subject to Lian. Accordingly, Hanbali has gone even further and made that time period 7 years.

Evidence Acts supersedes the rule of Muslim Law or not:

Question can be raised in this regard that whether the rules of Evidence Act supersedes the provision of the personal law or not. Different scholars hasgiven different opinion. When the section 2 of the Evidence Act, 1872 was in force several scholars have given their opinion as to the superseding effect of section 112 over personal law by the virtue of section 2. According to D.F. Mulla[19], the provisions of Evidence Act, 1872 supersede the substantive law under Mohammedan jurisprudence.According to Ameer Ali[20] Section 112 embodies the English Rule of law and cannot be held to vary or supersedes by implication the rules of Muslim law. Since the Evidence Act, 1872 is a procedural law whereas Muslim law is a substantive law thus former should be given preference over the later, this proposition was given by many well-known jurist's including Tayabiji.

In a case of*SibtMohd. v. Md. Hameed*[21], has held that Section 112 of The Evidence Act,1872 supersedes Mohamedan Law and that it applies to Mohamedans as well. In another case of *Mt. Sampatia Bibi v. Mir. Mahboob Ali*[22], the earlier decision in *SibtMohd. v.Md.. Hameed*[23], was followed, and it was held that the question of legitimacy must be decided in accordance with S. 112 of the Evidence Act, although its provision conflicts with the provisions of Mohamedan Law

19Sir DinshahFardunji MullaCIE MA. LLB or Dinshaw Mulla (1868-1934) , Indian author of legal reference books

20Syed Ameer Ali (1849 – 1928) was an Indian/British Indian jurist

21 ILR 48 All 625 AIR [1926] All 589

22 AIR [1936] All 528

23 48 All 625 AIR [1926] All 589

and that S. 112 applies by its terms to all classes of persons in British India and no exception is made in favour of Mohamedans.On the other hand, K.P Saxena[24] stated that:
“the Muslim law of legitimacy should prevail, as it is the substantive portion of the law, and section 112 ought not to be applied in such cases.”

The question about the applicability of section 112 after the repeal of section 2. According to Section 2 as it originally stood as follows: "On and from that day the following laws shall be repealed: all rules of evidence not contained any statute, act or regulation in force in any part of British India." As per the section all the rules of evidence, which were not contained in any Statute, Act or Regulation were repealed. Before the Evidence Act, 1872 coming into force all the rules of evidence, which had their origin in the Islamic Law with some modification, were followed by the courts in India. But after the enforcement of the Evidence Act, it ceased to have any force of law and for this the view of Indian High Court had been that the Muslim Law evidence was not applicable anymore.

The Muslim Personal Law (Shariat) Application Act was passed on 7 October 1937 in British India to ensure that Indians following Islamic faith shall be ruled according to their cultural norms.[25] In the 1930s, the Muslim League took up the case of codifying the Shariat as part of the law of British India and in the end, this politics would go on to produce the Shariat Act.[26]

In the case of *Abdul Ghani v Telah Bibi*[27]*,* Division bench of the High Court Bench of West Pakistan held that the rule of Mohammedan law of evidence was repealed by section 2 were repealed by the section itself. The view of the judges had been after the repeal of section 2 that the rule of Muslim law as to the legitimacy of a child was reviewed. In the case of *Hamida*

24K. P. Saxena, (1932-2013) Lucknow-based satirist and writer

25Rooychowdhary, Arija"Shariat and Muslim Personal Law: All your questions answered." *The Indian Express*(4 May 2016)

26Shoaib Daniyal, "A short history of Muslim personal law in India." *scroll.in (*Sep 04, 2017)

27 PLD, 1062, Lahore

Begum v MazidaBegum[28] the supreme court of Pakistan approved the judgement of the Lahore High Court given in the case of *Abdul Ghani v Taleh Bibi*[29] and it was held that on the repeal of the section 2 of the Evidence Act 1872 by the Act 1 of 1938, the Muslim personal laws will be applied to the Muslims.

But later in the case of*A.G. Ramchandra v. Shamsunnisa Bibi,*[30] the Madras High Court heldthat section 112 of Evidence Act,1872 is very general in its terms and it applies to all persons including Mohammedans , who may have a personal law of their own relating to legitimacy as there is no provisions exempting them from the application of section 112 of the Evidence Act,1872. The Learned Counsel argued that court has overlooked the provisions of the Muslim Personal Law (Shariat) Application Act, 1937 which clearly indicate that it is the Mohamedan Personal Law that has to govern and not the general provision contained in S. 112 of the Evidence Act.
Though such decision was took place but according to the Muslim Personal (shariat) application act, 1937, this will govern all the personal matters of all over the Muslim. After all the discussion it can be said that for the Muslim the Muslim Law shall prevail over the Evidence Act,1872.

28 SC [1975]

29 PLD, 1062, Lahore

30 AIR 1977 Mad 182, [1977] 1 MLJ 482

Chapter III

Muslim Law regarding Legitimacy of Child and Section 112 VIS-A-VIS MEDICAL SCIENCE

Concept of Pregnancy in Medical Science:

Pregnancy or conception is a term which is often come across in our context when we talk about presumption of legitimacy of a child in the realm of medical science. Pregnancy, also known as gestation, is the time during which one or more offspring develops inside a woman.[31]In order to being pregnant, sperm needs to meet up with an egg. Pregnancy can occur by sexual intercourse or assisted reproductive technology.[32]Pregnancy officially starts when a fertilized egg inserts in the lining of the uterus. It takes up to 2-3 weeks after sexual intercourse for pregnancy to happen.The date of sexual inter course is not essentially the same as that of conception, as viable spermatozoa may remain in the female genital tract for a number of days.[33] The maximum

31Eunice Kennedy Shriver "Pregnancy: Condition Information" National Institute of Child Health and Human Development (19 December 2013)

32Shehan CL, "The Wiley Blackwell Encyclopedia of Family Studies " (2016) 4 Set. John Wiley & Sons. 406

number of days for which they retain their potency is not known but is probably in excess of five or six days.[34]

Importance of determining the length of Gestation:

For determining the paternity of a child, it is important to discuss the length of gestation period. Generally, gestation means the period of developing a child inside the womb of a woman between conception and birth.Usually, it takes approximately forty weeks for a pregnancy to end but it can extend to forty-two weeks. It generally takes thirty-seven weeks for a gestation period to end. The average period of pregnancy is 40 weeks or 280 days which is counted from the first missed menstrual period.

Comparing Medical Science with the Muslim laws regarding legitimacy of child:

Rules of Muslim laws regarding the presumption are discussed earlier in this paper. Here in the rules, the date of the birth of the child is taken into consideration but it fails to discuss about the date of conception. If we follow the medical science it can be seen that if a child born within six months of a marriage or just after one day of six months then the child must conceive before the marriage. If a child is born within six months or 24 weeks the infant will be extreme preterm infants but it is rare. It can be said that if a child is born just after six months or within six months then there is possibilities that the mother of the child is got pregnant before the marriage. Therefore it can be said that the mother commits Zina and the offspring is out of zina..

Sexual intercourse before marriage is prohibited in Islam. A Quranic Verse can be mentioned here.

Al-Noor (The Light) - 24:2

Topics discussed in this Verse:

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33 Aarti Dhillon'PRESUMPTION OF LEGITIMACY UNDER SEC 112 OF EVIDENCE ACT AND NANDLAL BADWAIK CASE' (June 28, 2017) <https://itsmehappening.wordpress.com/2017/06/28/presumption-of-legitimacy-under-sec-112-of-evidence-act-and-nandlal-badwaik-case/> accessed 18th March 2019

34 Aarti Dhillon'PRESUMPTION OF LEGITIMACY UNDER SEC 112 OF EVIDENCE ACT AND NANDLAL BADWAIK CASE' (June 28, 2017) <https://itsmehappening.wordpress.com/2017/06/28/presumption-of-legitimacy-under-sec-112-of-evidence-act-and-nandlal-badwaik-case/> accessed 18th March 2019

[Day of judgment: belief in][Punishments at law][Zina]

"*The woman and the man guilty of adultery or fornication,- flog each of them with a hundred stripes: Let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the Believers witness their punishment."* - 24:2

It can be argued that the child out of Zina is not legitimate at all. Here a case can be referred. In the case of *Habibur Rahman Chowdhury Vs. Altaf ali Chowdhury,*[35]the privy council held, by the mohammeden law, a son to be legitimate must be the offspring of a man and his wife or of a man and his slave, any other offspring of zina that is illicit connection and cannot be legitimate.

Another argument can be brought here regarding the time of gestation. According to the rules of Muslim law, a child will be considered as legitimate child if a child born upto 4 years after dissolution of marriage. According to Medical science the gestation period is up to 42 weeks. According to Medical science after a sexual intercourse it takes up to 2-3 weeks for pregnancy to happen and pregnancy stars from the first day of a woman's last period where conception starts from two weeks after of such day and the maximum gestation period is 42 weeks. Therefore, it can be said that a total period of time is up to (3 weeks+2 weeks+42 weeks) = 47 weeks which means about 12 months or 1 year. That is why after 2 years of dissolution (Hanafi Law) and after 4 years of dissolution (Shafi and Maliki Law) if a child is born than it is not possible that the child comes from its mother's previous husband. Hanbali has and made that time period 7 years which is irrational as well.

In these two cases it can be argued that rules of Muslim Law regarding legitimacy of child conflicts with the concept of medical science.

Comparing Medical Science with Section 112:

If we see these findings of medical science then ambiguity arises in order to section 112 that whether by the word "birth" in the section istaken as the actual delivery date of a child in a hospital or the section taken into the consideration of the probable date of conception. The word 'begotten' used in section 112 of the Act means 'conceived' and not 'born'. According to section 112, A child born after the first day of marriage is presumed to be legitimate unless proof of non-access is claimed by the husband. In that case medical science has aessential role to play that it is not possible to deliver a child before the expiration of a minimum period of gestation thus

35 [1921] 23 BOMLR 636

rebutting the presumption of legitimacy of a child born after the first day of marriage. The presumption under the section arises from the time of birth of the child not from the time of the conception and the time of the conception is material only when the presumption is being displaced by the proof of access or non-access between the wife and husband.[36]

This section presumes that sexual intercourse is an absolute essential for the conception of a child in woman's womb. This presumption is expressed in the non-access clause of the section *i.e*. the section says if the man could not possibly have had sexual intercourse, it cannot be his child. Several modern advancements such as deoxyribonucleic acid (DNA), ribonucleic acid (RNA) tests, sperm bank or cryobank, in vitro fertilizations, surrogacy *etc*. have done away with the necessity of a sexual intercourse *i.e.* the physical presence of a man near a woman for the conception of a child.[37]

In this section, 'access' and 'non-access' mean the existence or non-existence of opportunities for sexual intercourse; but it does not mean actual cohabitation. The word 'access' in this section means 'effective access'. In a case where a widow uses her dead husband's donated sperm to get pregnant 280 days after her husband's death, since this section require 'continuance of a valid marriage' and the child, in this case, will, unfortunately, be born after the marriage has ceased, it can easily be proved to be illegitimate.[38]In this modern era, surrogacy can be an issue. As per the existing provisions, child born out of surrogacy, at the first sight it will be considered illegitimate. Again, according to this section if a woman agrees to become pregnant and deliver a child for a contracted party as a gestational carrier to deliver after having been implanted with an embryo then that child would be the legitimate childof that woman's husband (if she is married) but it is illogical because he is not involved in this.

36*Palami v. Sethu*81 IC 456

37Aarti Dhillon'PRESUMPTION OF LEGITIMACY UNDER SEC 112 OF EVIDENCE ACT AND NANDLAL BADWAIK CASE' (June 28, 2017) <https://itsmehappening.wordpress.com/2017/06/28/presumption-of-legitimacy-under-sec-112-of-evidence-act-and-nandlal-badwaik-case/> accessed 18th March 2019

38Aarti Dhillon'PRESUMPTION OF LEGITIMACY UNDER SEC 112 OF EVIDENCE ACT AND NANDLAL BADWAIK CASE' (June 28, 2017) <https://itsmehappening.wordpress.com/2017/06/28/presumption-of-legitimacy-under-sec-112-of-evidence-act-and-nandlal-badwaik-case/> accessed 18th March 2019

Importance of DNA Test for Determining Paternity:

Generally DNA paternity testingmeans the use of DNA profiling to determine whether two individuals are biologically parent and child. It can be said that origin of DNA test comes from this branch of medical science. Full form of DNA is Deoxyribonucleic acid. Genetic material can be found in the cells of living organism where each cell is the bearer of half of DNA of biological mother and father. It determines human character, behavior and body characteristic's thus this DNA test can be useful to determine the father of a child. Though governing laws are meant to be invoked in those cases where paternity is in dispute DNA test technology might be a solution as to the determinations of the paternity of a child. In the modern era of medical science where paternity DNA testing has been developed significantly, it is unnecessary to say that, paternity of a father can be determined by this testing with 99.99% accuracy.[39]The proof of non-access can be sorted out with the paternity DNA testing.

In Bangladesh, in this modern era in some cases the courts are allowing DNA test for determining paternity. In the case of *Beautiful Bibi vs. Sydur Rahman,*[40]the defendant claimed that he is not the biological father of the plaintiff's minor son thus he is not bound to give maintenance to the minor son. The Court allow the application given by the plaintiff for DNA testing. The court reversed the findings of the trial court that the son born within six months of the marriage and as per Muslim Law, the son is not the legitimate child but the appellate court stated that this is contrary to the statutory provision of section 112 of the Evidence Act, 1872 which stated the conclusive proof of legitimacy of a child born during continuance of the marriage unless it can be proved that the parties had no access to each other at any time when the child could have been begotten. The defendant could not prove the no access. The DNA report shows that the defendant is the biological father of the child. The court has taken the DNA report into consideration. The Court further stated that in our country, there is no specific law on DNA test but the Evidence Act, 1872 (section-60) approves admissibility of expert opinion as evidence. The court stated that the DNA Test report prepared by the Government DNA

39*Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh,* (2003) crlj 4508 (AP)

40 [2014] 67 DLR 1

Laboratory is a credible evidence. The appellate court also stated that the DNA test, for the purpose of identification of parentage not used frequently.

In another case of *Bangladesh JatiyoMahilaAinjibi Samity v. Bangladesh,*[41] it was claimed that the Former Deputy Inspector General of Police (DIG) of Bangladesh and his wife Mrs. Anwara Rahman traffic seven children of various ages out of the country but they claimed that they are the parent of the seven children. The High Court Division asked Dhaka Medical College authorities to carry out the DNA test at its DNA Lab under the supervision of the Supreme Court authorities upon separate petitions filed by BNWLA and BSEHR in 2006.[42] This case was solved by Sibling DNA testing in order to determine if the seven children share biological parents in common but the result of the DNA test shows that all the seven children are unlikely to be related to each other.

It can be seen that the courts are allowing DNA test regarding this issue but not frequently and by doing this research work I also did not find enough case where Bangladeshi Courts are allowing DNA test for solving this issue but as the Court has inherent power under section 151 of Code of Civil Procedure 1908 the court can order DNA testing for determining fatherhood since there is no provision in laws for DNA testing in this regard.

41 Writ Petition No. 5359 of 2006

42 Staff Correspondent, "Ex-DIG's 7 kids go under DNA test" The Daily Star (August 07, 2008)

Chapter IV

Presumption of Legitimacy of Child: A Comparative Study

Laws regarding Presumption of Legitimacy of Child in India:

Years and years ago the enactment of section 112 in chapter VIII of the Evidence Act, 1872 had given a severe blow to the rules of legitimacy under systems of personal law prevailing in the Indian subcontinent. Though Hindu law was not spared, most adversely effected was the Muslim personal law whose attitude to legitimacy and the period of gestation was wholly negatived by the newly enacted provision, made applicable to all citizens of the erstwhile British India irrespective of their religion.[43] At present, the rules laid down in section 112 of the Evidence Act are applicable in all the three countries of the subcontinent which are India, Pakistan and Bangladesh.

The conclusive proof of legitimacy of a child born during the continuance of a valid marriage is significantly analysed under section 112 of the Indian Evidence Act, 1872.

43Tahir Mahmood, 'PRESUMPTION OF LEGITIMACY UNDER THE EVIDENCE ACT: A CENTURY OF ACTION AND REACTION' (1972), pp. 78-89

In this modern era, DNA testing is also allowed by the Indian Court for determining paternity.Some cases can be referred regarding this issue.

Precedents regarding DNA testing:

Since sometimes DNA testing has been criticized especially when there is an existence of valid marriage. Public morality is always be an issue in this matter. There are cases where order for DNA testing have been upheld under certain requirements:

In a caseof*Gautam Kundu v. State of West Bengal*[44]supreme court held that,

The court should follow these three prerequisites regarding the order and application of DNA testing:

- Order for DNA testing can only be given when there is a sufficient proof of 'non-access' to rebut the presumption of legitimacy under section 112 of the Act. Existence of prima facie case is primary criteria for the husband to be entitled to such an order.
- Court should always foresee what would be the outcome of such testing. The child and the mother shall not be labelled as something disgraceful.
- Court should not allow such testing as a matter of course.

In another case of *Sharda v. Dharmpal*[45]a judge's bench of the Supreme Court held that:

- In a strong prima facie case and proof, court has the authority to order for DNA testing.
- Matrimonial court has the authority to compel a person to such medical tests as required by the court.
- Such order is not subject to the violation of right to life and privacy.
- If any person does not comply with the order of the court, an adverse inference may be drawn against such person under section 114 of the Act.

NandlalWasudeoBadwaik v. Lata NandlalBadwaik[46]

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44 [1993] AIR SC 2295

45[2003] 4 SCC 493

A recent judgment was passed in 2014 regarding this issue. It has been recognized by the Supreme Court that the result of a genuine DNA test is scientifically accurate. It is presumed that a child born during continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions laid therein are satisfied. This can be rebutted if it is shown that the parties to the marriage have no access to each other at any time when the child could have been begotten. Here, in the present case, the wife had claimed that the child was born in the wedlock, but the husband argued that he had no access to her when the child was begotten. The husband's claim was proved by the DNA test report showing that he was not the biological father of the girl child. The Supreme Court held that they could not compel the husband to bear the fatherhood of a child, when the scientific reports proved to the contrary.

As per the need of this modern era, the Indian Evidence (Amendment) Bill, 2003 has been proposed by the recommendation of the 185th Law Commission Report. In the Bill, proposal is there to revise Section 112 of the Indian Evidence Act, 1872. It provides as follows:

“112. The fact that any child was born during the continuance of a valid marriage between its mother and any man, or within two hundred and eighty days.

(i) After the marriage was declared nullity, the mother remaining unmarried, or

(ii) After the marriage was avoided by dissolution, the mother remaining unmarried.

Shall be conclusive proof that such person is the legitimate child of that man, unless

(a) It can be shown that the parties to the marriage had no access to each other at any time when the child could have been begotten; or

(b) It is conclusively established, by tests conducted at the expense of that man, namely,

(i) Medical tests, that at the relevant time, that man was impotent or sterile, and is not the father of the child; or

(ii) blood tests conducted with the consent of that man and his wife and in the case of child, by permission of the Court, that the man is not the father of the child; or

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[46] 2014 (1) SCALE 99 (SC): Crl. A. No. 24 of 2014; Decided on 6-1-2014 [Chandramauli Kr. Prasad and Jagdish Singh Khehar, JJ.]

(iii) DNA genetic printing tests conducted with the consent of that man and in the case of the child, by permission of the Court that the man is not the father of the child; and

Provided that the Court is satisfied that the test under sub-clause (i) or sub-clause (ii) or sub-clause (iii) has been conducted in a scientific manner according to accepted procedures, and in the case of each of these sub-clauses (i) or (ii) or (iii) of clause (b), at least two tests have been conducted,

and they resulted in an identical verdict that man is not the father of the child.

Provided further that where man refuses to undergo the tests under sub-clause (i) or (ii) or (iii) he shall, without prejudice to the provisions of clause (a), he deemed to have waived his defense to any claim of parentage made against him.

Explanation I: For the purpose of sub-clause (iii) of clause (b), the words 'DNA genetic printing tests' shall mean the tests conducted by way of samples relatable to the husband and the child and the words 'DNA' mean 'Deoxyribonucleic Acid'.

Explanation II: For the purpose of this section, the words 'valid marriage' shall mean a void marriage till it is declared nullity or a voidable marriage till it is avoided by dissolution, where by any enactment for the time being in force, it is provided that the children of such marriage which are declared nullity or avoided by dissolution, shall nevertheless be legitimate."

It transpires from above proposal that the Law Commission has recommended two more exceptions that where there is string proof; conclusive proof will be the standard for the same. So, as far as DNA evidence is concerned, the Bill prescribes that a mismatch is a conclusive proof for the person not being the father.[47]

This Bill has been proposed for amending section 112 in the Evidence Act, 1872 and to include DNA testing for proving the legitimacy. But this Bill has not been passed yet till date.

Statutory Framework in Pakistan

As earlier discussed, that the law regarding presumption of legitimacy is same in Pakistan like India and Bangladesh.In Pakistan, there is no particular law that deals with DNA evidence. DNA evidence is evaluated in the context of Articles 59and 164 of the Qanun-e-Shahadat Order 1984 ('QSO')[48]. It can be discussed with some case principles that how the Pakistani Courts deals with the DNA evidence.

47 2006 Cri LJ, Journal Section at 102

DNA Evidence in Pakistani Court

In *Khizar Hayat v Additional District Judge, Kabirwala*,[49]

In this case the High Court observed that a DNA test could not be ordered when it was proven that the son was born during the marriage, and the petitioner was unable to bring any reliable evidence for disputing his legitimacy.

Malik Muhammad Rafique v Tanveer Jahan[50]

In the recently decided case the High Court declined to conduct a DNA test unequivocally.The Court founded its decision on the following three grounds: firstly, that DNA tests cannot be routinely conducted on the basis of an unsubstantiated allegation; secondly, that the petitioner had failed to produce cogent and reliable evidence that would necessitate resorting to a DNA test; and thirdly, that the requisite consent of the parties for conducting the test was not available. The Court observed that to undergo a DNA test can have serious consequences and also it includes interference with personal liberty.

Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan[51]

In this case the Court considered over DNA fingerprinting and its implications for establishing paternity in the context of Article 128 of the QSO. The paternity of two children born during a marriage was denied by their father and a request for conducting DNA test was made. Referring to *Nandlal*, it was argued that Indian courts have started allowing DNA tests when the legitimacy of children is challenged on the ground of unchastity of one's wife. The Court observed:

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48 Dr. Shahbaz Ahmed Cheema, 'DNA Evidence in Pakistani Court: An Analysis', Vol 3 LUMS LAW JOURNAL < https://sahsol.lums.edu.pk/law-journal/dna-evidence-pakistani-courts-analysis?fbclid=IwAR0MyOinJxaioIoyWYgh_DGq8unsNSiqBSkh4prmDHElbug9FEMossrTzBE> accessed 12th March 2019

49 [2010] PLD Lah 422

50[2015] PLD Isl 30

51 [2015] PLD SC 327

The Article 128 of QSO is couched in language which is protective of societal cohesion and values of the community. This appears to be the rationale for stipulating affirmatively that a child who is born within two years after the dissolution of the marriage between his parents (the mother remaining un-married) shall constitute conclusive proof of his legitimacy.

After all the discussion it can be seen that Indian Courts and also the Pakistani Courts follows the traditional law and the statutory law for determining the parentage.It can be seen that in this modern era, the Indian courts are allowing DNA testing for determining the paternity on some grounds. The Indian courts allowing this medical test when there is a proof of no access or when there will be a prima facie case and the family court has authority to do so. It is seen that the Court held in a case that for testing DNA there will be no violation of right to life and privacy.

On the other hand, it can be said that Pakistani Courts are not that much supporting to allow DNA testing. It can be seen that in many cases the Pakistani Court does not allow DNA test for determining parentage on the grounds that it could result a serious consequence and interfere into personal liberty. The courts are also showing the ground that mere denial of parentage where the offspring is born within the lawful wedlock. The Supreme Court of Pakistan has largely been guided by Article 128 of the QSO and a preference for the collective interest of society over an individual's interest in excluding DNA evidence in paternity cases.[52]

Here, we can see that in some cases how the court give the admissibility of the DNA evidence and order to the party to go for DNA testing and also we can see how the courts are showing no interest for allowing DNA test for various grounds .In Bangladesh it is also rare and not used frequently as it is stated in the case of *Beautiful Bibi vs. Sydur Rahman*[53].Therefore, a different scenario can be seen in the court's decision of this subcontinent. After all the discussion it can be seen that the DNA test has taken place in exceptional circumstances in spite of being useful.

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52 Dr. Shahbaz Ahmed Cheema, 'DNA Evidence in Pakistani Court: An Analysis', Vol 3 LUMS LAW JOURNAL < https://sahsol.lums.edu.pk/law-journal/dna-evidence-pakistani-courtsanalysis?fbclid=IwAR0MyOinJxaioIoyWYgh_DGq8unsNSiqBSkh4prmDHElbug9FEMossrTzBE> accessed 12th March 2019

53 [2014] 67 DLR 1

Laws regarding Presumption of Legitimacy of Child in UK:

Legitimacy law in UK is governed by the Legitimacy Act 1976, Family Law aw Reform Act 1987, Births & Deaths Registration Act 1953,Human Tissue Act 2004,Family Law Act 1986 and by case laws. Section 2 of the Legitimacy Act 1976 stated thatwhere the parents of an illegitimate person marry one another, the marriage shall, if the father of the illegitimate person is at the date of marriage domiciled in England and Wales, render that person, if living, legitimate from the date of the marriage.

The Family Reforms Act, 1969 established powers on the court to direct taking a blood test in civil proceedings in paternity cases.Since the passing of 1969 Act, the general practice has been to use blood tests when paternity is in issue. However, it is to be stated that the court cannot order a person to submit to tests but can draw an adverse inference from a refusal to do so.[54]Part III of theFamily Law Reform Act 1969Actgives the power of the court that the court can direct the use of scientific tests for the purpose of determining parentage in the course of civil proceedings. In its former form, this was by means of blood testing to provide evidence for the determining of paternity. The Family Law Reform Act 1987 updated the legislation to take account of the advances in DNA science.

In a recent case named *Anderson V Spencer*[55]the Court of Appeal permitted for the very first time DNA samples taken from a Deceased person to be used for paternity testing. Scientific evidence of blood groups has been available since the early part of the century and the progress of serology has been so rapid that in many cases certainty or near certainty can be reached in the ascertainment of paternity.[56]

54Aarti Dhillon ,'PRESUMPTION OF LEGITIMACY UNDER SEC 112 OF EVIDENCE ACT AND NANDLAL BADWAIK CASE' June 28, 2017<https://itsmehappening.wordpress.com/2017/06/28/presumption-of-legitimacy-under-sec-112-of-evidence-act-and-nandlal-badwaik-case/> accessed 20th March 2019

55[2016] EWHC 851 (Fam)

56*S v McC, W v W* [1972] AC 24 at 58

In some cases, the DNA evidence is also criticized on the ground of public morality. In a case of *CfS v UK*[57] the court stated that the DNA testing could take place by agreement, but in the absence of agreement there is no power to direct it, and it cannot lawfully take place and were it otherwise, the confidentiality of the deceased's sample would be infringed and would be subject to an alarming and unanticipated interference. These principle gives a bar to a direction for testing.

Standards of Proof of Paternity in USA:

According to Uniform Parentage Act-a relationship between parents and child enlarge equally about the marital status of the parents (father and mother). A man is presumed to be the father under 4 circumstances is given below-

1- If a man is married to the mother of the child at the time the child is born or married to child mother within 300 days of the birth of the child then it is presumed that the man is the father of that child.

2-A man and the mother of the child before the birth of the child tried to get married like they had a ceremony but the marriage was not valid because one person was still married to someone else. If the child was born during that attempted marriage or within 300 days after the termination of the marriage then presumed that the man is the father of that child.

3- After a child born, the man and the child's mother have married then presumed that the man is a father of that child if the man acknowledges paternity in writing or with his consent.

4- When the child is still a minor then the man who is not married to the mother of that child can take the child into his home and openly hold the child as he is the father then it will be presumed that the man is the father of that child.

The UPA was updated in 2002. The UPA 2002 added a voluntary acknowledgment of paternity process for establishing parentage of non-marital children as well as provisions ofgenetic testing. This Act also updated the provisions and added an article governing the parentage of children born through surrogacy.The recent revision to this Act was approved in July 2017. A new Bill was proposed to remove gender distinctions, adds new methods of establishing parentage for

57[2009] 48 EHRR 50

non-biological parents, competing parentage claims, adds optional recognition of more than two parent, addresses parentage of children born as the result of sexual assault. It updates the surrogacy provisions. Hence some criticisms are arisen because of that.

Though this was first promulgated in 1973. At the time, the parentage laws in many states still discriminated against non-marital children. A number of Supreme Court decisions suggested, however, that such laws were unconstitutional.[58]The UPA (1973) sought to help states comply with these constitutional mandates and to fulfill what was seen as an important policy goal: eliminating the status of illegitimacy and establishing the principle of equality for all children.[59]

Cases can be mentioned regarding this issue:

N.A.H. v. S.L.S.[60]

In a Colorado case court held that-the best interests of the child must be considered in weighing competing presumptions of paternity.

Stitham v. Henderson[61]

While in a Maine court held that a man was *not* the father of a child born to his ex-wife during the marriage, because both parties knew the husband was not the biological father.

A recent report noted that the number of DNA tests ordered to determine paternity has more than quadrupled during the past twenty years.[62]

It can be seen that in UK the laws itself are allowing the DNA test as the Family Law Reform Act 1987 modernized the legislation to take consider DNA evidence. Other laws are also directing

58 Gomez v. Perez, 409 U.S. 535, 538 (1973) (per curiam) (striking down as unconstitutional Texas law that imposed child support obligations only on fathers of "legitimate" children); Stanley v. Illinois, 405 U.S. 645, 658 (1972) (striking down as unconstitutional Illinois law that excluded fathers of "illegitimate" children from the definition of "parent").

59 Courtney G. Joslin, Nurturing Parenthood Through the UPA (2017), 127 YALE L.J.F.589, 598 (2018).

60 [2000] 9 P.3d 354

61 [2001] 768 A.2d 598

62 Gail Rosenblum, 'Paternity Tests Not Just for Rich, Famous', ALBANY TIMES UNION, Mar. 25, 2007, at G5 (mentioning that men order the tests both to prove and disprove paternity)

DNA testing and the Case laws are following the same as well. In USA in this regard the Uniform Parentage Act are following.Though the new Bill of 2017 is become a criticized issue. It has been argued that it ignores the rights of children. However, the Courts are following the governing laws as we can see in the decision of the Court has been mentioned earlier. On the other hand, in Bangladesh there is no governing law which permits DNA testing to prove fatherhood. As per section 3 of the DNA Act, 2014 this Act will override other lawsbutit shall not be deemed to have prejudiced the provision of section 112 of the Evidence Act, 1872. After the above discussion it can be said that it is the discretion power of the courts where courts will allow the medical method for presumption of the legitimacy of child.

Chapter V

Recommendation and Conclusion

Recommendation:

Being a theoretical research,it is quite difficult to come to a conclusive statement or to give any direct decision on the topic.The core argument of my paper is that there is inconsistency related to the legal provisions in Bangladesh regarding legitimacy of children. In the Chapter II we can see the conflicting circumstances between the Sharia Law and Statutory Law with the time of the birth of a child after marriage and as well as after dissolution of marriage. In Chapter III we can see that if we compare the existing rules of the presumption with the medical science, we can find some contradiction regarding this, especially in gestation period.

DNA test technology might be a solution as to the determinations of the paternity. Though some propositions can be raised against it as we can see some case principles in Chapter IVare showing reluctant to the DNA testing. It can be said that violation of right to privacy can be questioned in a way that, by compelling a person to apply for DNA testing is against the right to life and personal libertywhich has stated under Article 32 of our constitution and violation of right against self-incrimination is also questioned in a way that,by giving medical evidence of the

alleged father is not only being self-incriminated but also a witness against himself which is a violation of Article 35(4) of our constitution.But in favour of the DNA test the Supreme court held in a case that, right to life and personal liberty is subject to constitutional laws and for the sake of public interest this right can be curtailed.[63]In another case it was held that self-incrimination means statement of a witness which is totally based on the personal knowledge of such witness and production of document not contained with any personal knowledge of such witness as well as medical examination, these are mechanical process where personal knowledge of the witness is absent thus right to self-incrimination is improper in this case.[64]In this age it is an issue of medical science which should to be dealt with scientific method and also by Laws of Nature. As we can see the different opinions regarding the DNA testing, so it can be used subject to some conditions as well.

Besides that, I have managed to give some recommendations for the betterment of the provisions regarding this issue. Those are given below

i.It can be suggested that one of the best way would be to repeal section 112 of the Evidence Act and replace it by a separate Act with proper gestation period applicable to all citizens of Bangladesh which may include such provision that this separate Act will prevail over all other laws regarding this issue for the time being in force

or

ii.To amend the Section 112 of the Evidence Act, 1872 with recommendations of The Indian Evidence (Amendment) Bill, 2003 which may include the DNA test subject to where there is sufficient proof of non-access and where there is a prima facie case and to also amend Muslim Personal Law (shariat) Application Act,1937 in such way that this Act shall no longer applicable regarding the issue of legitimacy of Child.

It may turn out the first legislation to give statutory acceptance to modern techniques like DNA test for determining paternity in Bangladesh.

63*Govind Singh v. State of Madhya Pradesh [*1975] AIR 1378

64*State of Bombay v. Kathi Kalu Oghad,* [1962] SCR (3) 10

iii. The second recommendation is to add provisions in the said Separate Act or in Section 112 through amending the section for the child born way of surrogacy (which is discussed in Chapter III) and child born out of a lawful wedlock like the Uniform Parentage Act 2000 of USA.Though it is not usual for our society but for the need of the time it can be considered. As it is known that the longer cohabitation is also a presumption of marriage, hence the child born out of wedlock can also be considered as legitimate by interpreting the non-marital relationship as to the longer cohabitation which is presumed as marriage under Muslim law as well.It can be a solution to the children for saving them from bastardy.

iv. Further that, as Bangladesh is a Muslim Country, majority of the people are Muslims here so if the rules of Muslim Law will not be followed objections will be raised.Hence the rules of Shia Law which speaks that if any child born within 10 lunar months after dissolution then the child will be presumed to be legitimate can be considered for determining proper gestation period. To avoid the further chaosit can be interpreted in a way that by applying the methods of *takhayyur* like the MFLO 1961 was come into force,specified rules should be followed in this legitimacy issue as there is no specific terms in the Quran or in Sunnah regarding this and if the rules concerning the Marriage or Talaq are specified by this method so why should not be the rules will be specified on the subject of the presumption of legitimacy for the best interest of a child.

Concluding remarks

After all the above discussion made in Chapter II and Chapter III it can be seen that laws that are guiding the Courts to decide legitimacy of child In Bangladesh it is a matter of criticism in this modern era. In that case medical science has a pivotal role to play.Governing laws are indeed based on the principle of public morality and public policy whereas the law should be based on the principle of fair justice in an efficient manner. If morality sits on this basic principle of law then the basic purpose of law is going to be defeated. It can be said that the laws regarding the issue in Bangladesh is not proper and it fails to ensuring justice. It will also be said that sometimes the existing provisions or the case laws are not ensuring best interest of a child.Thus, the issue regarding the presumption of legitimacy of child should be take into consideration for the protection of individuals right and the fairness in justice and saving the child from bastardy.

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