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Paternity in Non-Marital Births: Status and Rights of Nonmarital Children in India

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ABSTRACT

Paternalty is as essential as maternalty for the child's growth, emotional well-being, and psychological development. However, paternalty based on marital presumptions for ascribing parental rights and responsibilities to men is a clear violation of equitable doctrines. When the law identifies only a man in a matrimonial relationship as the 'legal' father of the child born during the subsistence of that relationship, it restricts and excludes all other forms of relationship which are not in conformity with the traditional concept of marriage, consequently, de-recognizing paternalty in such relationships. This presumption, therefore, had created indifferences and inequalities within and between genders and led to the detrimental classification of children as 'legitimates' and 'illegitimates'.

Post-World War II, there had been a severe revision of rights in general, which also revolutionised the status of child rights at the international and national levels, presumably due to the late but critical realisation that children are the nation's future. With the establishment of the Convention on the Rights of the Child, the long-battled philosophical question of child's rights was concluded, highlighting that children are entitled to equal or more special rights to adults. The Convention also established equality and equal protection for all children irrespective of the nature and status of their birth. Before and after the formal adoption of CRC, many legal systems across the globe had revised their laws on parentage and incorporated or upgraded the basic principles of CRC in their domestic application. The mandate of CRC is to give the child's best interest paramount importance in all the matters connected to them, especially when there is a conflict of interest between other stakeholders- parents or cohabiting partners.

Although India is a signatory to CRC, laws in India still haven't formally recognised the equality and equal status of non-marital children and thus eluded the 'best interest of the child' principle laid down under the Convention. Consequently, non-marital children in India, even today, remain an invisible group in the eyes of the law. Any discussion of their rights begins and ends with their entitlements in the putative father's self-acquired or ancestral properties. Similarly, there had been hardly any deliberation or efforts to investigate the socio-legal status and rights of non-marital children and the effect of classifying them as 'illegitimates' under the laws. This Article, therefore, critiques the

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mundane attitude of laws founded on parents' marital status in identifying, establishing and assigning paternity and legitimacy to children in non-marital families.

Keywords: *paternity determination, non-marital births, illegitimacy, family law.*

I. INTRODUCTION

For a country where vast diversities in cultures, customs and religions prevail within every hundred miles, India has shown remarkable sustainability in upholding the constitutional morale, outliving the speculation that she will stumble upon her high-standard democratic ideologies sooner or later. The Part VI of the Indian Constitution under Article 44 envisions the constitutional reverie to provide for its citizens a Uniform Civil Code (UCC), which presumably integrates (not necessarily homogenises) the Indian Personal laws under a secular fabric—a daydream of every legal fantasist, of India, becoming her true constitutional self— a completely secular democratic society, vanquishing patriarchalism and gender inequalities from the grass root level institutions. However, such a feat is not easily derivable due to the peculiar nature of the Indian personal laws governing family relationships.

In India, personal laws (family laws) are known for their pluralistic nature. Even though many are statutorily codified, they still contain deep-rooted religious and customary features. As a result, they are very susceptible to amendments or integration. Efforts are often made to attune them to societal changes by giving them purposive readings. Consequently, most of them had a facelift, yet a few were left out and remained rudimental for a considerable period.

Even today, some specific areas under personal laws, like child rights, are left out with severe legal disabilities. One such aspect featured in personal law is the '*legitimacy*' of children. It is disheartening that the rights of non-marital children in India are not vehemently studied or debated, even upon the coming into force of the Commissions for Protection of Child Rights Act, 2005, presaged by the two major treaties, namely the Convention on the Rights of the Child (in 1990) and the Convention on the Elimination of All Forms of Discrimination Against Women (in 1993) nor have any positive measures been taken to ameliorate the legal position of non-marital children. The only legislative enactment which addresses the rights of parties in a non-marital relationship or cohabitation is the Protection of Women from Domestic Violence Act of 2005. However, the Act does not deal with non-marital children per se.

While the marriage and parenting laws have undergone a series of revisions to uphold the constitutional principles of equality, the laws dealing with the '*paternity presumptions*' still have not lost their ascendancy in conferring *legitimate* status to children and have not fully

reflected the slow yet visible shifts happening in family formations across the country. Even today, personal laws classify children and confer them *legitimate* status based on the marital status of their parents. The Indian Evidence Act of 1872 still follows Lord Mansfield Rule on paternity ('presumption of paternity') to *legitimise* children when there is a legal marriage between the parents, even though a refutation is allowed in divorce proceedings, as a piece of corroborating evidence².

A piecemeal approach to recognising the *equality of children's opportunities for development* during their growth started with the National Policy for Children of 1974, which aimed to reduce *inequality and ensure social justice* for all children in India. It called for amending the existing laws "to give the interest of children paramount consideration".³ Further, the National Charter for Children, 2003, underlined the intent to secure *every child's inherent right to be a child and enjoy a healthy and happy childhood*. The charter mandates the state to take positive measures to "ensure that all children are treated equally without discrimination on the grounds of the child's or the child's parents or legal guardian's race, colour, caste, sex, language, religion, political or other opinions, national, ethnic or social origin, disability, birth, political status, or any other consideration."⁴

Further, the National Policy for Children, 2013, under the 'guiding principle', had stated that "the right to life, survival and development goes beyond the physical existence of the child and also encompasses the right to identity and nationality. Every child has the right to a dignified life, free from exploitation". Despite all these policy frameworks and statutory provisions, children in India, even today, are classified as '*legitimates*' and '*illegitimates*' based on the marital choices made by their parents.

II. NON-MARITAL BIRTHS

A comparative reading on births outside marriages will give an insight that the phenomenon of '*birth outside wedlock*' was not limited to a particular region or nation; instead, it can be referred to as a universal phenomenon that engulfed every society at one or another period. Institutions worldwide saw non-marital births and dealt with them according to their perceptions and understanding of sexual unions and procreation⁵. While social parentage was common in the early nomadic societies, and childbearing was never restricted inside a marital union, medieval

²See, *Dipanwita Roy v. Ronobroto Roy*, AIR 2015 SC 418; *Bipin Kumar Singh v. Smt. Pushpa Devi*, Civil Miscellaneous Jurisdiction No.568 of 2018, Patna High Court; *W v. H & An*, MAT.APP.(F.C.) 17/2016 & CM No.5064/2016, High Court of Delhi.

³ Policy No. (xiv), National Policy for Children 1974.

⁴ Article 13 of National Charter for Children, 2003.

⁵ See Arlene Skolnick, *The Social Contexts of Cohabitation*, 29 AM. J. COMP. L. 339 (1981).

and industrial societies saw it as a serious social issue. Legitimising births inside the recognised form of marriages paved the basis of the ‘doctrine of legitimacy.’ which was further affirmed through ecclesiastical norms⁶ and traversed into many modern family laws, including India’s.

As any discussion on Indian personal laws starts with a discussion on the heritage and customs practised since the early *Vedic* period, it is pertinent to have a brief understanding of the status of non-marital births and the position of children during that period. As stated by Sen-Gupta, “*the social history of India is a web of a multitude of strands of diverse culture*”, and one will quickly lose track by chasing the original practices as many cultural transitions happened before and after the traditions were actually started recording. Although India had close contacts with Tibeto-Burman, Dravidian, Kolarian and other societies and institutions, the laws propagated by Aryans became the foundational principle of Hindu Law, side-lining the non-Aryan customary practices⁷.

Children in India have enjoyed special attention since the early *Vedic* period and continue to have that special status even under the Indian constitution. However, the attitudes towards children born outside a recognised union were different then and even today. The Aryan culture is founded on the concept of patriarchy; for that reason, there had been an inordinate longing for *sons* since the *Rig Vedic* times, and immense importance was given to *sons* (*‘aurasa’*) begotten by the lawfully wedded wife. Nevertheless, the *Dharmasastra* gives a narrative on the institution of secondary sons and has provided an exemplary classification of sons in twelve different categories. The first in the category is the *Kanina*, the one begotten by a ‘maiden, in her father's house, without marriage’. As per the *Sutra*, he was regarded as a valid *heir*. There were descriptions of the practice of ‘*niyoga*’, where a woman was *permitted* to beget outside marriage to continue the lineage. In such cases, the “*child belongs either to the begetter or to both him and the husband of the woman*”.⁸ In either case, birth was revered, and lawful marriage was not a necessary condition to conceive.

Thus, *Sastras*, *per se*, made no differentiation towards birth outside wedlock or discriminated against children based on their birth, and no word was found equating the term ‘*illegitimate*’. Hence as explained by Derrett, *gudhaja*, the son with an unknown father who becomes the secondary son of his mother’s husband, the *kanina*, born to an unmarried girl who became the

⁶ See, Joseph Cullen Ayer Jr., *Legitimacy and Marriage*, 16 HARV. L. REV. 22 (1902-1903); Wilfrid Hooper. *Law of Illegitimacy: A Treatise on the Law Affecting Persons of Illegitimate Birth, with the Rules of Evidence in Proof of Legitimacy and Illegitimacy; and an Historical Account of the Bastard in Mediaeval Law* (1911).

⁷ Sen-Gupta, N. C. (1924). 32. The Early History of Sonship in Ancient India. *Man*, 24, 40–43. <https://doi.org/10.2307/2788895>

⁸ *Ibid*, p 32

secondary son of his maternal grandfather and the *ksetraja*, a son begotten by one other than the husband through approval, were all recognised. However, the *aurasa son* was the celebrated one. The only admonished birth was that of a *jaraja*, a son born through an adulterous relationship⁹.

However, the rights towards paternity were limited even under the *sutras*. While *sutras* assigned their guardianships and protection to the respective heads, establishing biological paternity was out of the question. *Sutras* were silent or ignorant about the *stigma* associated with the classification. In contrast, Manu was more thoughtful in attaching the seed to the owner of the field in which it was sowed¹⁰.

Later, the legal transition during the British period cemented the differentiation and removed the ‘secondary sons’ from the purview of ‘legitimate’ progeny by establishing monogamy as the civilised form of marriage. Ever since it has continued to be so. The error the British administrators made in interpreting *sastras* and *sutras* paved the way for establishing the ‘legitimacy doctrine’ based on the English notion of *filius nullius* under the Hindu Code Bill and subsequently in the 1955 and 1956 enactments.¹¹

Regarding the status of children under Hindu law, the children of void and voidable marriages are deemed legitimate children to decide inheritance rights over the putative father's property by a legal construction/ presumption under section 16 of the Act of 1955. At the same time, *non-marital children* are given the status of *illegitimates*. The same approach is followed under the Special Marriage Act of 1954. The Hindu Succession Act 1956 does not define illegitimates but has incorporated the term under *relatives* and *cognate*. In 1961, Derrett called this discrimination towards non-marital children under the Hindu Succession Act of 1956 ‘absurd’. The absurdity of differentiating children based on their parent's relationship status continues to govern Indian laws, even today.

III. PATERNITY

Paternity thus becomes a privilege and taboo in India. Law and society interchangeably use it, according to their moral suitability, but have rarely looked into the duty or responsibility of men towards their children associated with the status. For ages, ‘paternity determination’ has

⁹ See more here, J. Duncan M. Derrett. (1961). *Illegitimates: A Test for Modern Hindu Family Law*. Journal of the American Oriental Society, 81(3), 251–261. <https://doi.org/10.2307/595656>

¹⁰ *Ibid*, page 257

¹¹ See, J. Duncan M. Derrett. (1961). *Illegitimates: A Test for Modern Hindu Family Law*. Journal of the American Oriental Society, 81(3), page 254. <https://doi.org/10.2307/595656>; J. Duncan M. Derrett. “Statutory Amendments of the Personal Law of Hindus Since Indian Independence.” *The American Journal of Comparative Law* 7, no. 3 (1958): 380–93. <https://doi.org/10.2307/837671>.

remained shady under family law. When the law cannot assert what it is, it just presumes, consequently adopting the doctrine of '*presumption of legitimacy*' for paternity determination. Section 112 of the Evidence Act of 1872, section 16 of the Hindu Marriage Act of 1955, section 21 of the Indian Divorce Act of 1869 and section 25 of the Special Marriage Act of 1954 were framed based on this presumption that '*legal marriage is the conclusive proof of paternity*'. These laws neither have any provisions for the subsequent legitimisation of births nor have options for the parties to disclose the paternity of the child voluntarily, reversing its status.

Even though rarely, when an unmarried woman braves to conceive outside marriage, the plausibility of surviving with the conception is minimal, as the law and society would discourage her choice of birthing an 'illegitimate progeny. Most of the time, the social pressure results in the woman relinquishing her idea by consenting to abortion or, if allowed to give birth, abandoning the infant either to an orphanage or for adoption. These unfortunate mothers and children have little choice but to agree to their ill fate, and laws have always been impervious to their plight. Consequently, for a woman in India, even today, non-marital pregnancy is a mark of inconceivable shame that has to be concealed or abandoned at all costs.

The problem lies in the legal approaches towards parental recognition, primarily based on the traditional understanding of procreation and family formation. The Indian statutes repeatedly showed that they recognise parenthood and paternity only within a marriage or relationship in the *nature of marriage*¹². This has allowed most men to establish paternity conveniently, on a legal presumption and limited their parental (paternal) responsibility within monogamian marriages. The laws that stressed paternity determination for legitimating the births of children and their rights further cemented this patriarchal order in the institution of marriage, discriminating against women and children.

While women worldwide talk about reproductive freedom and bodily sovereignty, Indian women, even today, are bound to follow the conventional form of procreation- i.e., legally approved customary or ceremonial marriage, to ensure validity and legal recognition of both their and their children's rights. Although the Supreme Court of India had asserted that women have the right not to disclose the paternity of the child- and read it under the right to privacy¹³, or when allowed an unmarried mother, the 'right to abortion'¹⁴, *the question of law* presented before the court did not regard the rights of non-marital children, which the court then bound

¹²Sec 2 (f) of The Protection of Women from Domestic Violence Act, 2005

¹³ See, *ABC v. State (NCT of Delhi)*, AIR 2015 SC 2569, (2015) 10 SCC 1

¹⁴ See, *X v. The Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi &Anr.*, 2022 LiveLaw (SC) 809

not to consider.

Compulsory paternity testing verily intrudes on women's reproductive rights and sexual freedom. However, instead of viewing it as a means to expose the sexual/ reproductive freedom of women and weighing it with the 'privacy right' of the putative father, focus should be given to the welfare and benefits accrued to the child by such voluntary disclosure or determination. Further, States have a positive obligation, under the Convention on the Rights of The Child (CRC), to provide all *positive assistance* to the child, to know and be cared for by their parents, and "*preserve his or her true identity.*"¹⁵

As observed by Turner J N in 1976 in his observation on "Children born outside marriage - slow progress in common law countries"¹⁶, the unmarried mother, if given a chance by law to identify the paternity of the child, would certainly be coming forward for the possible interest and advantages accrued to her child due to such disclosure. No amount of shame can stop a mother in India who willed to give birth to a non-marital child against the social stigma if such revelation benefits herself and her child, let alone her privacy rights and its violations. At the same time, no mother would think it worthy of disclosing paternity if it is merely an administrative requirement to obtain information about her child's paternity.

A bird's eye view of the position of Indian women needs to be considered before declining the paternity determination under the umbrella of 'privacy rights. Unlike countries where 'illegitimacy' is abolished, and children are not discriminated against the marital status of their parents, in India, the presence of the 'legitimacy' doctrines, paternity determination becomes crucial for preserving legitimate child rights and protecting them from social stigma.

On the other hand, the apex court in India has taken a generous approach towards DNA testing and paternity determination for proving infidelity in divorce proceedings, in which the question of legitimacy was incidentally involved¹⁷.

IV. THE STATUS OF RIGHTS

The paternity disclosures could be classified under two headings. One is when the non-marital child or mother claims inheritance/ succession rights against the putative father. Another is when there is a procedural requirement of disclosing paternity, for example, in the child's birth certificate or a divorce proceeding, for proving adultery.

¹⁵ (United Nations, 1989, arts. 7 & 8)

¹⁶See Heaton, Jacqueline. "Should the Consent of the Father of an Illegitimate Child Be Required for the Child's Adoption? A Suggestion for the Reform of South African Law." *The Comparative and International Law Journal of Southern Africa* 22, no. 3 (1989): 346-54. <http://www.jstor.org/stable/23248806>.

¹⁷*Dipanwita Roy v. Ronobroto Roy*, (2015) 1 SCC 365, AIR 2015 SC 418

The privacy rights of the non-marital child, the unmarried woman and the putative father are viewed differently in these two contexts mentioned above. In the first instance, i.e. in the inheritance/ succession right of the child over the putative father's property, the concept of privacy- of both the mother and child- often takes a back seat when either is the beneficiary of such right/determination. Whereas, in the second instance, the courts in India have taken divergent views and given more weightage to the privacy rights of the parents and child.

It is true that if the father's identity is unknown and the mother refuses to disclose his identity, the law cannot compel her to admit it; as one may argue, it amounts to a severe infringement of her and her child's right to privacy. However, the law has never weighed the 'right' from the perspectives of women and children who will benefit from such disclosures, as in the case of property suits.

The observation made by two major international conventions on the issue of parental responsibilities might help to ameliorate the debates on the conflicting interests of women and children regarding paternity disclosures.

Article 16 (1) (d) of the Convention on the Elimination of All Forms of Discrimination against Women (from now on, CEDAW) states that; "*States parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and, in particular, shall ensure, based on equality of men and women: The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases, the interests of the children shall be paramount.*"

Further, the Committee on CEDAW, in its General recommendation No. 21,¹⁸ observed that although the principle of "*the best interests of the child shall be the paramount consideration*" included in the Convention on the Rights of the Child has become a universal norm, even in matters where the shared responsibility of parents is contested, many States do not observe the principle of granting the parents of children equal status, mainly when they are not married. It further noted that the children of such unions do not always enjoy the same status as those born in wedlock, and "*fathers fail to share the responsibility of care, protection and maintenance of their children.*"¹⁹The committee further recommended that the "*State parties should ensure that by their laws both parents, regardless of their marital status and whether they live with their*

¹⁸ UN Committee on the Elimination of Discrimination Against Women (CEDAW), CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994. <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>

¹⁹ Ibid, para 19

*children or not, share equal rights and responsibilities for their children.”*²⁰

While submitting its Initial Report in 1999, India stated that it had ratified the Convention in 1993 with two declarations and one reservation²¹; the rights mentioned under Article 16(1) of the convention shall be abided by its policy of non-interference in personal/ religious laws of minorities and other than Hindus unless there is a demand from their side²², However, unlike what was claimed by the State at that time regarding the extensive reformation of Hindu Law, underwent in light of Article 16 (1), Section 16 of the Hindu Law, 1955, and Section 6 of the Hindu Minority of the Guardianship Act, 1956, till today, retains, classifies and discriminates children based on their parent’s marital status, and women in matters of conferring ‘legitimacy’ to her non-marital children.

In the discussions held on the Initial Report submitted by India, Ms Acar observed that “*genuine democracy could not be achieved until there was equality in both the public and private spheres.... Genuine democracy also depended on eliminating certain social and cultural values that were often legitimised on the grounds of tradition, history or religion. Therefore, the cultural and religious norms that tended to make women subject to patriarchal traditions should be reinterpreted from the perspective of the advancement of women.....The Government should not use India’s cultural, religious and ethnic pluralism as an excuse for failing to meet its obligation of introducing legislation to counteract those discriminatory patriarchal norms. Indeed, leaving personal laws to ethnic and religious communities was tantamount to endorsing the status quo, although it was clear that women were discriminated against. That situation was incompatible with women’s rights and constituted a breach of the Convention.*”²³

Further, in the second and third periodic reports on the CEDAW, submitted by India, it was stated that the two declaratory statements on Articles 5(a), 16(1) and 16(2) of the Convention are being reviewed or may be withdrawn shortly. Furthermore, it was stated that the State is committed to its National Empowerment Policy adopted in 2001, which aims at encouraging changes in personal laws such as those related to marriage, divorce, maintenance and guardianship to eliminate discrimination against women. It was then assured that the initiative would be done with the full participation of all stakeholders, including the community and religious leaders²⁴.

²⁰ Ibid, para 20

²¹ Consideration of reports submitted by States parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Reports on State Parties- India, CEDAW/C/IND/1.

²² CEDAW/C/SR.452, para 40

²³ Ibid, para 47 and 48

²⁴ CEDAW/C/IND/2-3, paras 9 and 10

In the Initial Report submitted to the Committee on CRC in 1997, India stated that “*by ratifying the Convention on the Rights of the Child, the Government is obligated “to review national and State legislation and bring it into line with the provisions of the Convention.”*”²⁵. The State had admitted to the gaps in personal law, which are not conducive to the best interests of the child and observed that “*the concept of illegitimacy and the consequent disadvantages to the children concerned harm the principle of equality and dignity of children*”. The state also admitted that serious child rights violations happen on the family front, against the principle enshrined under Article 7 of the CRC- the child’s right to be cared for by their parents- due to the situations like birth out of wedlock and desertion²⁶.

However, other than compulsory birth registration norms, there have been hardly any initiatives to mitigate the inequalities faced by non-marital children in India²⁷. Instead, more relaxation was made in establishing paternal responsibility towards non-marital children while upholding the provisions discriminating against them.

V. STATUS OF NON-MARITAL BIRTHS

During the early 1960s, most developed countries started recognising paternal responsibility towards non-marital children. The first step towards it was dismantling the doctrine of ‘*illegitimacy*’ by de-recognising such a classification and placing financial accountability upon non-marital fathers towards their non-marital children²⁸. Further, acknowledging the cohabitating couples and conferring them equal status and parental benefits changed the social attitude and stigma towards non-marital births. Finally, in the late twentieth and early twenty-first centuries, legal parentage was redefined through the advent of new assisted reproductive technologies accommodating new interpretations of parentage to the otherwise natural or genetic fabric. In doing so, the laws of these countries have embraced egalitarian norms for family formation, diverging from the traditional hierarchical, gender-based marital roles.

In India, post-independence, many legal reformations on family laws occurred, including prohibiting child marriage and bigamy, recognising daughters as coparceners, liberalising divorce proceedings and facelifting maintenance rights of women and children, etc., are a few of them. However, in the codification process, the post-independent laws have re-introduced and retained the ecclesiastical model of legal discrimination against children based on their

²⁵ CRC/C/28/Add.10, para 76

²⁶ Ibid, para 127

²⁷ See, CRC/C/IND/3-4, paras 336 to 352

²⁸ NEJAIME, DOUGLAS. “The Nature of Parenthood.” *The Yale Law Journal* 126, no. 8 (2017): 2260–2381. <http://www.jstor.org/stable/45223095>; Ginsborg, Paul. “The Politics of the Family in Twentieth-Century Europe.” *Contemporary European History* 9, no. 3 (2000): 411–44. <http://www.jstor.org/stable/20081763>.

parent's marital status. This has restricted the legal recognition, support and inheritance rights of non-marital children and denied them paternal care and protection.

However, there were some feeble yet notable attempts made by a handful of parliamentarians, through their share of legislative action *vis-à-vis* 'Private Members Bill', to open the sympathetic view of the law towards non-marital children and their socio-legal rights.

A bill titled 'The Mother's Lineage Bill, 1970', was for the first time introduced in Lok Sabha by Shri Madhu Limaye in 1970,²⁹ which was later re-introduced in the House in 1984 by Prof. Madhu Dandavate³⁰, slightly modifying the title to 'The Mothers' Lineage Bill, 1983', 'to provide the right to trace one's lineage from the side of one's mother'.

In both cases, the *statement of object and reasons* for proposing the Bill stated that "*in order to make the man-woman equality a reality, the human mind has to liberate itself from many obsolete concepts which are associated with the possessive property-conscious, male-dominated society. The concept of illegitimacy and the practice of tracing one's lineage solely from the father's side is one such reactionary and fossilised concept. The reactionary attitudes which from the un-spelt basis of the present official and non-official practices and decisions of the courts will have to be discarded completely if the egalitarian principles of the Constitution are to inform and elevate our social life.*"

The Bill proposed to make it unlawful and punishable to compel any person to fill and sign any form, statutory or non-statutory, official or non-official, which has the option only to disclose one's father's name and no opportunity to disclose mother's for establishing a person's lineage and to refer anyone as '*bastard*' an offence with an imprisonment of one year and fine.

However, neither of these Bills became law. Nevertheless, the judiciary subsequently brought in some changes in this line³¹. Further, in 1990, the Bill resurfaced through another 'Private Members Bill' category, initiated by Kum. Uma Bharti³² in Lok Sabha, only to follow the same fate as the two earlier Bills.

In 1985, the Law Commission of India, in its 110th Report submitted on the Indian Succession Act 1925, recommended a revision of the position of the non-marital child in the changed social context and thinking. Thirty years later, the High-Level Committee on the Status of Women, in

²⁹ Bill No. 7 of 1970, Lok Sabha archives, Parliament of India.

³⁰ Bill No. 128 Of 1983, Lok Sabha archives, Parliament of India

³¹ In *Ms Githa Hariharan & Anr v Reserve Bank Of India & Anr* AIR 1999 2 SCC 228, the Hon'ble Supreme Court held that "father being a dominant personality cannot be given preferential rights over mother" and the term "after the lifetime" in section 6 of the act, need be re-read as "in absence of father". <https://main.sci.gov.in/judgment/judis/16993.pdf>

³² Bill No. 66 of 1990, Lok Sabha archives, Parliament of India.

2015³³, stated that “*the agenda of gender equality in India is unfinished because it is largely unfulfilled*”. The Committee, while deliberating on the issues of ‘bigamy’ noted that the price for ‘immorality’, cultivated for upholding monogamy under the Indian laws, is often borne by the women alone and therefore recommended amending the provisions of Hindu law, including Section 16, to include all children irrespective of the marital status of the mother and to eliminate the term ‘illegitimacy’ from all laws.

The Committee further suggested that to improve the status of women in India, it is pertinent to address the underlying issues resulting from the all-pervasive patriarchal attitude reflected in the socio-legal spheres that favour men over women in not-so-subtle ways. The Committee then calls upon the government to take proactive measures to end the pervasive nature of patriarchy in all forms and to achieve gender equality by 2030³⁴.

Further, in its 118th Report on 'Review of Guardianship and Adoption Laws', the Rajya Sabha Standing Committee on Personnel, Public Grievances, Law and Justice also recommended the need to do away with the term '*illegitimate*' child used in the Guardians and Wards Act and Hindu Adoptions and Maintenance Act, to represent the non-marital children. The Committee, in its recommendation, stated that "*the Committee strongly feels that the word 'illegitimate' should be omitted as no child is illegitimate and the law should be the same for all children whether born within or out of wedlock.*"³⁵

VI. CONCLUSION

Paternity is just a socio-legal construct, like *legitimacy* or *illegitimacy*. Legal parenthood or paternity outside the traditional concepts like biological connection, ceremonial marriage, or adoption is now practised in many parts of the world. While the forms of procreation have broadened, the laws must be stricter in asserting parental responsibilities. The presumption-based paternity has outlived its fictional purpose. Mandatory paternity establishment, like the compulsory registration of marriage irrespective of the parent’s relationship status, is the need of the time. This includes enforcing child-support means and duties to a new category of figures (non-marital fathers) traditionally placed outside the concept of family. It protects the interests of nonmarital children and their parents and removes the stigma of categorising children as ‘*illegimates*’. This legally ensures that the child is cared for by both parents and guarantees

³³ Report of the High-Level Committee on Status of Women in India Vol 1, Ministry of Women and Child Development (2015).

³⁴ Ibid

³⁵ 118th Report of Committee on Personnel, Public Grievances, Law and Justice, on 'Review of Guardianship and Adoption Laws', 2022.

equality in parent-child relationships. It will also help build a child-friendly society where childrearing can be seen as an equal responsibility of both parents, irrespective of their marital status and preferences.

There is an apparent apprehension regarding establishing paternity in non-marital relationships as often it poses a question regarding the putative fathers' nature of rights and responsibilities over their non-marital children. This was showcased in the Hindu Adoptions and Maintenance (Amendment) Bill 1962. Due to their disinterest in voluntarily owning the duty, the laws are not confident enough to hand over the custody of the non-marital children to their putative fathers. Suppose this confusion in the putative father's competency is why the law refrains from conferring him legitimate rights over the non-marital child. In that case, it not only gives the *disinterested* father a free hand in his wrongdoings but also discriminates against the legitimate interest of those men who want to acknowledge the paternity of their non-marital children.

Further, establishing legal paternity of children doesn't mean blindly handing over the custody of the children to the disinterested father without due regard to the 'best interest principle enshrined under numerous national and international child welfare policies and laws. Instead, it legally obligates the fathers to support their children financially or otherwise, irrespective of their marital status.

Unmarried mothers and their non-marital children in India deserve socio-legal empathy. The equality revolution started with the liberalising of the law of marriage and divorce, had removed many legal disabilities bestowed on women. However, this has not extended to women in non-marital relationships or their nonmarital children. Although many unprecedented judgements from various courts of the country had recognised the legal rights of unmarried women in cohabitation relationships, they failed to achieve constitutional or statutory parity with the privileges of married or divorced mothers. Making non-marital birth similar to births in marital unions would diminish the legal and moral indifference towards them. It may also safeguard the state's preference for continuing traditional marital unions as a preferable relationship.
