LEGITIMIZING ILLEGITIMACY: REVISITING ILLEGITIMACY IN THE PHILIPPINES AND ARGUING FOR DECLASSIFICATION OF ILLEGITIMATE CHILDREN AS A STATUTORY CLASS*

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ABSTRACT

This paper, divided into three parts, expounds on the development of illegitimacy as a legal concept, in the process inviting a critical look into the statutory classification vis-à-vis constitutional law precepts and modern developments in human rights and child rights law. Part I traces the historical development of illegitimacy in both civil and common law traditions, highlighting the moral underpinnings of the present socio-legal policies concerning illegitimate children. Part II focuses on the legal treatment of illegitimate children in the Philippines, noting that while there is an overall progress towards recognition of equality, illegitimate children remain disadvantaged in areas such as family law and succession. In Part III, the paper presents arguments for declassification, applying both "classic" and "new" equal protection treatments; the legal effects of recent treaty obligations of the Philippines; and the international trend towards amelioration of illegitimate children as a class. The paper concludes by reconciling the human rights precept of non-discrimination with the Constitutional mandate on protection of the family.

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"The bastard, like the prostitute, thief and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity."
—Kingsley Davis[1]

"Illegitimacy is a way of life—a second class way of life[.]"
—Harry D. Krause[2]

INTRODUCTION

Non-marital children[3] throughout history have the intolerable lot of being regarded as virtual outlaws. Because of their position outside the legally sanctioned family, they were almost always outside the law and consequently suffered from several incapacities that were only gradually withheld as humanitarian considerations in legal thought developed. Illegitimate children were regarded by society as inferior beings and were almost uniformly subjected to unfavourable statutory schemes across different legal systems.[4] Even today, a person born with the stigma of illegitimacy suffers not only from legal disadvantages, but also from subjective feelings of inadequacy perpetuated by customary societal attitudes.[5]

The concept of illegitimacy is a very old institution in law. It survived many reformations but persisted as a valid classification of persons, even as

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[1] Kingsley Davis, *Illegitimacy and the Social Structure*, 45 AM. J. SOCIOLOGY 215 (1939).

[2] Harry D. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477 (1967) [hereinafter "Equal Protection"].

[3] Throughout literature, different terms have been used to designate that class of persons born outside of legally recognized family structures. Countries following the civil law tradition predominantly use the term "illegitimate children," while the pejorative term "bastard" is used in common law. However, the use of these terms is not exclusive, as the word "bastard" in fact originated in France, a civil law country. Later literature reflects the use of value-neutral terms such as "non-marital children," with the United Nations preferring the designation "persons born out of wedlock." In this paper, the terms "bastard[s]," "illegitimate[s]," "illegitimate child[ren]," "non-marital child[ren]," and "person[s] born out of wedlock" will be used interchangeably.

[4] *See* VIENO VOITTO SAARIO, STUDY OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK, *infra* note 8, for an excellent comparative study of the legal treatment of children born out of wedlock across different jurisdictions.

[5] Note, *Compensation for the Harmful Effects of Illegitimacy,* 66 COLUM. L. REV. 127 (1966) [hereinafter "Compensation for Harmful Effects"].

literature advancing the interests of non-marital children grew over the years. Historically, illegitimacy traces its roots to the rise of Judeo-Christian moral philosophy in western civilization. With the rise of monogamous families as a near-universal standard of acceptable family pattern, the imposition of illegitimate status became crystallized in several legal systems as an acceptable measure to curb illicit behavior and to protect the family.[6]

However, the 20th century focus on international human rights law and the primacy of human rights brought about a re-examination of the underlying rationale behind this statutory classification. There is an increasing awareness of the inherent injustice surrounding legal disabilities imposed upon birth, often as a consequence of an extra-marital relationship of one's parents, and, in very real terms, a penalty for a circumstance which is beyond any person's control.

This paper is divided into three parts. The first part narrates the development of illegitimacy as a legal institution, both in civil and common law. In the process, it highlights the moral values and underlying philosophies behind the treatment of non-marital children as a distinct class. The second part deals with the treatment of illegitimate children under Philippine law. Specifically, the discussion focuses on the differing family rights and obligations under the Family Code and the Civil Code and highlights the rather enlightened treatment of illegitimate children in welfare legislation. The third part lays down arguments for the declassification of illegitimate children as a separate statutory class, focusing on constitutional law arguments reinforced by developments in international law and foreign jurisdictions reflecting the increasingly liberal treatment of illegitimate children. The objective of this paper is to invite a critical look into the institution of illegitimacy, an institution which was for centuries accepted without question. In a country where four out of ten babies are born illegitimate,[7] legislators ought to seriously examine the socio-historical context underlying this legal discrimination and weigh it against contemporary State commitment to human rights, equal dignity, and prohibition on any form of discrimination by law.

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[6] *See id.* at 127 n.1.

[7] National Statistics Office, *Three Babies Born Every Minute (Oct. 19, 2011), at* http://www.census.gov.ph/content/three-babies-born-every-minute-2009. The NSO in its Latest Birth Statistics (2009) reports that about 711,079 or 40.7% of the total births recorded for 2009 are illegitimate. Out of the total 711,079 illegitimate babies, more than half or 64.6% are recorded in Luzon.

PART I: HISTORICAL BACKGROUND

Discrimination against persons born outside the accepted family structure dates back many centuries in the history of mankind. Such persons, because of the nature of their birth, were placed in a category inferior to that enjoyed by persons born within the framework of the prevailing family pattern.[8] Because early legal systems accorded rights not to individuals but to family units, the fact of being outside the family put illegitimate children almost outside the protection of the law.

Contemporary literature on the subject, however, has advanced questions on the moral justness of visiting upon the child the sins of her parents and the propriety of imposing statutory discrimination on a person by virtue of a status, which is beyond her control. The following survey of the development of illegitimacy in different legal systems hopes to shed light on the policy considerations behind the treatment of illegitimate children as a class different from legitimate ones.

A. Illegitimacy in Civil Law

1. Roman Law and the Rise of the Catholic Church

Despite civil law tracing its origins from Roman law,[9] illegitimacy surprisingly was not an institution that developed from the Romans. In the early period, Roman law on persons was chiefly preoccupied with two fundamental distinctions between persons: *first*, between free men and slaves, and *second,* between independent and dependent persons.[10] The law on family relations was devoted to the four fundamental relations between citizens: father and child, master and slave, husband and wife, and guardian and ward. Much of the development in that period was concerned over the *potestas* and protecting its abusive use.[11] The rights and obligations attached to the *patria potestas* belonged to the father of the legal family, and as the aim was to secure its continuity, the problem of persons born out of wedlock did not arise. Both natural children,

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[8] VIENO VOITTO SAARIO, STUDY OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK 1, U.N. Doc. E/CN.4/Sub.2/265/Rev.1 (1967). Mr. Saario is the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, and his published report is fifth in a series of studies undertaken by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, with the authorization of the UN Commission on Human Rights and the Economic and Social Council.

[9] Civil law is derived from *ius civile*, "the law of the citizen," in contrast to *ius gentium*, "the law of the nations." *See* PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY (1999) for an excellent read on the development of modern civil law from Roman law.

[10] *See* J. INST. (Abdy & Walker trans.).

[11] MAX RADIN, HANDBOOK OF ROMAN LAW 106 *et seq.* (1927).

whether born inside or outside wedlock, and adoptive children were subject to the *potestas*. Before the end of the Roman Empire, proceedings to establish paternity were unknown.[12]

This legal order would prevail for several centuries until the rise of Christian philosophy and the intermarriage of Roman law and canon law. After the coronation of the Frankish King Charlemagne as Emperor by Pope Leo III in 800 A.D., his various kingdoms were reconstituted into a new Roman Empire. The so-called Carolingian Renaissance saw renewed interest in the relationship between the Church and the Empire, and pursuant to the Gelasian principle of two separate authorities, the Popes issued decretals of general application while Charlemagne and his successors claimed the power to make laws without popular consent for all their subjects, irrespective of nation, on the model of Roman imperial law.[13] In the tenth and eleventh centuries, the equilibrium between the temporal power of the Church and the empire was disturbed, and the period would see the struggle between the two authorities for dominance, with each side appealing to Roman law to justify their position. Church lawyers claimed that imperial law was valid only if it conformed with Church law. The quarrel, however, was not on the substance of the law, but on the issue of on whose hands lay the supreme temporal and spiritual power. This issue was eventually solved by the Concordat of Worms in 1122, and soon after the compromise, there was a sense of Europe as a Christian entity, ruled by Pope and Emperor.[14]

This rise of the Catholic Church and its moral and eventually legal dominance over Europe is significant. In his report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Special Rapporteur Vieno Voitto Saario traced the history of illegitimacy in many legal systems all over the world and ascribed the roots of illegitimacy to the rise of Christianity and the introduction of monogamous marriage. According to him:

> The concept of the family introduced by the Christian Church completely transformed the legal and social position of persons born outside the family structure. According to Christian teachings, the family was based on the sacramental character of a single indissoluble marriage. Paternity and maternity were the result of the procreation in wedlock. The category of persons born in wedlock was therefore limited.[15]

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[12] SAARIO, *supra* note 8, at 1.

[13] PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 41-43 (1999).

[14] *Id.* at 43.

[15] SAARIO, *supra* note 8, at 1.

The rise of Christianity and the singular emphasis on the sanctity of monogamous marriage led to the passage of restrictive measures intended to prevent non-marital children from being placed on the same footing with those born in wedlock.[16] With the spread of Judeo-Christian thought, it became a social belief that the cornerstone of society is the family established by civil marriage which requires ecclesiastical blessing.[17] The idea of the *legitimate* family as a structure composed only of a man and a woman, united legally and spiritually, and the offspring of such legal union became entrenched for much of the social history of Europe.

So complete was Christian domination of European thought that from the 5th to 15th centuries, most family relations laws were intermarried with canon law precepts. Canon law today defines marriage as a covenant "by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children."[18] Lawful procreation was confined within the bounds of marriage, which was raised from the level of an ordinary contract between citizens to the level of a sacrament. Being a sacrament, it called for the highest order of protection, and one such measure devised was the idea of distinguishing between marital and non-marital children. Children who were conceived or born of a valid or putative marriage are legitimate, while those conceived and born outside of one were not.[19] This definition of legitimacy as birth within a lawful marriage is still the modern definition of legitimacy in many legal systems including that of the Philippines.[20]

2. Birth of the French Civil Code and its Adoption by Other Countries

The French Civil Code of 1804, known as the *Code Napoleon,* was instrumental in crystallizing illegitimacy as a near-universal legal institution. *Code Napoleon*, though not the first modern codification of the law, was still the most significant because of its pan-European application. Its treatment of traditional fields such as family relations, property, and acquisition of property rights served as the model for similar codes in most countries outside the Anglo-American world, in jurisdictions as diverse as the Philippines, Japan, Egypt, and several Latin American countries.

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[16] *Id.*

[17] Victor Von Borosini, *The Problem of Illegitimacy in Europe,* 4 J. AM. INST. OF CRIM. L. & CRIMINOLOGY 212, 213 (1913).

[18] 1983 CODE c.1055.1 (The Canon Law Society Trust trans., 1983).

[19] "Children who are conceived or born of a valid or of a putative marriage are legitimate." 1983 CODE c.1137.

[20] "Children conceived and born outside a valid marriage are illegitimate, unless otherwise provided in this Code." FAMILY CODE, art. 165.

Because of its territorial expansion, it will be useful to delve briefly in the development of illegitimacy laws in France. Originally, the disabilities associated with non-marital children did not go back as far as Germanic law, as "legislation from this early period was hardly concerned with [...] the purity of morals." During the Early Middle Ages, irregularity in the question of birth was not very important, and "whether born outside of marriage or not, the children were connected with the father provided that he accepts them."[21]

As with the rest of Europe, the concept of illegitimacy changed with the advent of Christianity. Illegitimacy laws, now an instrument to promote public morality, started carrying with it heavily religious undertones:

> In the contemplation of the Church every child born out of marriage was illegitimate; every union other than marriage was a sin. It punished this illicit intercourse upon the person of the parents, and even upon that of the children, for these latter came into the world with an original stain ("*macula bastardiæ*"). It was especially severe as regarded children born of an adulteress, born of an incestuous connection, or the sons of priests ("*ex damnato coitu*"). The dishonour, or even the infamy, and its serious consequences, such as the incapacity to inherit, affected them because of the single fact of the irregularity of their birth.[22]

Brissaud, in his authoritative work on the history of French public law, lists some of the incapacities which attached to the person of a non-marital child:

> Among other incapacities which affected them, and which sometimes persisted for a long time, figured those of receiving ecclesiastical benefices, of exercising public functions, of being judges, sometimes even of being witnesses or of acquiring fiefs [...]. [T]heir admission into the hospitals is even doubtful, and an echo, as it were, of this repulsion is found in the singular rules of some German States, according to which, in the eighteenth century, their bodies had to serve for purposes of anatomical dissection.[23]

This intolerable condition somehow improved during the Monarchic Period of the 16th to 17th centuries, although the principle that a bastard has no family was maintained. To allow for provision of support, French law allowed

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[21] JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 202 (Rapelje Howell trans., 2nd ed. 1912).

[22] *Id.* at 204-205. (Citations omitted.)

[23] *Id.* at 206. (Citations omitted.)

bastards, the mother, or the parish bound to provide for its needs to prove the child's filiation either by voluntary admission or by establishing in court the child's maternity or paternity. The practice, however, gave rise to scandalous litigations, such that by the time of the French Revolution, only voluntary recognition was allowed as proof of natural paternity.[24]

During the Revolutionary Period, many aspirations that animated the French Revolution, i.e. equality of men, injustice of class privileges, freedom of conscience, and equality of opportunity for all citizens, found expression in several laws,[25] including one which ameliorated the condition of non-marital children by giving them the same successional rights as legitimate children.[26] Despite the prevailing liberal philosophy,[27] however, the Code that will be the precursor of several modern civil law codifications was ultimately utilitarian in its policy consideration. The Council of State, instead of continuing the trend towards recognition of rights of non-marital children, adopted a protectionist policy for the family. In the words of Brissaud:

> [Non-marital] children were sacrificed with a view to the fostering of marriage: the investigation of paternity was prohibited, as it had been under the Revolution (Art. 340); at the same time, the rights of natural children were almost as limited as they were in the old jurisprudence. This rather inhuman combination, wherein only the harshness of the intervening law was given a place, is not the last word in legislation.[28]

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[24] *Id.* at 207-211.

[25] *See* C.J. Friedrich, *The Ideological and Philosophical Background, in* THE CODE NAPOLEON AND THE COMMON-LAW WORLD 2, for a discussion of the ideological influence of the French Revolution on *Code Napoleon.* Friedrich explains the ideological thrust of the Code Napoleon by quoting Albert Sorel: "The *Code Civil* has remained, for the peoples (of the world), the French Revolution—organized. When one speaks of the benefits of this revolution and of the liberating role of France, one thinks of the *Code Civil,* one thinks of this application of the idea of justice to the realities of life."

[26] Act dated 12 Brumaire of the Year II. Equal inheritance rights were not only with regard to the possessions of their father and mother, but also with regard to those of collaterals. As to children born of an adulteress or an incestuous union, they were also recognized as having a right of inheritance, but a lesser one, i.e. 1/3 of the share of a legitimate child.

[27] 18th century France was liberal in its treatment of illegitimate children, and considered it inhuman to impose the consequences of the parents' "sin" upon a child. Theories of natural right considered the status of legitimacy or illegitimacy as conferring privileges as little justified as those of the abolished nobility. The illegitimate child, long the pariah of the family due to religious and aristocratic prejudices, was sought to be given the same rights as his brothers and sisters for, not being guilty of any wrong, it seemed iniquitous to punish him. *See* SAARIO, *supra* note 8, at 4; BRISSAUD, *supra* note 21, at 212. This period coincided with the Enlightenment movement in Europe, which challenged established ideas grounded on tradition and faith.

[28] BRISSAUD, *supra* note 21, at 212-213.

The drafters of the Code considered "that the strongest brake on illicit unions was to punish the children who were the fruit of them."[29] In the words of Napoleon, whose own views on the family and its role in society directly influenced the Code, "[s]ociety has nothing to gain by recognizing bastards."[30] For him, the family is considered as the basic cell of society and as such must be protected from intrusions of liberal trends that might threaten its stability.[31]

The drafters' intervention in the realm of family law ultimately reflected patriarchal ideology and "faithfully reflected the social facts of 1804."[32] Tom Holberg observes:

> Among the most controversial subjects of the Civil Code to modern commentators, have been those concerning family law and the treatment of women. The Code reflected the customary and canon laws in force during the *ancien régime.* The family was enthroned as the basic unit of society and its integrity had to be preserved. Theoretically the interests of the individuals of the family gave way before the interests of the family as a whole. Marriage was a civil contract, outside of marriage a family was theoretically illegal.[33]

Because the French Civil Code was adopted by the legislatures of various countries, its treatment of non-marital children spread to other territories, even to jurisdictions as diverse as Japan, which hitherto had not implemented systematic statutory discrimination against persons born outside of wedlock.[34] However, many countries have since then departed from this reactionary position adopted by the French Civil Code, with the 1930s seeing the liberalization of the status of persons born out of wedlock.[35] Several Latin American countries have already adopted constitutional provisions regarding equality of marital and non-marital children.[36]

3. The Spanish Civil Code and its Implementation in the Philippines

Statutory discrimination against non-marital children in the Philippines traces its roots to the introduction of Spanish laws on family relations in the

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[29] *Id.*

[30] Tom Holberg, *The Civil Code: An Overview*, *available at* http://www.napoleon-series.org/research/government/code/c_code2.html (last visited Mar. 28, 2014).

[31] SAARIO, *supra* note 8, at 4.

[32] Holberg, *supra* note 30.

[33] *Id.*

[34] Akira Hayami, *Illegitimacy in Japan*, *in* BASTARDY AND ITS COMPARATIVE HISTORY 397 (Laslett, Oosterveen & Smith eds., 1980).

[35] SAARIO, *supra* note 8, at 6.

[36] *See* discussion in Part III.C. Non-Discrimination in Foreign Jurisdictions, *infra.*

country. To understand this development, it is helpful to delve for a while in history.

Spanish law developed in the context of Christian kingdoms that gradually emerged from territories won back from the Moors. This piecemeal reconquest of Spain gave rise to the vast diversity of jurisdiction, such that by the 13th century, Spanish territories had a medley of local laws that did not apply to the whole jurisdiction.[37] In 1256, Alfonso X of Castile began the most celebrated attempt to organize these laws through the *Siete Partidas.* The *Siete Partidas* was influenced by local laws and customs of Castile, but the preponderant influence comes from canon law and the Institutes of Justinian. Although given only a suppletory effect, it was widely acclaimed as the basis of the modern Spanish Civil Code.[38]

These various medieval laws[39] and the *Siete Partidas* outlined a legal treatment of illegitimate children which was to remain basically the same for many centuries. Saario succinctly summarizes this as follows:

> Illegitimate children were divided into "natural" and "non-natural" children, on the basis of whether the parents did or did not have legal impediments to marry each other at the time of conception. Children born as a result of adulterous, incestuous, [or] sacrilegious relations had inheritance rights from their father in testate as well as intestate succession. Legitimation required the acknowledgement of the child by the father and granted the legitimated child full rights as from the date of the legitimating act [...]. Guardianship was granted to the father, the mother only having custody of her children in specified circumstances.[40]

This legal system was what the Spanish *conquistadores* brought with them into their various colonies and which was made to prevail over the indigenous legal systems previously in place.[41] Prior to the Spanish conquest, tribal groups in the Philippines, similar to early Germanic tribes in Europe, did not put much

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[37] Rubén Balane, *Spanish Antecedents of Philippine Civil Code, in* CIVIL LAW FLORILEGIUM: ESSAYS ON THE PHILIPPINE VARIANT OF THE CIVIL LAW TRADITION 21-26 (2012) [hereinafter "Spanish Antecedents"].

[38] *Id.* at 34-35.

[39] Among others, the Fuero Juzgo (671), the Fuero Viejo de Castilla (1212), and the Fuero Real (1255).

[40] SAARIO, *supra* note 8, at 5.

[41] The Law of the Indies, the entire body of laws issued by the Spanish Crown for its American and Philippine possessions, extended Spanish laws to Spanish colonies including the Philippines. The most notable compilation of these laws is the 1680 *Recopilacion de Leyes de los Reinos de las Indias* by Charles II.

stock to birth within marriage.[42] It appears that in at least some tribes[43] the condition of legitimacy and illegitimacy of the child was not taken into account in determining his social and legal status. The important consideration was not marriage but rather the social status of the parents, i.e. whether freeman or slave. A child is considered legitimate for as long as he is acknowledged, and acknowledgement may be effected by the simple act of the father in supporting his child. Legitimation was also quite liberal.[44]

The arrival of the Spaniards in the 16th century introduced not only their legal system, but also the Catholic Church, which grew to gain a foothold over much of the political, cultural, and economic life in the Philippine islands. By the time the Royal Order of Maria Cristina in July 1889 extended the Spanish *Codigo Civil* to the Philippines, the treatment of non-marital children in the country was largely similar to their counterparts in continental Europe. The Spanish Civil Code, including its classification of children into at least five classes, was to remain in force in the Philippines until 1950, when the Civil Code of the Philippines took effect.

B. Bastardy in Common Law

1. Development of English Bastardy Laws

English common law developed along the same lines as civil law to uphold monogamous marriage as the standard foundation of a legally sanctioned family. This "historical household,"[45] which is essentially the theory of family law that held sway for centuries in England, is criticized by modern writers as "antiquated," "defined by gender hierarchy and the law of coverture," and "a

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[42] Norberto Romualdez, *A Rough Survey of the Pre-historic Legislation of the Philippines*, 1 PHIL. L.J. 149, 163-64 (1914).

[43] The Philippine State did not exist, arguably until the 1898 Declaration of Independence that followed the 1896 Revolution against Spain. Prior to the arrival of the Spanish colonizers, the Philippine islands were populated by different tribes with no central form of government and with loose associations with each other anchored on kinship and linguistic ties. For reasons of economy and expediency, we will not dwell on the many varied practices from tribe to tribe but will focus only on general accounts available to us.

[44] Romualdez, *supra* note 42, at 164.

[45] *See* Allison Anna Tait, *A Tale of Three Families: Historical Households, Earned Belonging, and Natural Connections*, 63 HASTINGS L.J. 1345 (2012). In her article, Tait discusses the three competing theories of family relationship used by the courts to evaluate the rights of individual family members. The Blackstonian historical household was a theory first developed by Ruth Ginsburg, now Associate Justice of the US Supreme Court, in her appellate brief for *Reed v. Reed*, 404 U.S. 71 (1971).

discriminatory legal structure [...] that was the product of a past bias, stemming from historical contingency and not essential reason."[46]

This paternalistic theory of family law carried with the doctrine of *filius nullius*, resulting in a remarkably harsh legal treatment of non-marital children, pejoratively called "bastards." Under the early common law of England, a child born out of wedlock was regarded as *filius nullius*—a son of nobody.[47] The term accurately described the child's legal status,[48] which is described by Blackstone as follows:

> The incapacity of a bastard consists principally in this[:] that he cannot be heir to any one, neither can he have heirs but of his own body; for, being *nullius filius,* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.[49]

Thus, a bastard had no surname, no home to claim, no inheritance, and no right to any ancestry.[50] Parents, both mother and father, owed him no obligation of support or education.[51] Because of this lack of access to economic resources, bastards were often associated with poverty.[52] Because of this lack of legal relationship between a bastard and her parents, she also had no legal guardian, not even her mother, in marked contrast with civil law countries.[53] Also, unlike civil law countries, early English law refused to allow legitimation of

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[46] *Id.* at 1348.

[47] Robert Martin, *Legal Rights of the Illegitimate Child*, 102 MIL. L. REV. 67, 68 (1983). *See also* Alan Macfarlane, *Illegitimacy and Illegitimates in English History, in* BASTARDY AND ITS COMPARATIVE HISTORY 73 (Laslett, Oosterveen & Smith eds., 1980), which reports that "[i]n manorial law, generally, in theory a bastard can never be heir unto any man, nor yet have heir unto himself but his children." Thus, illegitimate children were referred to in common law as "bastards," of dubious, inferior or impure origin.

[48] SAARIO, *supra* note 8, at 4. Krause also remarks: "At common law, the illegitimate was filius nullius, no one's son—no more, but no less[.]" *in* ILLEGITIMACY: LAW AND SOCIAL POLICY. The principal disability of a bastard in common law is economic, in that he is denied right of support and inheritance rights from his parents, and is considered, for all intents and purposes, as an individual who does not belong to any family unit. *See* Tait, *supra* note 45.

[49] I WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 459 (13th ed., 1800).

[50] Tait, *supra* note 45, at 1366.

[51] Martin, *supra* note 47, at 68. *See also* D.H. Van Doren, Current Legislation, *Rights of Illegitimate Children under Modern Statutes*, 16 COLUM. L. REV. 698 (1916). So penal in fact is the nature of illegitimacy that the lot of the child who is born out of wedlock is called an "intolerable one."

[52] *Id. See also* Von Borosini, *supra* note 17, at 214, stating that "[i]llegitimate origin is responsible for the high death rate of bastards, for their impaired physical condition, [...] and their large representation in reformatories, prisons and hospitals for feeble minded, epileptics and insane."

[53] SAARIO, *supra* note 8, at 4.

a bastard, either by establishing paternity, by acknowledgement, or by subsequent marriage of her parents. Adoption was also unknown.[54] However, canon law tacitly recognized legitimation by subsequent marriage of parents.[55]

Aside from economic disability, bastards also suffered from social opprobrium that became particularly pronounced beginning the late medieval period, when continental law held illegitimate children to be a social evil and a moral outrage.[56] The preoccupation with morality and sanctity of marriage led to a legal treatment aimed at discouraging "deviant" unions by imposing severe disabilities on products of such immoral relationships. It has been suggested that the concept of *filius nullius* arose

> not out of difficulty of actual proof of the real father and the concurrent fear of fraudulent claims against estates, but rather because the child was the product of immoral relations. Thus the belief of the English in the practice of monogamy and the sanctity of the marriage, especially as influenced by the church, may have been responsible to a large extent for their severe treatment of the product of illicit relations, the illegitimate child.[57]

The treatment of bastards as a distinct class began as early as the Statute of Merton of 1235.[58] The harsh treatment resulting from the doctrine of *filius nullius* was partly mitigated in 1576 during the reign of Queen Elizabeth I, when the Poor Law was passed compelling the putative father to contribute to the

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[54] Martin, *supra* note 47, at 68. *See also* SAARIO, *supra* note 8, at 4, stating that "[a] person born out of wedlock could not acquire the status of a person born in wedlock except through a special Act of Parliament, this procedure was very rarely used because it was costly. The most famous example was that of the legitimation of children of John of Gaunt, by a Statute of Richard II."

[55] Alan Macfarlane, *Illegitimacy and Illegitimates in English History*, *in* BASTARDY AND ITS COMPARATIVE HISTORY 73 (Laslett, Oosterveen & Smith eds., 1980), which provides that "[b]y law of the church, all those born of parents who married, no matter when the marriage took place, were legitimate. In common law, however, a distinction developed between general bastardy and special bastardy, the former being those children of parents who did not marry after the birth of the child, and the latter being those children of a union wherein the parents married afterwards. When general bastardy was disputed, it could be tried in ecclesiastical courts as such, but special bastardy could only be tried in common law courts, for it was not recognized as bastardy by the church."

[56] HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 3 (1971). *See also* MacFarlane, *supra* note 55, at 74. "Bastardy was treated by the church courts as the logical outcome of, and morally equivalent to, fornication."

[57] Martin, *supra* note 47, at 68.

[58] The Statute of Merton of 1235, considered as the first English statute, defined a bastard: "He is a bastard that is born before the marriage of his parents."

support of his illegitimate child if his identity as father can be established.[59] The purpose is not so much to ameliorate the child, but to punish the child's mother and putative father and also to relieve the parish from the cost of supporting the mother and child. The Poor Law was amended and improved several times, but it was not until the Legitimacy Act of 1926 that children born outside of wedlock were allowed to be legitimized by the subsequent marriage of their parents, provided that neither parent had been married to a third party at the time of the birth. This was modified by the Legitimacy Act of 1956, which allowed a child to be legitimized when his parents married, regardless of their past status, and allowed legitimization for children born out of void marriages, provided that both or either parents reasonably believed that the marriage was valid and was entered into in good faith.

2. Treatment of Illegitimate Children in the United States

Although family laws in the United States hold little sway in the Philippines, it is still interesting to take note of the development of illegitimate children's rights in the context of US Supreme Court decisions grounded on the equal protection clause.

Initially, the common law concept of *filius nullius* was adopted in many American jurisdictions. Over the years, many state legislatures passed measures to alleviate the harshness of this concept by conferring previously denied rights to illegitimate children. Legislative response tended to focus on (1) liberalization of legitimation requirements; (2) creation of support proceedings; and (3) expansion of inheritance rights.[60] Consequently, American law on illegitimacy is characterized by piecemeal grants of rights, reinforced by landmark Supreme Court decisions on equal protection between legitimate and illegitimate children. The abrogation of distinction is by no means complete,[61] and legislative attitude towards illegitimate children vary from state to state.

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[59] SAARIO, *supra* note 8, at 4. *See also* Van Doren, *supra* note 51, at 698 n.3, on the Poor Act.

[60] *Compensation for Harmful Effects*, *supra* note 5, at 129. *See* Martin, *supra* note 47, at 68-70 for a brief history of illegitimacy in the USA.

[61] Only two states, Arizona and Oregon, do not recognize any concept of illegitimacy, thus eliminating legal discrimination against illegitimates. Lousiana in contrast, following the French and Spanish tradition, retain harsh discriminatory provisions against illegitimate children, classifying them into natural and non-natural children. Only natural children, who are illegitimate children acknowledged by the father and are the offspring of parents, who at the time of conception could have contracted marriage, can be legitimated. Bastards, adulterous or incestuous children do not enjoy the right to inherit from the estate of either mother or father, entitled to nothing more than alimony. *See* LA. CIV. CODE ANN. art. 202, 290 (1969).

The role of the Supreme Court in the development of illegitimacy discourse in the United States cannot be undermined. Mostofi, in an article regarding the rights of illegitimate children in America, summarizes these developments:

> Under the Court's watchful eye, the illegitimate child progressed from the status of *filius nullius* to that of constitutionally recognized personhood. More or less in chronological order, the Court has recognized the rights of illegitimate children in the following areas: (1) the parent's copyright renewal rights; (2) wrongful death of a parent; (3) recovery under workers compensation statutes; (4) the right to support from the natural father; (5) benefits under welfare programs; [and] (6) inheritance by intestate succession.[62]

Levy v. Louisiana[63] set a precedent in 1968 when the US Supreme Court struck down Louisiana's wrongful death statute permitting only dependent legitimate children to bring an action for wrongful death of their mother for being discriminatory against illegitimate children, in violation of the equal protection clause. The Court asserted that illegitimate children are "persons" within the meaning of the Fourteenth Amendment and, as such, entitled to equal protection. It held that the State may not create an action for wrongful death of a parent in favor of legitimate children and deny the action to illegitimate children, especially when the child's status as legitimate or illegitimate had no relation to the nature of the wrong alleged. The Court concluded: "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs [was] possibly relevant to the harm that was done the mother."[64]

In the case of *Gomez v. Perez*,[65] the US Supreme Court sustained an equal protection attack against state statute obligating the father to support only his legitimate children. According to the Court:

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[62] Lili Mostofi, *Legitimizing the Bastard: The Supreme Court's Treatment of the Illegitimate Child*, 14 J. CONTEMP. LEGAL ISSUES 453 (2004), *referring to* (1) DeSylva v. Ballentine, 351 U.S. 570 (1956); (2) Levy v. Louisiana, 391 U.S. 68 (1968); (3) Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); (4) Gomez v. Perez, 409 U.S. 535 (1973); (5) New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); (6) Jiminez v. Weinberger, 417 U.S. 628 (1974); (7) Trimble v. Gordon, 430 U.S. 762 (1977); and (8) Lalli v. Lalli, 439 U.S. 259 (1978). *See* Robert Stenger, *The Supreme Court and Illegitimacy: 1968-1977*, 11 FAM. L.Q. 365, 365 n.1 (1978) for a list of equal protection cases regarding illegitimate children decided by the US Supreme Court.

[63] 391 U.S. 68 (1968).

[64] *Id.* at 72.

[65] 409 U.S. 535 (1973).

> [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers[,] there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is "illogical and unjust."[66]

The *Gomez* Court relied on precedent set down in *Levy* and *Weber v. Aetna Casualty & Surety Co.*,[67] decided within five years of each other, and from which the Court distilled the general principle that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[68] This principle paved the way for significant expansion of illegitimate children's rights, including recovery under worker's compensation statutes, benefits under welfare programs, and inheritance by intestate succession. It is worth mentioning, however, that in none of these cases did the US Supreme Court posit a constitutional right of children, legitimate or illegitimate, to be supported by their fathers, to be recognized, or to have the same successional rights, each case having been decided only on the basis of a particular statute of the particular state concerned. Thus, despite the elimination of many legal disabilities afflicting the illegitimate child, the US Supreme Court has yet to articulate a uniform standard to facilitate the elimination of all legal disabilities suffered by illegitimate children.

C. Policies Behind the Legal Treatment of Illegitimate Children

The preceding historical survey reveals several legislative policies behind the treatment of illegitimate children as a distinct, and often underprivileged, class.

1) *Vindication of offended public morals.* The harsh treatment of illegitimate children is almost always some form of punishment for the violation of a strongly held societal belief. History will show that it was developed primarily as a tool to promote the primacy and sanctity of monogamous marriage. Although monogamy is "rare as far as human cultures go,"[69] it nevertheless evolved as a near-universal standard for the acceptable ordering of kinship relations, such that even among cultures which tolerate deviations from monogamous marriage, distinctions between the legitimate and illegitimate family remain.

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[66] *Id.* at 538, *quoting* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

[67] 406 U.S. 164 (1972).

[68] 409 U.S. 535, 538 (1973).

[69] Peter Laslett, *Introduction: Comparing Illegitimacy over Time and Between Cultures, in* BASTARDY AND ITS COMPARATIVE HISTORY 9 (Laslett, Oosterveen & Smith eds., 1980).

2) *Legislative tool to curb illicit behaviour.* The frequency of illegitimate births is used by social commentators as an index of the moral state of the community, and a rise in bastardy is an indication of decline in public morality.[70] To combat this, governments have long used denial of rights to illegitimate children. The procreation of children outside marriage, if not viewed as a moral lapse, is considered by and large as deviant behavior. Because it represents failure of social control, rise in bastard births is thought to be a sign of state decline, and thus many governments saw it as their business to ensure decline in percentage of bastard births by imposing severe punishment on products of non-sanctioned unions.

3) *Economic measure to prevent fraudulent claims against estates.* Because illegitimacy laws developed long before reliable scientific techniques of determining paternity became available, the limitation on economic rights of illegitimate children, including inheritance rights, was thought of as a justifiable measure to prevent fraudulent claims against estates of putative parents. The limitation on support and inheritance rights must be understood within a context in which a claim of paternity by an individual, if accepted without question, could very well open the estate to fraud, to the prejudice of the legitimate heirs. This context of economic scarcity is best captured by the statement: "[t]he chastity of woman was 'of the utmost importance, as all property depends upon it.[']"[71] Thus, some legal systems allowed support and inheritance rights to an illegitimate child, but only when his father acknowledged him.

4) *Statement of mores of a particular society.* The mores of a particular society play an important role in defining legitimacy and illegitimacy. This is seen in the example of France, in which strongly-held beliefs of the members of the Council of State prevented contemporary humanist philosophy from taking hold in the law. Moreover, although monogamous marriage patterned after the Judeo-Christian tradition is seen to be the dominant standard that was adopted by many countries, it is by no means the sole criterion used to define legitimate and illegitimate status across cultures and times. Historically, offspring of forbidden caste unions—such as between

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[70] *Id.* at 1. Decline in public morality is thought to be correlated to the decline of the State as, for example, in the later Roman Empire.

[71] Macfarlane, *supra* note 55, at 75, *citing* CHRISTOPHER HILL, PURITANISM AND REVOLUTION 384 (1962).

> citizens and non-citizens, whites and blacks, and slaves and freemen—have been regarded as illegitimate,[72] notwithstanding the monogamous character of the parent's union.

An interesting proposal by Manilowsky, made as early as 1930, posits that analysis of the nature of bastardy reveals a so-called "principle of legitimacy" that justifies the legal distinction between legitimate and illegitimate children:

> The most important moral and legal rule concerning the physiological state of kinship is that no child should be brought into this world without a man—and one man at that—assuming the role of sociological father, that is guardian and protector, the male link between the child and the rest of the community. I think that this generalization amounts to a universal sociological law, and as such I have called it [...] The Principle of Legitimacy.[73]

This view, however paternalistic, is historically accurate, considering that for much of history, women and children were regarded incapacitated to effect legal transactions on their own. Thus, the need for guardians, in the person of the husband or the father, who could legally represent them and be responsible for their actions. In this context, bastards are social misfits who lack the "male link" that would connect him to the rest of the community. In the words of Laslett:

> The appearance of children for whom no mature male, permanently allied to the mother, can be held responsible, has to be prevented in order to safeguard the future of society as a society and of each of its constituent members.
>
> For only if the familial system is maintained, marriage carefully protected, and procreation socially controlled, can the population be kept within the means of subsistence known and seen to be available. Moreover, only if each new person is born into an established family can he be brought up as a bearer of the society's culture, as a reliable, a useful and a valued member of its particular structure. To be a legitimately accepted child within the family of his or her father "represents a need of universal significance for the normal social and

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[72] Laslett, *supra* note 69, at 7. Examples include Pericles passing a law in Athens forbidding the marriage of citizens to non-Athenians, bastardizing the offspring of such unions. From classical times, all slave children have been illegitimate in the United States until the Emancipation of 1865. In the colonial period before this, all sexual intercourse between black and white, slave or free, was forbidden, and therefore products of these types of union are illegitimate notwithstanding marriage, if possible, or monogamous nature of the parent's relationship.

[73] Manilowsky, *cited in* Laslett, *supra* note 69, at 5.

> psychological development of the individual, as well as for defining his social status, according to the ideals and values of his culture."[74]

All these point to illegitimacy as an indispensable institution meant to control the economics of child-bearing and ordering of kinship structures. But are the myriad disabilities imposed on the illegitimate child herself really indispensable or, at the very least, effective? A turn of the century article regarding rights of illegitimate children observed the irony in bastardy laws trying to promote its declared objective of encouraging marriage and discouraging illicit intercourse by severely penalizing the product of the illegitimate union:

> It does not help to discourage illicit intercourse to allow the father to escape all responsibility for the maintenance and education of his illegitimate offspring. The holy institution of matrimony is not exalted, nor is the public weal advanced, by the creation of an anomalous pauper class, the issue of temporary unions where passion may be given full sway because the cares of paternity and the sharing of name and heritage do not accompany it. Only by holding parents strictly to account can promiscuous propagation be restrained by law; and only by granting to the unfortunate bastard the same rights against his progenitors to which his legitimate brother is entitled, can justice be done to him.[75]

PART II: ILLEGITIMACY IN THE PHILIPPINES

Philippine laws maintain the distinction between marital and non-marital children. However, the classification and treatment of non-marital children has undergone an interesting evolution that is perhaps far from over.[76]

In 1949, the Civil Code of the Philippines[77] was enacted. Reflecting Spanish tradition, it classified children into three main categories, to which belonged different classes of children:

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[74] Laslett, *supra* note 69, at 5. (Citations omitted.)

[75] Van Doren, *supra* note 51, at 700-701.

[76] Rubén Balane, *The Family in Focus*, *in* CIVIL LAW FLORILEGIUM: ESSAYS ON THE PHILIPPINE VARIANT OF THE CIVIL LAW TRADITION 86 (2012) [hereinafter "The Family in Focus"]. In the Philippines, laws governing the classification and status of children were introduced in stages: (1) the *Leyes de Toro* of 1505 (by virtue of the Royal Ordinance of Prelation of 1530, as incorporated in the *Recopilacion de las Leyes de las Indias*); (2) the Spanish Civil Code of 1889; (3) the Civil Code of the Philippines; and finally, (4) the present governing law, the Family Code.

[77] Rep. Act No. 386 (1949). 57% of the 2,270 articles of the Civil Code are derived from the Spanish *Codigo Civil. Spanish Antecedents, supra* note 37.

1) Legitimate children, which includes:
    a. Legitimate children proper;[78]
    b. Legitimated children;[79]
    c. Adopted children;
2) Natural children, which includes:
    a. Natural children proper;[80]
    b. Natural children by legal fiction;[81]
3) Illegitimate children other than natural (i.e. spurious children[82]), which includes:
    a. Adulterous children;
    b. Incestuous children; and
    c. Illicit children.[83]

Under the Civil Code then, there existed a hierarchy of children on the basis of rights granted by law. This classification of children vis-à-vis their parents determined the rights to which they are entitled, and the well-ordered delineation among these groups "demonstrate a clear intent on the part of the framers [...] to compartmentalize and separate one from the other, for legitimacy/illegitimacy determines the substantive rights accruing to different categories of children."[84]

The Family Code simplified this classification by reducing it to two categories: legitimate and illegitimate children. The membership and rights

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[78] These are children who are conceived or born during a valid marriage. Take note that birth and conception need not both occur during the marriage.

[79] Only natural children proper can be legitimated by a subsequent valid marriage between his parents (CIVIL CODE, art. 269). Natural children by legal fiction cannot be legitimated. *See* De Santos v. Angeles, G.R. No. 105619, 251 SCRA 206, 214-16, Dec. 12, 1995, for a thorough discussion on the classification of children under the Civil Code.

[80] Natural children are children born outside wedlock of parents who, at the time of the conception of the former, were not disqualified by any impediment to marry each other, are natural (CIVIL CODE, art. 269).

[81] Natural children by legal fiction are those conceived or born of marriages which are void from the beginning. They shall have the same status, rights and obligations as acknowledged natural children (CIVIL CODE, art. 89).

[82] A spurious child is one born of parents who, at the time of conception, were disqualified to marry each other on account of certain legal impediments. (Briones v. Miguel, G.R. No. 156343, 440 SCRA 455, 462, Oct. 18, 2004).

[83] Prior to the Civil Code, however, this already complicated hierarchy included other classes of illegitimate children, such as the "*manceres*" or the offspring of prostitutes and the "sacrilegious children," or children of those who had received Holy Orders. The Civil Code of 1950, in an effort to keep up with the times, limited illegitimate filiation to those which are adulterous, incestuous, and illicit.

[84] De Santos v. Angeles, G.R. No. 105619, 251 SCRA 206, 213-14, Dec. 12, 1995.

belonging to the category of legitimate children remained the same, but inter-class distinctions between natural children and illegitimate children other than natural were removed. Illegitimate children were simplified to two classes: (1) those conceived and born of parents who were not married to each other but were not disqualified by any impediment from marrying each other; and (2) those conceived and born of parents who were disqualified from marrying each other.[85] There is no difference in the treatment of each class, except that the former can be legitimated and may enjoy the rights of legitimate children.[86]

A legitimate child is one conceived *or* born during a valid marriage. Children conceived or born during a voidable marriage are also legitimate, as long as conception or birth occurs before a final decree of annulment. Exceptionally, there are three instances in which a child conceived or born outside a valid marriage is considered legitimate:

1) Children of voidable marriages (Art. 54); and
2) Children of two kinds of void marriages (Art. 54):
    a. Those void under Article 36; and
    b. Those void under Article 53 (i.e.[ ] subsequent marriages contracted without or before recording of judgment of annulment or nullity, of partition and distribution of property, and of the delivery of the children's presumptive legitimes).[87]

All other children conceived *and* born outside a valid marriage are illegitimate.

A. Treatment of Illegitimate Children under Philippine Laws

Philippine law is considerably more humane in its treatment of non-marital children.

In 1988, even as many jurisdictions were still debating the rights of non-marital children vis-à-vis marital ones, the Philippines already adopted a simplified classification, legitimate or illegitimate, with both classes enjoying the same right to support and same remedies to establish filiation. The major

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[85] *The Family in Focus*, *supra* note 76, at 85.

[86] Exceptionally, if the only disqualification of the parents is because either or both of them were below eighteen years of age, their child may be legitimated by a subsequent valid marriage. Article 177 of the Family Code was amended by Rep. Act No. 9858 to read: "Children conceived and born outside of wedlock of parents who, at the time of the conception of the former, were not disqualified by impediment to marry each other, or were so disqualified only because either or both of them were below eighteen (18) years of age, may be legitimated."

[87] *The Family in Focus*, *supra* note 76, at 86.

difference lay on successional rights, in which traditional impediments on the illegitimate child remain.

1. Under the Family Code of the Philippines

The Family Code introduced significant advancements to the rights of non-marital children which were comparatively advanced for its time. Aside from abolishing the inter-class distinction among illegitimate children, it introduced important provisions including: (1) entitlement of illegitimate children to full support; (2) granting mothers of illegitimate children full parental authority over them; and (3) allowing the illegitimate child to prove filiation using the same means allowed for legitimate children. Full equality, however, is not yet achieved, and for our purposes, we will examine the differences between legitimate and illegitimate children in terms of: (i) proof of filiation; (ii) parental authority and custody; (iii) use of surname; (iv) support; and (v) succession.

i. Proving Filiation

Filiation, the kinship relation between an individual and her progenitors, is the bedrock upon which rests a child's entitlement to family law rights. In general, in order that a person may enjoy any status at all as regards her parents, her filiation has to be established in accordance with law.[88] Such is the importance of filiation proceedings that the right to institute such action is traditionally an area of discrimination between legitimate and illegitimate children. For example, there used to be a distinction between legitimate children, who can claim filiation, and illegitimate children, who must be recognized in order to enjoy certain rights with respect to such parent making the recognition.[89]

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[88] Marital children, however, enjoy a presumption of paternity. Thus, the law presumes that they are the offspring of their married parents. Such filiation may be impugned only on limited grounds specified under the law (FAMILY CODE, art. 166). However, a child who is born after 300 days following the dissolution of the marriage or the separation of spouses does not enjoy any presumption of legitimacy or illegitimacy (RULES OF COURT, Rule 131, § 4). Non-marital children, in contrast, do not enjoy any such presumption with respect to either parent. Maternal filiation is, however, easily proven by the fact of birth.

[89] *See* CIVIL CODE, art. 265, regarding methods of proving legitimate filiation, and art. 268, which talks about the action to claim legitimacy. The Code is silent, however, on whether the same action is available to illegitimate children wanting to claim filiation. Instead, it regulates the modes of recognition of illegitimate children, which can be either voluntary (art. 276) or compulsory (art. 283-284) on the parent, and gives the illegitimate child certain rights with respect to the parent making such recognition (art. 282). Different prescriptive periods are also provided for (art 268, *compared with* art. 285).

The Family Code abolished these distinctions. Important in this regard is Article 175, which provides:

> ARTICLE 175. Illegitimate children may establish their illegitimate filiation *in the same way and on the same evidence as legitimate children.*
>
> The action must be brought within the *same period specified in Article 173*, except when the action is based on the second paragraph of Article 172, in which case the action may be brought during the lifetime of the alleged parent.[90]

Article 173 states that the action to prove filiation may be brought by the child during her lifetime, and is transmissible to the heirs should the child die during minority or in a state of insanity. Article 172, in turn, provides:

> ARTICLE 172. The filiation of legitimate children is established by any of the following:
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> (1) The record of birth appearing in the civil register or a final judgment; or
>
> (2) An admission of legitimate filiation in a public document or a private handwritten instrument and signed by the parent concerned.
>
> In the absence of the foregoing evidence, the legitimate filiation shall be proved by:
>
> (1) The open and continuous possession of the status of a legitimate child; or
>
> (2) Any other means allowed by the Rules of Court and special laws.[91]

Thus, in case the proof offered is open and continuous possession of illegitimate status, or any other means allowed under the Rules on Evidence, the prescriptive period is the lifetime of the parent. This is the sole remaining distinction between legitimate and illegitimate children as regards filiation proceedings. The distinction is justified, however, by the need to provide the putative parent an opportunity to controvert the claim, an opportunity which is lost once the putative parent is dead. As explained by eminent family law expert Justice Alicia Sempio-Diy:

> [U]nlike legitimate children who are publicly recognized, illegitimate children are usually begotten and raised in secrecy and without the legitimate family being aware of their existence. Who then can be sure of their filiation but the parents themselves? But suppose the child

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[90] FAMILY CODE, art. 175. (Emphases supplied.)

[91] Art. 172.

> claiming to be the illegitimate child of a certain person is not really the child of the latter? The putative parent should thus be given the opportunity to affirm or deny the child's filiation, and this, he or she cannot do if he or she is already dead.[92]

Insofar as proving filiation is concerned then, the distinction appears to be reasonable, dictated by factual differences in the circumstances of children born into married parents and children born to unmarried parents.

ii. Parental Authority, Custody, and Citizenship

Parental authority is thought to be a natural right of the parents,[93] who cannot be deprived of such unless otherwise shown to be unfit. Different systems of law, however, provide for different allocations of parental authority. In general, in case of marital children, parental authority could be granted to the father only or to both parents, while in case of non-marital children, it could be granted to one or both parents depending on whether the child has been acknowledged, to the mother only, to the father only, to both of them jointly, or even to agents of the State.[94]

Under the Family Code, parental authority over a legitimate child is vested on both father and mother, who are also presumed by law to be her natural parents. Children born outside of wedlock, however, are under the sole parental authority of the mother, the only parent with whom her filiation can be easily established by the fact of birth.

Since custody flows from parental authority, the father and mother of the legitimate child has joint custody over her, while only the mother has sole custody over the illegitimate child. Recognition by the father could be a ground for ordering him to give support, but not to custody over his illegitimate child.[95]

An illegitimate child, being under the sole parental authority and custody of the mother, follows the status and citizenship of the mother.[96] However, the child of a Filipino father, whether legitimate or illegitimate, is himself a Filipino,

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[92] ALICIA SEMPIO-DIY, HANDBOOK ON THE FAMILY CODE OF THE PHILIPPINES 295 (2006 ed.).

[93] The Constitution implicitly recognizes that parental authority is a natural right and duty. CONST. art. II, § 12 states that "[t]he natural and primary right and duty of parents in the rearing of the youth for civic efficiency and the development of moral character shall have the support of the Government."

[94] SAARIO, *supra* note 8, at 89 *et seq.*

[95] SEMPIO-DIY, supra note 92, at 296, *citing* Briones v. Miguel, G.R. No. 156343, Oct. 18, 2004.

[96] Serra v. Republic, G.R. No. 4223, May 12, 1952 (unreported).

as Article IV of the 1987 Constitution on citizenship makes no distinction between legitimate or illegitimate filiation.[97]

iii. Use of Surname

Use of surname is important in any study of statutory discrimination among children because it is traditionally the first indicator of legitimate or illegitimate filiation. Use of surname is normally determined by law, but persons have often resorted to appropriation of one or both of the parent's surnames in order to avoid the stigma of illegitimacy.

Use of surname, like other family law rights, flow from the existence of filiation. Thus, a legitimate child, whose filiation is established as regards both parents, has the right to use her father's surname as principal surname and her mother's surname subsidiarily.[98] Before its amendment, the Family Code allowed the illegitimate child to use only her mother's surname. Republic Act ("R.A.") No. 9255, amending Article 176 of the Family Code,[99] gave illegitimate children the right to use their father's surname provided they are recognized by the putative father.

It would be erroneous, however, to conclude that R.A. No. 9255 places legitimate children and acknowledged illegitimate children on equal footing. Indicators of illegitimate filiation remain, even for acknowledged illegitimate children. For although R.A. No. 9255 allowed acknowledged illegitimate children to *use* their father's surname, its implementing rules do not allow the *registration* of the father's surname as the child's last name in all instances. Thus, while the surname of the acknowledging father may be entered as the child's last

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[97] *See* Tecson v. Commission on Elections, G.R. No. 161434, 424 SCRA 277, Mar. 3, 2004. Note, however, that the ruling in *Tecson* was based on an identical provision in the 1935 Constitution, and that the context of the decision was the natural-born citizenship requirement for presidents under the 1987 Constitution.

[98] *The Family in Focus*, *supra* note 76, at 86.

[99] Rep. Act No. 9255 (2004), or "An Act Allowing Illegitimate Children to use the Surname of Their Father, amending for the purpose Article 176 of Executive Order No. 209, otherwise known as the 'Family Code of the Philippines.'" FAMILY CODE, art. 176, as amended reads:

> Illegitimate children shall use the surname and shall be under the parental authority of their mother, and shall be entitled to support in conformity with this Code. However, illegitimate children may use the surname of their father if their filiation has been expressly recognized by the father through the record of birth appearing in the civil register, or when an admission in a public document or private handwritten instrument is made by the father. *Provided,* the father has the right to institute an action before the regular courts to prove non-filiation during his lifetime. The legitime of each illegitimate child shall consist of one-half of the legitime of a legitimate child.

name in the birth certificate in case of a birth that is not yet registered,[100] the same cannot be done for a child previously registered using her mother's surname. In the latter case, the child's last name appearing in her birth certificate can no longer be changed, notwithstanding subsequent acknowledgement by her father.[101] Instead, an annotation will be made in the birth certificate which will serve as authority for the child to use her father's last name.[102] In all cases, an annotation stating that the child is acknowledged pursuant to R.A. No. 9255 must be made. In case the acknowledgement is made using any means other than an admission of paternity done at the back of the birth certificate, an annotation indicating illegitimate filiation must also be made on the Certificate of Live Birth itself.

iv. Support

Just as parental authority is considered a natural right, support is considered a natural duty that parents owe to their children. Normally, support obligations are legally binding for as long as there is a clear determination of paternal and/or maternal filiation. Unlike in common law countries where the doctrine of *filius nullius* prevails, Philippine law provides that both legitimate and illegitimate children are entitled to full support.

The difference lies in the order of preference in case the obligor is the father. Article 200 of the Family Code provides:

> ARTICLE 200. When the obligation to give support falls upon two or more persons, the payment of the same shall be divided between them in proportion to the resources of each.

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[100] Office of the Civil Registrar General, Adm. Order No. 1 (2004) [hereinafter "Civil Registrar Rules"]. Rules and Regulations Governing the Implementation of Republic Act No. 9255. Rule 8.1.1, referring to births not yet registered, provides: "The surname of the father shall be entered as the last name of the child in the Certificate of Live Birth. The Certificate of Live Birth shall be recorded in the Register of Births."

[101] Civil Registrar Rules, Rule 8.1.1. Rule 8.2.1, pertaining to births previously registered under the surname of the mother, reads:

> If admission of paternity was made either at the back of the Certificate of Live Birth or in a separate public document or in a private handwritten document, the public document or AUSF shall be recorded in the Register of Legal Instruments. Proper annotation shall be made in the Certificate of Live Birth and the Register of Births as follows:
>
> "The surname of the child is hereby changed from (original surname) to (new surname) pursuant to RA 9255."
>
> *The original surname of the child appearing in the Certificate of Liver Birth and Register of Births shall not be changed or deleted.* (Emphasis supplied.)

[102] *Id.*

> However, in case of urgent need and by special circumstances, the judge may order only one of them to furnish the support provisionally, without prejudice to his right to claim from the other obligors the share due from them.
>
> When two or more recipients at the same time claim support from one and the same person legally obliged to give it, should the latter not have sufficient means to satisfy all claims, the order established in the preceding article shall be followed, *unless the concurrent obligees should be the spouse and a child subject to parental authority, in which case the child shall be preferred.*[103]

Article 199, on the other hand, provides:

> ARTICLE 199. Whenever two or more persons are obliged to give support, the liability shall devolve upon the following persons in the order herein provided:
> (1) The spouse;
> (2) The descendants in the nearest degree;
> (3) The ascendants in the nearest degree; and
> (4) The brothers and sisters.[104]

Insofar as the mother is concerned then, both illegitimate and legitimate children enjoy the same support, since both are under her parental authority. However, should the obligor be the father, his minor legitimate children come before his spouse, but his minor illegitimate children, not being under his parental authority, come *after* her.[105] Thus, there may be instances in which illegitimate children cannot demand support from their father should the latter have insufficient means to support his legitimate children and his spouse. This effectively limits the illegitimate child's rights to support and subordinates her needs to that of the legitimate family.

Furthermore, while the support of legitimate children is a liability of the assets of the absolute community or conjugal partnership, the support of illegitimate children is, as a rule, chargeable only to the separate property of the parent obliged to give support. Only in case of insufficiency of the separate property is the conjugal property liable, and then only as an advance to be deducted from the obligor's share in the conjugal property after dissolution.[106] In enforcing such claims, the rule also differs depending on the property regime of the married illegitimate parent. In absolute community, there is no need of

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[103] FAMILY CODE, art. 200. (Emphasis supplied.)
[104] Art. 199.
[105] *The Family in Focus, supra* note 76, at 87.
[106] *Id.* at 88.

first proving that the charges under Article 94 of the Family Code has been covered or paid. The rule is different for conjugal partnership, where there must be a showing that the obligations of the conjugal partnership enumerated under Article 121 was first satisfied before extra-conjugal liabilities such as support of illegitimate children may be enforced.[107]

v. Successional Rights

The Family Code removed intra-class distinctions in the legitime of illegitimate children and increased it to one-half of that of the legitimate child. Aside from this difference, however, the rules on succession under the Civil Code continue to govern.

2. Under the Civil Code of the Philippines

Succession is still the field in which discrimination between marital and non-marital children is most felt. Since the Civil Code antedates the Family Code by almost 40 years, the more egalitarian treatment found in the latter law is not as pronounced in the former. Nevertheless, it represents an evolution of successional rights of illegitimate children, in that it allowed all classes of illegitimate children to inherit from their parents, provided filiation is duly established.[108]

It must be recalled that prior to the Family Code, illegitimate children were divided into at least three categories: (1) natural children; (2) natural children by legal fiction; and (3) illegitimate children other than natural. Under the Spanish Civil Code, illegitimate children other than natural, like spurious children, were entitled to support only. They were not entitled to succeed as compulsory heirs, unlike acknowledged natural children.[109] With the enactment of the Civil Code of the Philippines, all classes of illegitimate children were allowed to inherit, and Article 887 of the same listed such children as the fourth and fifth class of compulsory heirs. [110]

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[107] FAMILY CODE, art. 122. *See also* SEMPIO-DIY, *supra* note 92, at 167.

[108] Zuzuarregui v. Zuzuarregui, 102 Phil. 346, 351 (1957).

[109] *Id.* at 350.

[110] CIVIL CODE, art. 887. The provision reads:

The following are compulsory heirs:

(1) Legitimate children and descendants, with respect to their legitimate parents and ascendants;

(2) In default of the foregoing, legitimate parents and ascendants, with respect to their legitimate children and descendants;

(3) The widow or widower;

(4) Acknowledged natural children, and natural children by legal fiction;

The Code Commission justified the change by saying:

> The transgressions of social conventions committed by the parents should not be [visited upon] the illegitimate children. The law should not be too severe upon these illegitimate children, be they natural or otherwise, because they do need the special protection of the State. They are born with a social handicap and the law should help them to surmount the disadvantages facing them through the misdeeds of their parent.[111]

Nevertheless, significant differences between legitimate and illegitimate children remain, especially in the area of (i) legitimes; (ii) intestate succession; and (iii) the controversial right of representation. Let us examine these three areas.

i. System of Legitimes

Legitimes are portions of the net estate of the decedent which the law reserves for compulsory heirs, and which the decedent cannot dispose of by testamentary disposition. The law provides for differing shares depending on the combination of compulsory heirs that survive, but in general, the legitime of each illegitimate child consists of one-half of the legitime of a legitimate child.[112] In addition, legitimate children and/or their legitimate descendants are considered primary compulsory heirs, meaning they are preferred over and exclude secondary compulsory heirs, such as legitimate parents and/or ascendants and illegitimate parents. Illegitimate children, like the surviving spouse, are concurring compulsory heirs, which means that they succeed together with the primary or secondary heirs but do not exclude any other compulsory heir.

Depending on the number of legitimate and illegitimate children, the possibility exists that the total legitimes will exceed the entire estate.[113] In such cases, reduction of shares will have to be made. However, such reduction cannot affect the legitimes of legitimate children, who are *primary* and *preferred* heirs, and the legitime of the surviving spouse, as such reduction is prohibited under

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(5) Other illegitimate children referred to in Article 287.

[111] Zuzuarregui v. Zuzuarregui, 102 Phil. 346, 350 (1957), *citing* REPORT OF THE CODE COMMISSION ON THE PROPOSED CIVIL CODE OF THE PHILIPPINES 89.

[112] FAMILY CODE, art. 176.

[113] RUBÉN BALANE, JOTTINGS AND JURISPRUDENCE IN CIVIL LAW (SUCCESSION) 359 (2010).

Article 895 of the Civil Code.[114] In other words, in a situation in which the spouse, the legitimate children and the illegitimate children of a decedent survive, it is only the legitimes of the last group which will be reduced, *pro rata* and without preference among them.[115] Thus, although the legitime of the legitimate child can never be impaired, there may be instances in which the legitime of her illegitimate siblings may be whittled away to insignificant amounts.

To illustrate the possible inequity of this situation, let us use three examples. First, a man named Andres married Bianca and had one legitimate child, Charles. The marriage does not work out, and Bianca leaves with Charles. Andres himself establishes another family with Zenaida, and fathers Dorothy, Esther, Frederick, and Genevieve. Because Andres had become estranged with Bianca and Charles, he lives with his second family, suffering their needs and building his wealth with them. He grows to old age and is taken care of by his illegitimate children until he dies. In the distribution of Andres' estate, Charles, who is practically a stranger, gets one-half. Bianca, the legal wife, gets one-fourth of his estate, while Dorothy, Esther, Frederick, and Genevieve each receive only the reduced amount of one-sixteenth of their father's estate.

Second, let us assume that Charles died in his infancy. By the time Andres dies, his compulsory heirs will be Bianca, his legal spouse, and his four illegitimate children, Dorothy, Esther, Frederick, and Genevieve. Under Article 894 of the Civil Code, the estranged Bianca will get one-third of Andres' estate, while the four surviving children will get only one-twelfth of their father's estate each.[116]

Lastly, let us change the facts such that Andres never had a child with Bianca but was instead left by the latter after he went abroad. After six years in Saudi Arabia, Andres returned to the Philippines and met Zenaida, with whom he founds a family. They have four children whom they rear from infancy until adulthood. On a vacation for their thirtieth anniversary, both Andres and Zenaida met an accident and died. Andres is survived by his legitimate parent, Maximo. Maximo will get one-half of Andres' estate, while Andres' four children

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[114] *Id.*

[115] *Id.*

[116] CIVIL CODE, art. 894. In case the decedent leaves illegitimate children and a surviving spouse, the sharing will be one-third for the illegitimate children collectively and one-third for the surviving spouse.

each receive only one-sixteenth of their father's estate because they are by law considered illegitimate.[117]

ii. Intestate Succession

The rules on intestate succession are also heavily affected by the status of legitimacy or illegitimacy. Similar to the system of legitimes, the shares of illegitimate children in intestate succession are generally less than those accorded to legitimate children, i.e. one half of the share of a legitimate child.[118]

Aside from the distributive portion in the estate, another area particularly worth examining is the "iron curtain" in intestate succession found in Article 992, which prohibits illegitimate children from inheriting *ab intestato* from the legitimate relatives of their parents. It provides:

> ARTICLE 992. An illegitimate child has no right to inherit *ab intestato* from the legitimate children and relatives of his father or mother; nor shall such children or relatives inherit in the same manner from the illegitimate child.[119]

In *Diaz v. Intermediate Appellate Court,*[120] the Supreme Court had occasion to discuss the rationale behind this provision:

> Article 992 of the New Civil Code provides a barrier or iron curtain in that it prohibits absolutely a succession *ab intestato* between the illegitimate child and the legitimate children and relatives of the father or mother of said illegitimate child. They may have a natural tie of blood, but this is not recognized by law for the purpose of Article 992. *Between the legitimate family and the illegitimate family there is presumed to be an intervening antagonism and incompatibility.* The illegitimate child is disgracefully looked down upon by the legitimate family; and the family is in turn, hated by the illegitimate child; the latter considers the privileged condition of the former, and the resources of which it is thereby deprived; the former, in turn, sees in the illegitimate child nothing but the product of sin, palpable evidence of a blemish broken

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[117] CIVIL CODE, art. 896. In case the decedent leaves a legitimate parent and illegitimate children, the sharing will be one-half for the legitimate parent and one-half for the illegitimate children collectively.

[118] CIVIL CODE, art. 983, *in relation to* CIVIL CODE, art. 895, *as amended by* FAMILY CODE, art. 176.

[119] CIVIL CODE, art. 992.

[120] G.R. No. 66574, 182 SCRA 427, Feb. 21, 1990.

> in life; *the law does no more than recognize the truth, by avoiding further ground of resentment.*[121]

Diaz interpreted the word "relatives" to include the legitimate parents of the father and mother of illegitimate children. Thus, illegitimate descendants of legitimate children have no right to represent the latter in intestate succession. To appreciate the effect of this prohibition, let us again use Dorothy, Esther, Frederick, and Genevieve as an example. Suppose that Andres himself is a legitimate child. Zenaida is also a legitimate child, her parents Yolanda and Teodoro being lawfully married to each other. When Andres and Zenaida died in the car accident, the four siblings were taken care of by Yolanda and Teodoro, Zenaida's parents. Despite the existence of a blood tie between and notwithstanding their clearly harmonious relationship, none of the children can inherit *ab intestato* from Yolanda or Teodoro. Neither can they inherit from Maximo, Maximo being the legitimate parent of Andres. The situation holds true even if all the grandparents die without any surviving legitimate descendants.[122] Moreover, Dorothy, Esther, Frederick and Genevieve cannot be considered compulsory heirs of their grandparents, as the same bar on representation applies in the system of legitimes. The Supreme Court explained this by saying:

> [T]he fact that a natural son has the right to inherit from the father or mother who acknowledged him, [...] does not [mean] that he has the right to represent either of them in the succession to their legitimate ascendants; his right is direct and immediate in relation to the father or mother who acknowledged him, but it can not be indirect by representing them in the succession to their ascendants to whom he is not related in any manner, because he does not appear among the legitimate family of which said ascendants are the head.[123]

iii. Right of Representation

Representation is a right created by fiction of law, by virtue of which the representative is raised to the place and the degree of the person represented, and acquires the rights which the latter would have if he were living or if he

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[121] *Id.* at 432-433, *citing* 7 MANRESA 110, *as cited in* Grey v. Fabie, G.R. No. 45160, May 23, 1939, 40 O.G. Supp. 3, at 196. (Emphases supplied.)

[122] Llorente v. Rodriguez, 10 Phil. 585 (1908). In this case, the Supreme Court, citing the Supreme Court of Spain, ruled that a natural child was barred from inheriting by intestate succession from her grandmother, who was the legitimate mother of the natural child's predeceased mother, even if the former died without any legitimate descendants surviving her. The intent is to impose an *absolute* bar, and the fact that a natural child can inherit from his father or mother who acknowledged her does not necessarily give her the right to represent either of them in succession to their legitimate ascendants.

[123] *Id.* at 590.

could have inherited. It is a form of hereditary subrogation which operates when a descendant of the decedent predeceases the latter, is incapacitated or unworthy, or is disinherited. When the right is applicable, the direct descendant of such deceased or incapacitated heir may inherit what the latter would have been entitled to had he survived or had he been capacitated to receive it.

The general rule found in the Spanish Civil Code is that representation is allowed only within the legitimate family, such that if the head of the descending direct line is a legitimate child, "it is assumed that the descendants called upon to succeed by such line shall be the issue of a lawful marriage."[124] But although the Philippines adhered to this principle, it did so with "fine inconsistency," in that "in subsequent articles (990, 995 and 998) [the] Code allow[ed] the hereditary portion of the illegitimate child to pass to his own descendants, whether legitimate or illegitimate."[125] The result is perhaps an unintended consequence of placing a premium on descent from an illegitimate line.

To illustrate, Article 992 prohibits an illegitimate descendant from representing a legitimate parent and inheriting from the estate of a legitimate ascendant. The successional bar directly affects the right of representation of illegitimate children when the person to be represented is a legitimate child. But if the person to be represented is an illegitimate child, the same prohibition does not apply. This is because Article 902 of the Civil Code expressly provides that "[t]he rights of illegitimate children set forth in the preceding articles are transmitted upon their death to their descendants, whether legitimate or illegitimate." Although Article 902 pertains to the system of legitimes, there is authority stating that such right is equally applicable in intestate succession, as the provisions relating to descendants of illegitimate children do not discriminate among legitimate and illegitimate issue.[126]

The result is a system of representation that denies from illegitimate children of a legitimate child the right to inherit in the latter's stead, but grants such right to both legitimate and illegitimate issue of illegitimate children. As Professor Balane observes, the net effect is that "the right of representation given to descendants of illegitimate children is broader than the right of representation given to descendants of legitimate children."[127] In our example, Dorothy, Esther, Frederick, and Genevieve cannot inherit from their grandparents Maximo and Nelia if their father Andres was a legitimate child, but

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[124] Oyao v. Oyao, 94 Phil. 204, 207 (1957), *citing* Llorente v. Rodriguez, 10 Phil. 585 (1908).

[125] J.B.L. Reyes, *Reflections on the Reform of Hereditary Succession*, 4 J. INTEG. BAR PHIL. 40 (1976).

[126] *See* CIVIL CODE, art. 989-90.

[127] BALANE, *supra* note 113, at 362.

can do so if, for example, Maximo and Nelia were not married and Andres was himself illegitimate. This is a curious situation, and as eminent civilist Justice J.B.L. Reyes observed:

> This difference being indefensible and unwarranted, in the future revision of the Civil Code we shall have to make a choice and decide either that the illegitimate issue enjoys in all cases the right of representation, in which case [Article] 992 must be suppressed; or contrariwise maintain said article and modify Articles 992 and 998. The first solution would be more in accord with an enlightened attitude vis-à-vis illegitimate children.[128]

3. Welfare Legislation Concerning Children

Welfare legislation in the Philippines reflects a more enlightened attitude in the treatment of illegitimate children perhaps because, unlike family laws, they are often amended and are thus more responsive to social changes. A discernable trend is that the later the enactment of the law, the less it discriminates between children on the basis of legitimate or illegitimate filiation. An examination of four welfare laws—the Employees' Compensation and State Insurance Fund, the Social Security Law of 1997, the Government Service Insurance System Act of 1997, and the National Health Insurance Act of 1995—will provide a case in point.

The Employees' Compensation and State Insurance Fund ("ECSIF") is of 1974 vintage, found in Book IV, Title II of the Labor Code of the Philippines.[129] The ECSIF is a system intended to provide for the worker and his beneficiaries adequate income and medical related benefits in the event of a work-connected disability or death. The ECSIF, however, consistent with the Civil Code classification then in place, makes a distinction between legitimate and illegitimate children as dependents of an employee. Thus, a dependent is defined as the "legitimate, legitimated or legally adopted or acknowledged natural child who is unmarried, not gainfully employed, and not over twenty-one (21) years of age or over twenty-one (21) years of age provided he is incapacitated and incapable of self-support."[130] An illegitimate child other than an acknowledged natural child is not counted as a dependent, but is treated only as a secondary beneficiary,[131] entitled to claim death benefits in the absence of primary beneficiaries of the employee.

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[128] Reyes, *supra* note 125.

[129] Pres. Dec. No. 442 (1974), as amended.

[130] LABOR CODE, art. 167(i).

[131] LABOR CODE, art. 167(j), enumerating the primary beneficiaries to be (1) the dependent spouse until he/she remarries, and (2) dependent children. A dependent

In marked contrast are the Social Security Law of 1997 ("SSS Law")[132] and the Government Service Insurance System Act of 1997 ("GSIS Law").[133] Under these two laws, a dependent child is a legitimate, legitimated or legally adopted child, *including the illegitimate child*, who is unmarried, not gainfully employed, not over the age of majority, or is over the age of majority but incapacitated and incapable of self-support due to a mental or physical defect acquired prior to age of majority.[134] In addition, all children, whether legitimate or illegitimate, are now considered primary beneficiaries.[135]

This trend of equal treatment is also present in the National Health Insurance Act of 1995 ("NHIA").[136] Under the NHIA, a member's legal dependent includes the "unmarried and unemployed legitimate, legitimated, illegitimate, acknowledged children as appearing in the birth certificate; legally adopted or step-children below twenty-one (21) years of age."[137] A consideration of the foregoing laws led the Supreme Court to conclude that when it comes to welfare legislation, the "civil status of the employee as either married or single is not the controlling consideration in order that a person may qualify as the employee's legal dependent. What is rather decidedly controlling is the fact that the spouse, child, or parent is actually dependent for support upon the employee."[138]

A final point that may be made when it comes to welfare laws affecting children is the Child and Youth Welfare Code. Enacted in 1974, it codified laws on rights and responsibilities of children below the age of majority and the rights and responsibilities of parents as well as the commitment of the State to provide for the care of special classes of children. In its enumeration of children's rights, it provided that "[a]ll children shall be entitled to the rights herein set forth

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acknowledged natural child is considered a primary beneficiary only when there are no other dependent children who are qualified and eligible for monthly income benefit. In the absence of primary beneficiaries, the secondary beneficiaries are (1) the dependent parents; (2) the other illegitimate children, and (3) the legitimate descendants (other than legitimate children).

[132] Rep. Act No. 8282 (1997) [hereinafter "SSS Law"].

[133] Rep. Act No. 8291 (1997) [hereinafter "GSIS Law"].

[134] GSIS Law, § 2(f). The SSS Law, § 8(e)(2), substantially provides for the same definition, *viz*: "(2) The legitimate, legitimated or legally adopted, and illegitimate child who is unmarried, not gainfully employed, and has not reached twenty-one (21) years of age, or if over twenty-one (21) years of age, he is congenitally or while still a minor has been permanently incapacitated and incapable of self-support, physically or mentally."

[135] SSS Law, § 8(k); GSIS Law, § 2(g).

[136] Rep. Act No. 7875 (1995), *as amended by* Rep. Act No. 9241 (2004) and Rep. Act No. 10606 (2013)

[137] Rep. Act No. 7875 (1995, *as amended*), § 4(f).

[138] Philippine Journalists, Inc. v. Journal Employees Union, G.R. No. 192601, June 3, 2013 (unreported).

without distinction as to legitimacy or illegitimacy, sex, social status, religion, political antecedents, and other factors."[139]

B. Status of Illegitimate Children vis-à-vis Legitimate Children

The history of Philippine legislation concerning non-marital children shows a discernable trend towards a more egalitarian treatment. In the words of Justice Flerida Ruth Romero, eminent family law expert:

> If there is a discernible trend in law to favor and uphold the legitimacy of children [...] there is a similar trend to bestow more rights to the illegitimate children on the modern theory that there are no illegitimate children, only illegitimate parents. Under the Family Code, the illegitimate children now enjoy these rights: to use only the surname and be under the parental authority of the mother and to be entitled to support and to receive legitime but only one-half of that of the legitimate child. Now, thanks to a new law [...], illegitimate children, if expressly acknowledged by their fathers may use his surname, not merely that of their mothers. so long as "their filiation has been expressly recognized by the father through the record of birth appearing in the civil register, or when an admission in a public document or private handwritten instrument is made by the father." Such recognition will expectedly pave the way for support and increased successional or inheritance rights.[140]

The foregoing exposition may lead the reader to assume, quite wrongly, that except for successional rights, non-marital children now enjoy the same status as marital children. This is far from the truth. Substantial social and legal distinctions remain, in part because of the continuing classification of non-marital children as "illegitimate."

The UN Committee on the Rights of the Child, in its concluding observations on Philippine compliance with the Convention on the Rights of the Child, points out that the statutory classification of children born outside wedlock as "illegitimate" is *per se* discriminatory.[141] The very term "illegitimate" suggests that this class of persons are *contrary to law* or outside what the law

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[139] CHILD & YOUTH WELFARE CODE, art. 3.

[140] Flerida Ruth Romero, *Concerns and Emerging Trends Relating to Family and Children*, 86 PHIL. L.J. 5, 33 (2012). (Citations omitted.)

[141] UN Committee on the Rights of the Child, Concluding Observations: Philippines, U.N. Doc. CRC/C/15/Add.259, ¶ 20 (Sept. 21, 2005).

would consider "legitimate." The suggestion in turn justifies continuing legal and, by extension, social, discrimination.[142]

The fact of distinction itself on the basis of marital or non-marital birth causes significant harm on non-marital children. This is because the imposition of such status actually justifies the withholding of "private resources that ought to be available to give [them] an even start in life,"[143] including the economic support that would have been available from the child's biological parent.[144] Professor Maldonado in her article detailing the stigma and discrimination against non-marital children describes the harmful effect of this legislated economic disparity:

> [Unlike their non-marital counterparts], marital children are automatically entitled to resources from both parents, resources that give them a competitive advantage over non-marital children. As shown below, children who grow up in single parent homes, many of whom are non-marital, are more likely than children raised by married parents to experience poverty, suffer emotional and behavioral problems, underperform in school, drop out of high school, become teen parents, and engage in delinquent behavior. These poorer outcomes may be the result of growing up with fewer resources.[145]

The unequal successional rights of marital and non-marital children also deny the latter the same access to intergenerational wealth.[146] While a marital child may enjoy the windfall from the estate of her deceased relatives, a non-marital child is often limited to her legitime from her father or mother, a share which, as previously discussed, is not preferred and may be reduced to very insignificant amounts. And because of the iron curtain in intestate succession, she is also precluded from inheriting a share of the estate of her father or mother's relatives, such as paternal or maternal grandparents. These restrictions

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[142] Discrimination occurs when there is any "distinction, exclusion, restriction or preference [...] based on any ground such as [...] birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." UN CHILDREN'S FUND, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 19 (3rd ed., 2007) [hereinafter "CRC IMPLEMENTATION HANDBOOK"].

[143] Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 830 (1966).

[144] *See* discussion on order of support, *supra*. The fact that the illegitimate child is entitled to full support does not necessarily mean that he is given this, as the order of preference puts her below that to which she would have been entitled to had there been no distinction between marital and non-marital children.

[145] Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 365 (2011).

[146] *Id.* at 366.

do not only limit the non-marital child's ability to acquire property or wealth, but also other valuable resources such as psychological and emotional support. It also suggests the message that the family's relationship with a non-marital child is of lesser quality than that with a marital child, facilitating paternal disengagement.[147]

Moreover, the classification of non-marital children as "illegitimate" in real terms puts a "stamp of dishonor" on their persons. It facilitates societal discrimination for, in the words of Professor Healy, "when law treats members of a group as second-class citizens, it invites others to discriminate against that group as well."[148] "[This] 'invitation' to discriminate [is] strengthened by implicit and explicit messages that non-marital families are a social problem and should be discouraged [...] [and reinforces the societal biases] that non-marital families are inherently inferior."[149]

This much was recognized in House Bill No. 2355, a proposed legislative measure now pending in the House of Representatives which seeks to abolish altogether the classification of children to legitimate, illegitimate, and legitimated. In its explanatory note, it states:

> [F]rom the day a child is born out of wedlock, her [sic] or she automatically becomes a marginalized citizen, socially and economically. [...] From birth, this child may never experience the love and care a traditional family usually gives. Worse, this child is prone to ridicule by his peers and ostracize [sic] by an unforgiving society. [...] Despite the utter disadvantage being suffered by a child born out of wedlock, *our laws further add injury by labelling and brandishing them as "illegitimate"* or "legitimated." Black [sic] Law Dictionary defines "illegitimate" as "contrary to law" [...] while Webster Dictionary defines the term as "against the law; illegal; born out of wedlock." *In effect, an illegitimate child is not only a child born out of wedlock but a child that is against the law or a child that is contrary to law.* Sad to say, this unsavory label is carried by this child to adulthood and until his death.[150]

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[147] *Id.*

[148] Thomas Healy, *Stigmatic Harm and Standing*, 92 IOWA L. REV. 417, 479-80 (2007), *cited in* Maldonado, *supra* note 145, at 367.

[149] Maldonado, *supra* note 145, at 367.

[150] H. No. 2355, 16th Cong., 1st Sess. (2013). An Act Amending Title VI of E.O. No. 209 as amended, otherwise known as the Family Code by Removing and/or Erasing Distinctions Between Legitimate, Illegitimate and Legitimated Filiation, and for other purposes. (Emphases supplied.) As of this writing, the bill is still pending in the House Committee on Revision of Laws.

Equality, thus, is not fully achieved for as long as there are certain groups of people that the law labels as "illegitimate" because of a circumstance beyond their control. Although gradual amelioration is desirable, it should not be enough if the goal is to recognize non-marital children as full individuals. The question then is whether the removal of distinctions based solely on birth outside wedlock is legally feasible in the Philippines, considering the long history of its usage, the unique Christian influence on Philippine culture, and the constitutional provisions on the protection of the family.

PART III: TOWARDS LEGITIMIZING ILLEGITIMACY

As early as 1967, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities already recognized the subtle yet insidious discrimination against non-marital children as a practice inconsistent with the Universal Declaration of Human Rights. Consistent with its goal to raise public awareness on the issue, it commissioned a study which traced the development of and differences in illegitimacy laws of participating countries.[151] A result of this study is the adoption of the *Draft General Principles on Equality and Non-Discrimination in Respect of Persons Born out of Wedlock*.[152] This document is important in that it laid down a fundamental principle that can be used as a measure of equality between marital and non-marital children without sacrificing the legitimate interests of the State: "Every person, once his filiation has been established, shall have the same legal status as a person born in wedlock."

The objective of the last part of this paper is to examine the legal feasibility of adopting this principle in our jurisdiction. Taking into consideration the discussion in Part I regarding state interests served by the policy behind discrimination against illegitimate children, this part will examine the efficacy of doing away with such classification, while at the same time taking heed of the constitutional injunction on the State to preserve and protect the family.

We begin by examining specific provisions of the Constitution which mandate against discrimination, and how discrimination against illegitimate children does not fall within the case-specific exceptions which evolved in Philippine and US jurisprudence. Then, we examine discrimination against non-

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[151] VIENO VOITTO SAARIO, STUDY OF DISCRIMINATION AGAINST PERSONS BORN OUT OF WEDLOCK: DRAFT REPORT (1967). The Philippines is a participating country in this study.

[152] Annex VII of SAARIO, *supra* note 8, at 225. The Sub-Commission on Prevention of Discrimination and Protection of Minorities adopted this draft at its nineteenth session (1967), after examining the principles submitted by the Special Rapporteur. The Sub-Commission transmitted the draft general principles to the Commission on Human Rights for further consideration and adoption.

marital children as a practice contrary to the Universal Declaration of Human Rights ("UDHR") and the Convention on the Rights of the Child ("CRC"), both legal instruments to which the Philippines is a signatory and which the Philippine State has the obligation to respect. We will show examples in foreign jurisdictions where non-discrimination among children was achieved by constitutional fiat before finally concluding with a discussion on the normative command of equality of rights and dignity vis-à-vis the constitutional mandate on protection of the family.

A. Equal Protection and Non-Discrimination under the Constitution

1. Classic Equal Protection and the Test of Valid Classification

Article III, Section 1 of the 1987 Constitution provides that "[n]o person shall be deprived of life, liberty or property without the due process of law, nor shall any person be denied the equal protection of the laws."

It is well-settled that this mandate of equal protection simply means that all persons similarly situated should be treated alike, both as to rights conferred and responsibilities imposed.[153] The intention is to "secure and safeguard equality of right and of treatment against intentional and arbitrary discrimination, and to work nothing less than the abolition of all caste and invidious class-based legislation."[154] However, the clause does not demand that all persons be dealt with identically, nor that things which are different be treated as though they were the same. It does not require exact or perfect equality, calling only for equality of right and not of its enjoyment.[155] Thus, equal protection is not violated when classification is made by legislation, provided such action meets the test of valid classification. The classic test of valid classification was laid down by the Supreme Court in the case of *People v. Cayat*:

1) The classification must rest on substantial distinctions which make for real differences;
2) It must be germane to the purpose of the law;
3) It must not be limited to existing conditions only; and
4) It must apply equally to all members of the same class.[156]

The decisive questions that must be answered are (1) whether the classification between legitimate and illegitimate children is justified by

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[153] Ichong v. Hernandez, 101 Phil. 1155 (1957), and a host of other cases.
[154] 16B C.J.S. *Constitutional Law* § 1098.
[155] *Id.*
[156] *People v. Cayat*, 68 Phil. 12, 18 (1939).

substantial distinctions which make for real differences, and (2) whether such classification is germane for the achievement of legitimate state interests served by the law. Clearly, the test requires that a law that imposes special burdens on a class of people *must have a specific purpose*, for the concept of equal protection requires the state to govern impartially. "It may not draw distinctions between individuals solely on differences that are irrelevant to a legitimate governmental objective."[157] Moreover, while the State has broad power when it comes to making classifications, it may not draw a line which constitutes an "invidious discrimination against a particular class."[158]

The existence of a legitimate governmental objective may be conceded. Laws which discriminate against illegitimate children have invariably been justified by invoking two grounds: (1) protection of public morals, and (2) the overriding social objective of promoting the family. The latter objective, insofar as the Philippine jurisdiction is concerned, is even constitutionally enshrined. On the other hand, the state interest in promoting public morals by regulating sexual conduct was extensively discussed in the case of *Ermita-Malate Hotel and Motel Operations Association, Inc. v. City Mayor of Manila.*[159] Such interest was upheld by invoking the police power of the State, that "most essential, insistent and the least limitable of powers, extending as it does 'to all the great public needs.'"[160] The Supreme Court concluded that the State, under its police power, has competence to promote public health, public morals, public safety, and the general welfare, even at the expense of regulation of private conduct, except only when a State activity being questioned needlessly restrains even constitutionally guaranteed rights, in which case it may be stricken down for being overbroad.[161]

However, such legitimate governmental objective by itself is not enough. It must be shown that the classification made to carry out such objective is *relevant and appropriate*, that is, germane for such purpose. The US Supreme Court, faced with an equal protection challenge concerning the rights of an illegitimate child, laid down a useful standard in evaluating relevance by distinguishing between economic legislation and legislation which affects basic civil rights. It said:

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[157] Biraogo v. The Philippine Truth Commission of 2010, G.R. No. 192935, 667 SCRA 78, 167, Dec. 7, 2010, *citing* Lehr v. Robertson, 463 U.S. 248, 103 (1983).

[158] Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[159] 127 Phil. 306 (1967).

[160] *Id.* at 316. (Citations omitted.)

[161] White Light Corporation v. City of Manila, G.R. No. 122846, 576 SCRA 416, 432, Jan. 20, 2009, *citing* Chavez v. Commission on Elections, G.R. No. 162777, 437 SCRA 415, Aug. 31, 2004 *and* Adiong v. Commission on Elections, G.R. No. 103956, 207 SCRA 712, Mar. 31, 1992.

> In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. [...] However that might be, we have been extremely sensitive when it comes to basic civil rights (Skinner v. Oklahoma, supra, at 541; Harper v. Virginia Board of Elections, 383 U. S. 663, 669-670) and have not hesitated to strike down an invidious classification *even though it had history and tradition on its side.* (Brown v. Board of Education, 347 U. S. 483; Harper v. Virginia Board of Elections, supra, at 669.)[162]

Thus, when the equal protection clause is invoked to protect *economic interests*, it suffices that a less stringent standard is used to evaluate the reasonableness of the classification. The classic formulation of this traditional standard is expressed in the doctrinal case of *Ichong v. Hernandez*:[163]

> The equal-protection clause [...] does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. [...] A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. [...] When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. [...] One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.[164]

The reluctance to pronounce a violation of the equal protection clause in such cases is likened to a presumption of constitutionality. This presumption is, however, reversed where the "basic civil rights of man" are at issue.[165] *When the equal protection clause is invoked to protect basic civil rights*, as opposed to mere economic interest, *courts are advised to undertake a closer scrutiny* in drawing the line between constitutional and unconstitutional discrimination. Thus, in *Harper v. Virginia Board of Elections*,[166] the US Supreme Court, speaking through Mr. Justice Douglas, explained:

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[162] *Levy v. Louisiana,* 391 U.S. 68, 71 (1968). (Citations in the original, emphasis supplied.)

[163] 101 Phil. 1155 (1957).

[164] *Id.* at 1177, *citing* Van Devanter, *J., in* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911).

[165] Skinner v. Oklahoma, 316 U.S. 535, 541(1942).

[166] 383 U.S. 663 (1966).

> In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. [...] *Notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change.* [...] We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, *classifications which might invade or restrain them must be closely scrutinized and carefully confined.*[167]

In determining the relevance of the classification between legitimate and illegitimate children in relation to achievement of stated governmental objectives, close scrutiny in the spirit of *Harper* must be observed. This is because an illegitimate child's right to familial relations and right to live as a dignified member of society is more closely related to "basic civil right[s] of man" than to mere economic interests.[168] As Professor Krause explains:

> Although money is involved, the illegitimate's claim goes much further, for it centers on his second-class status in our society—a society in which illegitimacy is a "psychic catastrophe" [...]. Indeed, the psychological effect of the stigma of bastardy upon its victim seems quite comparable to the damaging psychological effects upon the victims of racial discrimination, which effects were successfully exploited in the battle over school segregation. In other words, a classification based on a criterion of illegitimacy is a *vulnerable one,* with respect to which *the presumption of constitutionality is reversed.*[169]

Considering the foregoing, one must examine whether, even under close scrutiny, the treatment of illegitimate children as a particular class is relevant and appropriate for the purpose of promoting public morality and protecting the family. Since the level of scrutiny must be higher than that normally reserved for the protection of economic interests, a finding that the classification is germane may be sustained *only if there is clear and convincing evidence which shows that such legal discrimination against illegitimate children discourages promiscuity, promotes marriage, and protects the family.*

Comparative studies in demographic statistics relating to illegitimate births reveal that despite the presence of strict bastardy laws, the prevalence of illegitimate children and illegitimate births persisted over time seemingly without

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[167] *Id.* at 670. (Emphases supplied, citations omitted.)

[168] *Equal Protection, supra* note 2, at 488.

[169] *Id.* (Citations omitted, emphases supplied.)

correlation to the legal regime in existence.[170] As explained in Part I, illegitimacy is intended to be a penalty for the infraction of social order committed *by the parents of the child.* But as the penalty is imposed not on the *wrongdoer* but on the product of the *wrong*, it did little to deter such behavior.[171] The diminished obligation to provide support allows parents, particularly fathers, to escape the economic consequences of having children, and the impaired successional rights of these children did little in helping internalize the economic cost of rearing them within the family unit. Instead, what bastardy laws clearly promoted was the economic marginalization of illegitimate children, child abandonment, and even infanticide.[172] One need not look far for validation of the observation that laws discriminating against illegitimate children have little effect on a parent's sexual conduct. In the Philippines alone, despite legal discrimination that persisted for centuries, latest birth statistics show that four in every ten births are illegitimate.[173]

It may be argued at this point that, notwithstanding the tenuous relationship between discriminatory legislation and the governmental objective sought to be achieved, illegitimate and legitimate children are still so far differently situated as to justify distinction between the two classes. The fact of birth outside the family structure puts the illegitimate child in a situation which may be factually different from that enjoyed by a legitimate child.[174] Consistent with jurisprudence, one need not treat similarly those classes which are in fact not alike.

Differences between marital and non-marital children, however, are more apparent than real. As legitimacy and illegitimacy in the Philippines are defined on the basis of validity or invalidity of marriage, there will be situations in which a legitimate child may be born and raised in a one-parent household, e.g. where the marriage was subsequently annulled, or dissolved under Articles 36 and 53, and situations in which an illegitimate child will be raised in a two-parent household that for all intents and purposes passes for a *legitimate* family, (e.g. in unions without marriage, but which satisfy the requirement of a stable, consensual heterosexual union). The latter child has no more in common with, say, the child of a paramour, except for the fact that their parents are not validly married. In these situations, one is hard pressed to find "substantial distinctions which make for real differences," for the classification is not based on

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[170] *See* MacFarlane, *supra* note 55.

[171] Mr. Justice Powell, in *Trimble v. Gordon*, 430 U.S. 762, 770 (1977), rejected a similar argument, stating that "[t]he parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."

[172] MacFarlane, *supra* note 55.

[173] *See* National Statistics Office, *supra* note 7.

[174] SAARIO, *supra* note 8.

characteristics inherent in the children. Instead, the distinction is made based on the status of *another* person, i.e. the parent of the child.

Moreover, since the law itself[175] exceptionally provides for two instances in which children conceived and born in *void* marriages are legitimate, the fourth condition of equal application to all members of the same class is violated. If validity or invalidity of marriage is made the basis of illegitimacy, there exists no cogent reason for children who are products of unions invalid under Articles 36 and 53 not to be treated the same way as other children born in unions declared invalid for different reasons. Psychological incapacity as a ground for nullity of marriage is no more desirable than, say, lack of legal capacity of the contracting parties.

2. Modern Equal Protection and Scrutiny of Suspect Classifications

Philippine jurisprudence on equal protection has evolved to include not only an examination of the validity of a statutory classification, but a scrutiny of the inherent reasonableness of such classification as well. Approximating the standards of review applied in the United States, the Supreme Court in the case of *Serrano v. Gallant Maritime Services, Inc.*[176] made a reference to the three levels of scrutiny in order to review the constitutionality of a classification embodied in a law:

> There are three levels of scrutiny at which the Court reviews the constitutionality of a classification embodied in a law: a) the deferential or rational basis scrutiny in which the challenged classification needs only be shown to be rationally related to serving a legitimate state interest; b) the middle-tier or intermediate scrutiny in which the government must show that the challenged classification serves an important state interest and that the classification is at least substantially related to serving that interest; and c) strict judicial scrutiny in which a legislative classification which impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class is presumed unconstitutional, and the burden is upon the government to prove that the classification is necessary to achieve a *compelling state interest* and that it is the *least restrictive means* to protect such interest.[177]

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[175] FAMILY CODE, art. 54. Children conceived or born before the judgment of annulment or absolute nullity of the marriage under Article 36 has become final and executory shall be considered legitimate. Children conceived or born of the subsequent marriage under Article 53 shall likewise be legitimate.

[176] G.R. No. 167614, 582 SCRA 254, Mar. 24, 2009.

[177] *Id.* at 277-278. (Emphasis in the original, citations omitted.)

Justice Puno's *ponencia* in *Central Bank Employees Ass'n, Inc. v. Bangko Sentral ng Pilipinas*[178] is instructive of this expansion of the equal protection analysis. Although traditionally, the standard used in equal protection challenges in our jurisdiction "in the main [ ] followed the 'rational basis' test, coupled with a deferential attitude to legislative classifications and a reluctance to invalidate a law unless there is a showing of a clear and unequivocal breach of the Constitution,"[179] the Court signalled a shift towards adopting US jurisprudence which goes beyond the "static rational basis test."[180] Thus, the "new" equal protection, characterized as a "major intervention tool," was adopted in our body of jurisprudence.

In the United States, the level of scrutiny used depends on whether the challenge involves a suspect, quasi-suspect, or non-suspect classification. Strict scrutiny is used for suspect classifications such as race,[181] national origin, religion, and alienage. Intermediate scrutiny is reserved for quasi-suspect classifications including gender,[182] illegitimacy,[183] and sexual orientation.[184] Rational basis scrutiny applies to all other discriminatory classifications not classified as suspect or quasi-suspect, e.g. income, age, disability, political preference, political affiliation, or felons.

The Philippine Supreme Court, however, is not confined to this categorization found in US jurisprudence. In *Central Bank Employees Ass'n,* it expressly applied strict scrutiny to a classification made on the basis of income, which is only subject to rational basis scrutiny in the US. And in *Serrano*, it

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[178] G.R. No. 148208, 446 SCRA 299, Dec. 15, 2004 [hereinafter "Central Bank Employees Ass'n"].

[179] *Id.* at 370. (Emphases and citations omitted.). *See also id.* at 371-74, in which Justice Puno cites GERALD GUNTHER, CONSTITUTIONAL LAW 586-589 (11th ed., 1985) and gives a recommended discussion regarding the development of "old" and "new" equal protection under American Jurisprudence.

[180] *Id.*

[181] *See, e.g.* Korematsu v. United States, 323 U.S. 214 (1944). The US Supreme Court applied the strict scrutiny standard to racial discrimination but controversially upheld the governmental act of ordering Japanese Americans into internment camps during World War II.

[182] Initially, sex-based classification was considered suspect and the US Supreme Court applied "strict scrutiny" in the case of *Frontiero v. Richardson*, 411 U.S. 677 (1973). However, strict scrutiny was not adopted in evaluating later gender-based claims, as in *Craig v. Boren*, 429 U.S. 190 (1976), where the US Supreme Court instituted an "intermediate scrutiny" standard in determining validity of sex-based classification.

[183] *See, e.g.* Clark v. Jeter, 486 U.S. 456 (1988); Lalli v. Lalli, 439 U.S. 259 (1978).

[184] United States v. Windsor, 133 S.Ct. 2675 (2013), where in a challenge against the constitutionality of the Defense of Marriage Act, the US Supreme Court held that sexual orientation is a quasi-suspect classification subject to intermediate scrutiny.

enumerated suspect classifications to include race, gender,[185] and, exceptionally, *classifications which violate a fundamental right, or prejudice persons accorded special protection by the Constitution.*[186]

Strict scrutiny then is applied not only to suspect classifications, but also to classifications which: (a) violate a fundamental right; or (b) prejudice persons accorded special protection by the Constitution. Justice Brion, in his separate opinion in *Biraogo v. The Philippine Truth Commission of 2010*, additionally expounds on the application of strict judicial scrutiny to an equal protection challenge in our jurisdiction:

> Briefly stated, the strict scrutiny test is applied when the challenged statute either:
>
> (1) classifies on the basis of an inherently suspect characteristic; or
> (2) *infringes fundamental constitutional rights.*
>
> In these situations, the usual presumption of constitutionality is reversed, and *it falls upon the government to demonstrate that its classification has been narrowly tailored to further compelling governmental interests*; otherwise, the law shall be declared unconstitutional for violating the equal protection clause.[187]

In our jurisdiction, the question of whether illegitimacy is a suspect classification has not yet been squarely ruled upon. However, it is submitted that classification on the basis of birth outside wedlock is one that calls for strict scrutiny because it *prejudices persons accorded special protection by the Constitution.* Children, regardless of filiation, belong to the protected category of youth,[188] who—like women, indigenous peoples, workers, and the urban poor—enjoy

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[185] Again, this is *not* a suspect classification under US jurisprudence. The US Supreme Court in *Craig v. Boren*, 429 U.S. 190 (1976), expressly refused to subject gender-based classification to strict scrutiny, instead applying what came to be known as "intermediate scrutiny."

[186] Serrano v. Gallant Maritime, Inc., G.R. No. 167614, 582 SCRA 254, 280, Mar. 24, 2009, *citing Central Bank Employees Ass'n*, 446 SCRA 299.

[187] Biraogo v. The Philippine Truth Commission of 2010, G.R. No. 192935, 667 SCRA 78, 357-58, Dec. 7, 2010. (Emphases in the original, citations omitted.)

[188] The basis of determining classes accorded special protection by the Constitution is the presence or absence of specific constitutional recognition or guarantees pertaining to that sector. These are sectors of society which the Constitution professes particular regard in their development, well-being, and protection. In particular, CONST. art. II, §§ 12-13, and art. XV, § 3(2) recognize the right of children, without distinction as to quality of filiation, to special protection against conditions prejudicial to their life or development.

explicit Constitutional guarantees.[189] As illustrated in Part II, classification between marital and non-marital children creates a factually prejudicial environment that potentially violates the right of non-marital children to "special protection from all forms of neglect, abuse, cruelty, exploitation, and *other conditions prejudicial to their development.*"[190]

Illegitimacy is also a classification based on an *inherently suspect characteristic.* A classification is inherently suspect if it is one which specifically curtails the civil rights of a single group,[191] or when it is motivated by judgment on moral inferiority of a certain group by virtue of any morally irrelevant trait.[192] Certainly, discrimination between legitimate and illegitimate children based on the view that the illegitimate child is morally inferior to, and less deserving than, the other, is a classification based on a morally irrelevant trait. For "[i]llegitimacy indicates nothing about a person's moral status; what it may indicate is something about the moral status of the person's parents."[193]

The strict scrutiny standard requires a showing that: (1) the challenged classification serves a *compelling* state interest; and (2) it is the *least restrictive means* to protect such interest.[194] Accordingly, the burden is on the government to show that (1) classification on the basis of birth inside or outside wedlock is the least restrictive means to protect a compelling state interest; and (2) the state interest in promoting legitimate family relationships is compelling enough to warrant such burden on the basic civil rights of non-marital children.

It is submitted that the present classification will not withstand strict judicial scrutiny. The burden of showing *compelling* state interest is a great one, and it is not met by an abstract claim that discrimination helps improve the purity of morals. The assumption that imposing penalties on illegitimate children

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[189] For women, CONST. art. II, § 14, art. XIII, § 14; indigenous peoples, art. II, § 22; workers, art. II, § 18, art. XIII, § 3; urban poor, art. XIII, §§ 9-10. Incidentally, these are the very same sectors afforded special representation in the party-list system for the first three consecutive terms after ratification of the 1987 Constitution. Art. VI, § 5(2).

[190] CONST. art. XV, § 3(2). (Emphasis supplied.)

[191] Korematsu v. United States, 323 U.S. 214, 216 (1944). Justice Black, writing for the Court, says: "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that the courts must subject them to the most rigid scrutiny."

[192] Michael Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1051 (1979).

[193] Miriam Defensor Santiago, *The "New" Equal Protection*, 58 PHIL. L.J. 1, 4 (1983). Defensor Santiago cites Justice Stevens, dissenting in *Mathews v. Lucas*, 427 U.S. 523 (1976), writing: "The fact that illegitimacy is not as apparent to the observer as sex or race does not make this governmental classification any less odious."

[194] Serrano v. Gallant Maritime Inc., 582 SCRA 254.

will discourage non-marital relations (and that giving preferred status to legitimate children will encourage marital relations) presupposes that parents decide the ordering of their relationships on the basis of future harm or benefit to their children. There is want of convincing evidence to this effect. Indeed, statisticians and demographers have concluded that the relationship between stricter laws and decline in illegitimate relationships is so attenuated that there can be no causal relationship between the two factors.[195]

Moreover, the burden of showing that discrimination is the *least restrictive means* of effecting a desired state of affairs is difficult to surmount. The US Supreme Court in *Trimble v. Gordon* expressly rejected a similar argument that "a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships."[196] And in *Weber v. Aetna Casualty & Surety Co.*,[197] the same Court rejected the argument that "persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation."[198] Thus:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that *legal burdens should bear some relationship to individual responsibility or wrongdoing.* Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[199]

Even assuming that classification based on legitimacy does not warrant the application of strict scrutiny, it will at the very least warrant a heightened or intermediate level of scrutiny. This much is settled jurisprudence in the United States, where the US Supreme Court in several cases[200] applied intermediate scrutiny on equal protection challenges raised by illegitimate children. The

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[195] *See* Laslett, *supra* note 72. Interestingly, given the uncertainty and variability of definition of valid marriage in time and place, records of illegitimacy should show such regularity and persistence.

[196] Trimble v. Gordon, 430 U.S. 762, 769 (1977).

[197] 406 U.S. 164 (1972).

[198] *Id.* at 173.

[199] *Id.* at 175. (Emphasis supplied.)

[200] *See, e.g.* Trimble v. Gordon, 430 U.S. 762, where the US Supreme Court used a standard of judicial review demanding more than "a mere finding of some remote rational relationship between the statute and a legitimate State purpose," though less than strictest scrutiny; Clark v. Jeter, 486 U.S. 456, where intermediate scrutiny was applied in analyzing an equal protection challenge raised by an illegitimate child on the differential prescriptive period of paternity suits instituted by legitimate and illegitimate children; Lalli v. Lalli, 439 U.S. 259, where the same standard of review was applied.

intermediate or middle-tier test requires the government to show that (1) the challenged classification serves an *important* State interest, and (2) the classification is *at least substantially related* to serving that interest.[201] Clearly then, whether one applies the strict or intermediate level of scrutiny, the validity of a classification on the basis of birth inside or outside of wedlock *requires more than just a passing showing of rational relation to a legitimate State interest.*

B. Principle of Equality and Non-Discrimination in International Law

The proposition that children, regardless of filiation, are inherently equal finds greater support when examined side by side with international law norms on equality and non-discrimination. For our purposes, we will examine three international human rights documents relevant to the development of these norms, especially with respect to children.

1. The Universal Declaration of Human Rights

Equal treatment between legitimate and illegitimate children once filiation has been established is supported by the principle of equality of rights and principle of non-discrimination found in the UDHR.

The UDHR, adopted by a unanimous vote of the UN General Assembly on December 10, 1948, is an international document which, for the first time in history, spelled out basic civil, political, economic, social and cultural rights that all persons are entitled to by virtue of their common humanity. Consistent with the Charter of the United Nations,[202] the UDHR was intended to provide for a "common standard of achievement for all peoples and nations."[203] Although it originally had no binding effect, being a mere Resolution of the General Assembly, over time the UDHR became widely accepted as fundamental norms of human rights, to the point that it is referred to as the "Magna Carta for all humanity."

The enjoyment of rights guaranteed in the UDHR is founded on the principles of equality of rights and non-discrimination. These twin principles, also found in the Charter of the United Nations, are reaffirmed in the first article of the UDHR:

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[201] Serrano v. Gallant Maritime, Inc., 582 SCRA 254.

[202] The Charter seeks to "reaffirm faith in fundamental human rights" as an instrument to maintain international peace and security. U.N. CHARTER, preamble. *See also* U.N. CHARTER, art. 55-56.

[203] Universal Declaration of Human Rights, G.A. Res. 217 (III) A, at preamble, ¶ 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

> *All human beings are born free and equal in dignity and rights.* They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.[204]

The import of Article 1 is to ascribe to human beings the essential attributes of freedom and equality.[205] A human being, by the mere fact of birth, is entitled to stand equal in dignity with his fellow humans, free from artificial distinctions which do not satisfy the principle of non-discrimination. These qualities are "essential" for they are enjoyed from birth without any need of formal recognition by law.[206]

Article 2 on the other hand elaborates on the corollary principle of non-discrimination:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

The prohibition on discrimination is a twofold one. Saario, explaining Article 2, states that it covers "not only prohibition on discriminatory distinctions, exclusions, or limitations directed against any individual or group of individuals based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, but also the *prohibition of any preferential treatment accorded to such groups.*"[207] This is implemented by Article 7, which prohibits the introduction of any form of discrimination by law and protects the individual against any incitement to such discrimination:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

In relation to persons born outside wedlock, Article 25 specifically provides:

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[204] *Id.* at art. 1. (Emphasis supplied.)
[205] SAARIO, *supra* note 8, at 16.
[206] *Id.*
[207] *Id.*

> 1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
>
> 2. Motherhood and childhood are entitled to special care and assistance. *All children, whether born in or out of wedlock, shall enjoy the same social protection.*[208]

It is interesting to note that the UDHR specifically provides for a provision on children born outside of wedlock. The drafting history of Article 25 shows that it was initially intended to provide for a more comprehensive mandate of equality among children.[209] The intent is to address the myriad injuries to personal dignity suffered by persons who had the misfortune of being born outside wedlock, and who, because of such an arbitrary circumstance, are deprived in varying degrees of family, property, and inheritance rights, sometimes even civil rights. Even then, the rampant discrimination against non-marital children was already recognized as a "serious infringement of human rights," which should not be tolerated.[210]

However, the final version of the UDHR shied away from an express statement of equality. The text was voted in two parts, with the first part, which reads: "[c]hildren born out of wedlock are equal in rights to children born in marriage," being rejected by 18 votes to 18, with 9 abstentations. The second part, "[c]hildren born out of wedlock shall enjoy the same social protection as children born in marriage," was adopted by 32 votes to 3, with 10 absentations. Saario describes the grounds for opposition by some country representatives:

> Other members opposed [...] on a variety of grounds. [...] It was maintained [...] that it would hardly be possible to proclaim legitimate and illegitimate children might serve to discourage legal matrimony, which would conflict with the principle that the family is the fundamental group unit of society. Adoption of the Yugoslav proposal, it was said, would mean a denial of the importance of the marriage bond and would harm rather than benefit illegitimate children by constituting an inducement to beget and bear children.[211]

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[208] (Emphasis supplied.)

[209] SAARIO, *supra* note 8. The original Yugoslav proposal reads: "Children born out of wedlock are equal in rights to children born in marriage and shall enjoy the same social protection."

[210] *Id.* at 191.

[211] SAARIO, *supra* note 8, at 192.

Then, as now, although many countries recognize that the legal treatment of children born out of wedlock is violative of the principle of equality of rights and dignity under the UDHR, the serious obstacle towards full equality has always been concerns on its effects on the family unit. Saario notes that the enemy of any legislative attempt to ameliorate the condition of non-marital children has always been the "fear that the elimination of any difference in status and rights as between persons born out of wedlock may be detrimental or even fatal to the institution of the family and its sanctity, and morality in general."[212]

2. The UN Declaration of the Rights of the Child

Advocates of non-marital children's rights who failed to secure a comprehensive statement of equality under the UDHR met greater success in 1959 with the adoption of the UN Declaration of the Rights of the Child ("UNDRC"), the next important international law document respecting children's rights. The UNDRC, consisting of a preamble and ten principles, was adopted by 70 votes to 0, with 2 abstentations. Its most important provision with respect to non-marital children is found in Principle 2:

> The child shall enjoy all the rights set forth in this Declaration. *Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of* race, colour, sex, language, religion, political or other opinion, national or social origin, property, *birth or other status, whether of himself or of his family.*[213]

Principle 2 articulates both equality of rights and non-discrimination. Its drafting history shows that the first sentence was adopted unanimously. The second sentence, mandating equality of rights and non-discrimination, was also adopted unanimously. The remainder of the second sentence reading "whether of himself or of his family" was adopted 50 votes to 7, with 9 abstentations.

The UNDCR refers to the UN Charter and the 1948 UDHR. The import of this textual reference and its legal characterization is explained by Van Bueren:

> The status of the Declaration of the Rights of the Child has to be analysed carefully. Although it is a non-binding resolution of the General Assembly, the fact that it was adopted unanimously accords it a greater weight than other General Assembly resolutions. At its lowest, a unanimous adoption by the General Assembly implies that

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[212] *Id.* at 15.

[213] (Emphases supplied.)

> *the Declaration has a moral force because its principles have the approval of all the member states of the United Nation.* The practical value which can be attributed to such moral force is a different matter, and therefore specific consideration has to be given as to whether the Declaration of the Rights of the Child, as a whole or in any of its provisions, has been recognized by states as being incorporated into international customary law.[214]

Parenthetically, the same thing can be said of the UDHR, which is also a unanimous resolution of the General Assembly. Although its provisions are not by itself binding law,[215] the UDHR is nevertheless based on Articles 55 and 56 of the UN Charter,[216] a treaty which imposes binding obligations upon State parties. Both the UDHR and the UNDRC illustrate international recognition that discrimination on the sole basis of birth is contrary to human rights law. However, since the phenomenon affects only individuals as opposed to other forms of discrimination, which affect entire social groups, full eradication of discriminatory practices has proven difficult.

3. The UN Convention on the Rights of the Child

The next step in the evolution of the principle of equality and non-discrimination with respect to children is the UN Convention on the Rights of the Child. The CRC entered into force on September 2, 1990. Its mother document is the 1924 Geneva Declaration on the Rights of the Child, adopted by the League of Nations long before the creation of the United Nations after World War II. The significance of the 1924 Geneva Declaration lies in its

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[214] GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD 7 (1995), *cited in* SEDFREY M. CANDELARIA, THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE PHILIPPINE LEGAL SYSTEM 16 (1997). (Emphasis supplied.)

[215] *See* Republic v. Sandiganbayan, G.R. No. 104768, 407 SCRA 10, 86, July 21, 2003 (Puno, *J.*, *separate opinion*).

[216] The UN Charter is itself a treaty. Articles 55 and 56 provide:

> ARTICLE 55. With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
>
> 1. higher standards of living, full employment, and conditions of economic and social progress and development;
>
> 2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
>
> 3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.
>
> ARTICLE 56. All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

recognition, for the first time, of children's rights as a distinct category of rights subject to international protection.[217] However, it did not have much legal impact because it "was never intended to create an instrument which placed binding obligations upon states."[218]

Unlike its predecessors, the CRC is a binding instrument representing a universally agreed set of non-negotiable standards and obligations. According to the UNICEF, "[t]hese basic standards set minimum entitlements and freedoms that should be respected by governments."[219] The Convention lays down four core principles: (1) non-discrimination; (2) devotion to the best interests of the child; (3) the right to life, survival and development; and (4) respect for the views of the child. In addition, it introduces the principle of interdependence and indivisibility of children's rights, such that rights found in the CRC are treated as one whole package and full enjoyment of one right hinges on the enjoyment of other rights.[220]

Unlike the UDHR and the UNDRC, the CRC is a treaty signed by the Philippines and duly concurred in by the Philippine Senate pursuant to Section 21, Article VII of the Constitution. By ratifying the Convention, the Philippines accepted an obligation to respect, ensure, protect, promote and fulfil the enumerated rights, including adopting or changing municipal laws and policies in order to conform with the provisions of the CRC. This state obligation is characterized as an *active* one. According to the CRC Implementation Handbook:

> [I]n terms of international law, the obligation "to respect" requires States "to refrain from any actions which would violate any of the rights of the child under the Convention [...] *The obligation 'to ensure' goes well beyond that of 'to respect'*, since *it implies an affirmative obligation on the part of the State to take whatever measures are necessary* to enable individuals to enjoy and exercise the relevant rights."[221]

The principle of non-discrimination is crystallized in Article 2 of the CRC, which provides:

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[217] CANDELARIA, *supra* note 214, at 11 (1997).

[218] *Id., citing* VAN BUEREN, *supra* note 214, at 7 (1995).

[219] United Nations Children's Fund, Primer on the Convention on the Rights of the Child, *available at* http://www.unicef.org/crc/index_30160.html (last visited Mar. 5, 2013).

[220] CANDELARIA, *supra* note 214, at 23.

[221] CRC IMPLEMENTATION HANDBOOK, *supra* note 142, at 21, *citing* Philip Alston, *The Legal Framework of the Convention on the Rights of the Child*, 91 BULL. HUM. RTS. 2, 5. (Emphasis supplied.)

> 1) States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction *without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's* race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, *birth or other status.*
>
> 2) States Parties shall take all appropriate measures to ensure that *the child is protected against all forms of discrimination or punishment on the basis of the status,* activities, expressed opinions, or beliefs *of the child's parents, legal guardians, or family members.*[222]

As previously mentioned, there is under Paragraph 1 of Article 2 an affirmative obligation on the part of the State to review its legislations in order to conform with the principle of non-discrimination. If a State's constitution or domestic legislation does not bar discrimination on all the grounds listed in the first paragraph, it is recommended that the State enlarge its list of prohibited grounds of discrimination in order to comply with its obligations under the CRC.[223]

Paragraph 2, on the other hand, has wider implications than paragraph 1. While Paragraph 1 concerns discrimination only in relation to the enjoyment of rights in the CRC, paragraph 2 requires action against "all forms of discrimination" not confined to the issues raised by the Convention.[224] Its import is to obligate States Parties to take affirmative measures to protect the child from discrimination of any kind, especially those which operate as a punishment for the status, activities, opinions or beliefs of the child's parents or legal guardians.

Despite this provision, and notwithstanding the legal protection against discrimination found in Section 1 of Article III of the Constitution, there is no case which judicially challenges the validity of imposition of legal disabilities on non-marital children as a form of "discrimination or punishment" from which the child must be protected under Paragraph 2. The UN Committee on the Rights of the Child, in its latest report on Philippine compliance with the CRC, itself notes that the country has "yet to address the discriminatory provisions of existing laws such as the Family Code and R.A. No. 9255, in particular their classification as 'illegitimate' children and their unequal right to inheritance."[225]

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[222] (Emphases supplied.)

[223] CRC IMPLEMENTATION HANDBOOK, *supra* note 142, at 24.

[224] *Id.* at 30.

[225] UN Committee on the Rights of the Child, Consideration of Reports Submitted by State Parties Under Article 44 of the Convention—Third and fourth periodic reports of States parties due in 2007: Philippines, ¶ 86, U.N. Doc. CRC/C/PHL/3-4 (Mar. 20, 2009).

Considering that the body of Philippine family laws was last amended in 1987, more than two years before the Philippines ratified the CRC, there is a need, consistent with Article 2, to re-examine the Family Code in light of the principles found in the treaty.

What then is the legal effect of the CRC as far as domestic law is concerned? May it be the source of enforceable rights and obligations? The question has not yet been squarely raised before and settled by the Supreme Court. However, being a treaty concurred in by the Philippine Senate, it has the force and effect of a statute. As to whether it may be invoked to challenge the provisions in an older statute, e.g. the Family Code, Professor Candelaria has this to say:

> In case of a conflict between a treaty and a law, the prevailing rule is that since neither is superior to the other, as between an earlier and a later law, *the later one prevails.* When this occurs, a law that arises subsequent to a treaty but inconsistent with the latter nullifies the treaty as far as domestic law is concerned. However, the treaty remains valid from the perspective of international law.[226]

A meaningful consideration of the legal effect of the CRC must take into account that it is a treaty which represents a *voluntary limitation* on the sovereign power of the State. Although no international body can force compliance, parties to a treaty nevertheless voluntarily *limit* their otherwise sovereign competence to legislate on any matter and in any manner it deems fit. As explained by the Supreme Court in *Tanada v. Angara*:[227]

> [Sovereignty] is however subject to restrictions and limitations voluntarily agreed to by the Philippines, expressly or impliedly, as a member of the family of nations. [...] By the doctrine of incorporation, the country is bound by generally accepted principles of international law, which are considered to be automatically part of our own laws. One of the oldest and most fundamental rules in international law is *pacta sunt servanda*—international agreements must be performed in good faith. "A treaty engagement is not a mere moral obligation but creates a legally binding obligation on the parties [...]. *A state which has contracted valid international obligations is bound to make in its legislations such modifications as may be necessary to ensure the fulfillment of the obligations undertaken.*"[228]

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[226] CANDELARIA, *supra* note 214, at 23. (Emphasis supplied, citations omitted.)
[227] G.R. No. 118295, 272 SCRA 18, May 2, 1997.
[228] *Id.* at 66. (Emphasis supplied, citations omitted.)

C. Non-Discrimination in Other Countries

At this point, it is worthwhile to know that the principle of equality and non-discrimination among children in the spirit of the CRC is an operative principle that has been enshrined in constitutions of several countries, especially those in Latin America. This illustrates that the removal of distinctions between marital and non-marital children is possible, and indeed has been achieved by constitutional fiat in at least 23 countries.[229]

An examination of the constitutions of these countries will show that there are at least four methods for achieving non-discrimination by constitutional fiat: (1) by explicitly providing that children born out of wedlock have rights equal to those born within marriage (e.g. Albania, Brazil, Bulgaria, Ethiopia); (2) by providing that all children regardless of parentage, origin, or filiation are equal before the law or have equal rights (e.g. Andorra, Bolivia, Ecuador, El Salvador, Finland, Germany, Guatemala, Nicaragua, Panama, Timor Leste, Ukraine); (3) by providing that parents have the same duties and obligations to their children, regardless of birth inside or outside wedlock (e.g. Costa Rica, Panama, Uruguay, Venezuela); and (4) by explicitly prohibiting any form of discrimination against children born outside of wedlock (e.g. Portugal, Vietnam).

Some countries that expressly prohibit discrimination between marital and non-marital children also prohibit the use of discriminatory designations concerning the nature of the child's filiation (e.g. Brazil, Ecuador, El Salvador, Nicaragua, Panama, Portugal). Of these countries, some go a step further by prohibiting description of filiation in the birth certificates of children. El Salvador, for example, prohibits any description concerning the nature of filiation in the records of the Civil Registry, or the civil status of the child's parents in the birth certificates. Ecuador also prohibits reference on the quality or type of kinship in the birth certificate or in any identity document, while Panama abolished the classification of filiation entirely and prohibits the entry of any statement establishing differences of birth or civil status of parents in the registration records of the child. Nicaragua is notable in that it adopted the CRC in its constitution by specific reference, giving it full force and effect in its jurisdiction.

Other countries broaden the scope of equality by constitutionally recognizing various forms of families, including stable *de facto* unions, as legitimate and entitled to full protection of law. Thus, arbitrary distinctions on the quality of family relations are removed as long as the union meets certain

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[229] For the full list of specific constitutional provisions, please refer to Appendix.

threshold requirements. Notable examples include Bolivia, Ecuador, Guatemala, Nicaragua, and Venezuela. Notably, Bolivia and Guatemala make any form of discrimination among offspring punishable by law.

Some countries provide limited equality, in that the constitutional provision recognizing equality between children specifies the rights which non-marital children enjoy equally with their marital counterparts. Examples include the Central African Republic, which provides that children born outside wedlock have the same right to public assistance that legitimate children have; Germany, which provides that children born outside of marriage shall be provided with the same opportunities for physical and mental development as are enjoyed by those born within marriage; Ghana, which specifically provides for equal opportunity to succeed; and Italy, which provides that the law shall ensure to children born out of wedlock every form of legal and social protection that is compatible with the rights of the members of the legitimate family. It is thus unknown whether marital and non-marital children enjoy full operative equality in these jurisdictions, as implementation of the non-discrimination provision in the constitution is left to legislation.

D. Reconciling Non-Discrimination with Protection of the Family

Discrimination against illegitimate children is often justified by the overriding social objective of protecting the family. In the Philippines, the legitimate state interest over the protection of this "basic social institution" is even constitutionally enshrined:

> ARTICLE II
> *Declaration of Principles and State Policies*
>
> * * *
>
> SECTION 12. The State recognizes the sanctity of family life and shall protect and strengthen the family as a basic autonomous social institution.
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> * * *
>
> ARTICLE XV
> *The Family*
>
> SECTION 1. The State recognizes the Filipino family as the foundation of the nation. Accordingly, it shall strengthen its solidarity and actively promote its total development.

The positive mandate of the State to adopt means to strengthen the solidarity of the family elevates family relations into a State concern, removed from the sphere of purely private relations between citizens. This is translated in the Family Code:

> ARTICLE 149. The family, being the foundation of the nation, is a basic social institution which public policy cherishes and protects. *Consequently, family relations are governed by law and no custom, practice, or agreement destructive of the family shall be recognized or given effect.*[230]

In the words of Commissioner and later Chief Justice Davide, the main proponent of Section 1 of Article XV,

> the Filipino family [...] is in fact the foundation of society, the foundation of the nation. Without a strong family there cannot be a strong nation. [...] The solidarity and strength of the family is also the solidarity and strength of the nation.[231]

This mindset, not unlike that of the Council of State, which drafted the French Civil Code, is protective of the *historical household*, the traditional concept of family as one founded on lawful marriage. In fact, the Philippines follows this classic socio-theological belief by providing that marriage, "an *inviolable social institution,* is the foundation of the family and shall be protected by the State."[232]

Devoting an entire article in the Constitution for the family is evidence of a paramount state interest in its preservation. Thus, any attempt to remove distinctions between marital and non-marital children must reckon with the question of whether it amounts to a practice "destructive of the family," or whether it will threaten the institution of marriage.

The solution lies in looking beyond the concept of the "legal family." It is important to note that the Constitution does not limit the scope of its protection only to *legal* families, and even then, nowhere in the Constitution and the Family Code is the concept of "family" actually defined.[233] The closest definition of this amorphous concept is found in Article 150 of the Family Code, which provides that family ties exist between the following individuals:

> ARTICLE 150. Family relations include those:
> (1) Between husband and wife;

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[230] (Emphasis supplied.)
[231] V REC. CONST. COMM'N 92 (Sept. 25, 1986).
[232] CONST. art. XV, § 2.
[233] *The Family in Focus*, *supra* note 76, at 65.

(2) *Between parents and children;*
(3) *Among brothers and sisters, whether of the full or half-blood.*[234]

Clearly, the law recognizes the existence of family ties not only between *legitimate* members of the family, but between parents and children and children *inter se, provided that filiation exists.* Indeed, exclusion of illegitimate children in the concept of family is possible only if one equates filiation with marriage, which should not be the case. For while filiation is the source of rights and obligations between *parents and children*, marriage is the source of rights and obligations between *spouses.*[235]

Illegitimate children, despite their less privileged status, are not intended by design to be excluded from the protection that the State must give when the constitution enjoins it to promote "family solidarity and development." Indeed, even the framers of the Constitution were in agreement that "family" refers to those enjoying "family relations" as defined in the Civil Code,[236] and that "children" refer to "legitimate, legitimated, natural children by legal fiction, acknowledged natural children and other illegitimate children."[237] The injunction on the State to promote and preserve the family was not intended to outlaw non-marital relationships, as the existence of non-marital families is recognized. The wording of the provision "acknowledges the fact that some poor people establish families without marriage but [they] should not be discriminated."[238]

Indeed, Article XV itself is authority for the proposition that non-marital children's rights to equal dignity and protection are on at least the same level as the State's concern for the protection of marriage and family. Section 3 of Article XV recognizes the right of all children, regardless of filiation, to "assistance, including proper care and nutrition, and *special protection from all forms of neglect*, abuse, cruelty, exploitation, *and other conditions prejudicial to their*

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[234] (Emphasis supplied.)

[235] Examining kinship structures removed from its religious undertones, it becomes apparent that the only actual problem posed by non-marital relations is the absence of the legal presumption of filiation. Unlike marital children who enjoy attributed filiation from the moment of birth, non-marital children have to prove such relationship to their natural parents. Maternal filiation is recognized because it can be established by the mere fact of birth, but paternal filiation often has to be proved through judicial proceedings. Beyond the requirement of filiation, however, the law imposes no other conditions before family relation is recognized. This is as it should be, filiation being the source of rights and obligations between parents and children.

[236] CIVIL CODE, art. 217, *now* FAMILY CODE, art. 150.

[237] III JOURNAL CONST. COMM'N 91 (Sept. 24, 1986). Commissioner Nieva clarified that the Committee adopted Article 217 of the Civil Code as the basic definition of the "family," and that "children" therefore refers to legitimate children, legitimated children, natural children by legal fiction, acknowledged natural children and other illegitimate children.

[238] *Id.*, comment of Commissioner Gascon.

development."[239] The right of the non-marital child to equal dignity and special protection against legal and societal discrimination prejudicial to her development is not rendered any less than that of the marital child, simply because her parents were not married at the time of her birth.

The point being made is that there is no inherent incompatibility between the protection of the family and the advancement of the interests of non-marital children. Advocates of family protection often overlook that illegitimate children are also part of the "family." In defining family ties between parents and children, the Constitution and the Family Code use filiation as the sole criterion. Thus, removing distinctions between marital and non-marital children provided that filiation is duly established, cannot be constitutionally objected to on the ground that it will violate the protection of the family clause.

The obligation of the State to protect the family should be understood in the context of two other equally important obligations of the State: (1) its obligation to respect fundamental rights of persons under the Bill of Rights, and (2) its obligation under international law to protect children from all forms of discrimination as a consequence of their parents' activity or status. Basic civil rights of non-marital children should not be burdened on the mere assumption that doing so will promote a paramount state objective. The interests served by the status quo should not trump the interest of reform, especially if such reform is consonant with the principle of equality of rights and non-discrimination. Given that discrimination between marital and non-marital children is a suspect classification subject to strict scrutiny, the burden of showing a compelling state interest in continued legal discrimination must be shifted to the proponents of the status quo.

CONCLUSION

"The sole criterion of legitimate or illegitimate birth, without more, is not a rational criterion on the basis of which [the] law may constitutionally classify."[240] Although it is not argued that *all* distinctions between legitimate and illegitimate children are without basis, still, an examination of legitimate state interests behind the adoption of illegitimacy laws vis-à-vis equal protection and the international law norms of equality of rights and non-discrimination, should lead legislators to re-examine the prevailing classification of children. Most of the disabilities suffered by persons born outside of wedlock are the product of

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[239] CONST. art. XV, § 3(2).

[240] Harry D. Krause, *The Non-Marital Child—New Conceptions for the Law of Unlawfulness,* 1 FAM. L.Q. 1, 4 (1967).

tradition, of centuries of legislative inertia without critical re-examination of the validity of such precepts in the modern setting.

Because discrimination against non-marital children touches on their "basic civil rights," the burden of proving reasonableness of classification must always fall on the State. An illegitimate child's fundamental right to dignity as well as her right to a family cannot be equated to mere economic interests such that any showing of reasonable connection will suffice to overcome an equal protection challenge. And because the classification burdens a protected group under the Constitution, the highest level of judicial scrutiny must be applied in analyzing a claim for equal protection. A classification can be sustained only if there is a showing that it serves a compelling state interest, and that it is the least intrusive means of achieving the same.

Finally, the legitimate state interest in protecting the family as the basic unit of society is served once filiation, the source of rights and responsibilities in family law, is duly established in accordance with law. Beyond this requirement, no other condition must be imposed on the child in order for him or her to enjoy rights guaranteed under the Constitution and statutes. This is because, by ratifying the CRC, the Philippines consented to assume an affirmative obligation to ensure a more comprehensive protection of children against *all* forms of discrimination. A contrary interpretation will violate the principle of *pacta sunt servanda.*

It has been 23 years since the CRC acquired the force and effect of municipal law, and almost a century since the Bill of Rights and the guarantee of equal protection were introduced in the Philippines. It is high time that the plight of children born outside of wedlock be taken seriously. Their condition will improve only when the law itself ceases to "invite" discrimination. Professor Harry Krause observed:

> Everybody knows that illegitimacy is a second-class way of life, because the fact of birth outside a family places the child outside of the prevailing social norms. What is realized less generally is that *much of the burden of illegitimacy is imposed by law and has very little to do with the unavoidable fact of birth outside of marriage.*[241]

Consigning a significant portion of the population to living this second class way of life, purely because of an accident of birth, is no different from discriminating on the basis of color, race, social status, or nobility—all forms of discrimination recognized by civilized nations as contrary to human rights. Even

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[241] *Id.* at 1. (Emphasis supplied.)

the renowned English poet Shakespeare, more than 400 years ago, echoed strong sentiments behind this illogical discrimination with the passage:

> Why bastard? wherefore base?
> When my dimensions are as well compact,
> My mind as generous, and my shape as true,
> As honest madam's issue? Why brand they us
> With base? with baseness? bastardy? base, base?[242]

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[242] WILLIAM SHAKESPEARE, KING LEAR, act 1, sc. 2, *as quoted by* Douglas, *J. in* Levy v. Louisiana, 391 U.S. 68, 72 n.6 (1968).

APPENDIX

The following table excerpts the constitutional provisions of twenty three countries which guarantee equality between marital and non-marital children by including express provisions on non-discrimination in their constitutions.

TABLE 1: Countries which Guarantee Equality between Marital and Non-Marital Children

State	Excerpt[243]	Citation & Year
Albania, Republic of	*Children born out of wedlock have rights equal to those born within marriage.*	ALB. CONST. (1998, as amended) art. 54(2).
Andorra, Principality of	Both spouses have the same rights and duties. *All children are equal before the law, regardless of their parentage.*	ANDORRA CONST. (1993) art. 13(3).
Brazil, Federarive Republic of	*Children born inside or outside wedlock or adopted shall have the same rights and qualifications, any discriminatory designation of their filiation being forbidden.*	BRAZ. CONST. (1988) art. 227(VII)(6).
Bolivia	*Every child* and adolescent, *without regard to origin, has equal rights and duties with respect to his or her parents.* Discrimination among offspring on the part of parents shall be punished by law.	BOL. CONST. (2009) art. 59(III).
	The free unions or de facto unions, which meet the conditions of stability and singularity and that are maintained between a man and a women without legal impediment, shall have the same effects as a civil marriage, both in the personal and property relations of the couple as well as with respect to adopted children or to children born to the couple.	BOL. CONST. (2009) art. 63 (II).
Bulgaria	*Children born out of wedlock shall enjoy equal rights with those born in wedlock.*	BULG. CONST. (1991) art. 47(3).
Central African Republic	[...] *Children born outside of marriage have the same rights to public assistance that legitimate children [have].* Natural children, legally recognized, have the same rights as legitimate children. [...]	CENT. AFR. REP. CONST. (2013) art. 6.

[243] (Emphases in excerpts supplied.)

Costa Rica	*The parents have the same obligations to their children born out of the marriage as to those born in it.* All persons have the right to know who their parents are, in accordance with the law.	COSTA RICA CONST. (1949, as amended) art. 53.
Ecuador, Republic of	Family in its various forms is recognized. The State shall protect it as the fundamental core of society and shall guarantee conditions that integrally favor the achievement of its goals. They shall be comprised of legal or common-law ties and shall be based on the equality of rights and opportunities of their members. [...]	ECUADOR CONST. (2008) art. 67.
	To protect the rights of persons who are members of a family: 1. Responsible motherhood and fatherhood shall be fostered; and the mother and father shall be obliged to take care, raise, educate, feed and provide for the integral development and protection of the rights of their children, especially when they are separated from them for any reason. * * * 5. The State shall promote the joint responsibility of both mother and father and shall monitor fulfillment of the mutual duties and rights between mothers, fathers, and children. 6. *Daughters and sons shall have the same rights, without any consideration given to kinship or adoption background.* 7. No declaration on the quality of the kinship shall be required at the time of registering the birth and no identity document shall refer to the type of kinship.	ECUADOR CONST. (2008) art. 69(1),(5)-(7).

El Salvador	*The children born in or out of matrimony and the adopted [ones], have equal rights before their parents.* [It] is the obligation of these to give their children protection, assistance, education and security. Any description [calificación] concerning the nature of the affiliation will not be consigned in the records of the Civil Registry, nor will the civil status of the parents be expressed in the birth certificates [partidas]. Every person has the right to have a name to be identified [with]. The secondary law [ley secundaria] will regulate this matter.	EL SAL. CONST. (1983, as amended) art. 36.
Ethiopia, Federal Democratic Republic of	[Rights of Children] (4) *Children born out of wedlock shall have the same rights as children born of wedlock.*	ETH. CONST. (1995) art. 36(4).
Finland	SECTION 6. *Equality.* Everyone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. *Children shall be treated equally* and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.	FIN. CONST. (1999) sec. 6.

Germany, Federal Republic of	ARTICLE 6. *Marriage and the family; children born outside of marriage.* * * * (5) Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.	GER. [BASIC LAW] (1949, as amended) art. 6(5).
Ghana, Republic of	ARTICLE 28. (1) Parliament shall enact such laws as are necessary to ensure that – (a) every child has the right to the same measure of special care, assistance and maintenance as is necessary for its development from its natural parents, except where those parents have effectively surrendered their rights and responsibilities in respect of the child in accordance with law; (b) every child, whether or not born in wedlock, shall be entitled to a reasonable provision out of the estate of its parents; [...]	GHANA CONST. (1992) art. 28(1)(a)-(b).
Guatemala, Republic of	ARTICLE 48. *De facto Unions.* The State recognizes de facto unions and the law will regulate [perceptuará] everything relative to it.	GUAT. POL. CONST. (1985) art. 48.
	ARTICLE 50. *Equality of the Children.* *All of the children are equal before the law and they have the same rights. Any discrimination is punishable.*	GUAT. POL. CONST. (1985) art. 50.

Italy	ARTICLE 30. It is the duty and right of parents to support, raise and educate their children, even if born out of wedlock. In case of incapacity of the parents, the law shall provide for the fulfilment of their duties. The law shall ensure to children born out of wedlock every form of legal and social protection that is compatible with the rights of the members of the legitimate family. The law shall lay down the rules and limitations for the determination of paternity.	IT. CONST. (1947), art. 30.
Nicaragua, Republic of	ARTICLE 71 [Amended by Law No. 192 of 4 July 1995] It is [a] right of Nicaraguans to constitute a family. Family inheritance [patrimonio familiar], which is not subject to seizure and exempt from any public charge, is guaranteed. The law will regulate and protect these rights. *Children enjoy special protection and all the rights that their condition requires, for which the International Convention of the Rights of the Child has full force.*	NICAR. CONST. (1987, as amended) art. 71.
	Marriage and stable common law unions are protected by the State; they rest on the voluntary agreement of the man and the woman and may be dissolved by the mutual consent or by the will of one of the parties. The law will regulate this matter.	NICAR. CONST. (1987, as amended) art. 72.
	All children have equal rights. Discriminatory designations may not be used in matters of filiation. In common legislation, the provisions or classifications that diminish or negate the equality of children[,] have no force.	NICAR. CONST. (1987, as amended) art. 75.

Panama, Republic of	*The parents have, with respect to their children born [habidos] out of matrimony, the same duties as towards their children born [nacidos] within it. All of the children are equal before the law and [they] have the same rights of inheritance within intestate successions.* The Law will recognize the rights of the minors or of the incapacitated children and of the destitute parents in testate successions.	PAN. POL. CONST. (1972) art. 60.
	The Law shall regulate the investigation of the paternity. *The classifications as to the nature of the relationship are abolished. There will not be entered [consignará] any statement establishing differences of birth or regarding the civil status of the parents in their registration records [actas], or in any attestation, baptismal records or certificate referring to the affiliation.* [...]	PAN. POL. CONST. (1972) art. 61.
Portugal	ARTICLE 36. *Family, marriage and filiation.* * * * (4) Children born outside wedlock shall not be the object of any discrimination for that reason, and neither the law, nor official departments or services may employ discriminatory terms in relation to their filiation.	PORT. CONST. (1976) art.36(4).
Timor-Leste, Democratic Republic of	SECTION 18. *Child protection.* 1. Children shall be entitled to special protection by the family, the community and the State, particularly against all forms of abandonment, discrimination, violence, oppression, sexual abuse and exploitation. 2. Children shall enjoy all rights that are universally recognised, as well as all those that are enshrined in international conventions commonly ratified or approved by the State. 3. *Every child born inside or outside wedlock shall enjoy the same rights and social protection.*	TIMOR-LESTE CONST. (2002) sec. 18(1)-(3).

Ukraine, Republic of	*Children are equal in their rights regardless of their origin and whether they are born in or out of wedlock.*	UKR. CONST. (1996) art. 52.
Uruguay, Oriental Republic of	*Parents have the same duties toward children born outside of wedlock as toward children born within it.*	URU. CONST. (1966) art. 42.
Venezuela, Bolivian Republic of	[...] The father and mother have the shared and inescapable obligation of raising, training, educating, maintaining and caring for their children, and the latter have the duty to provide care when the former are unable to do so by themselves. The necessary and proper measures to guarantee the enforceability of the obligation to provide alimony shall be established by law.	VENEZ. CONST. (1999) art. 76.
	Marriage, which is based on free consent and absolute equality of rights and obligations of the spouses, is protected. A stable de facto union between a man and a woman which meets the requirements established by law shall have the same effects as marriage.	VENEZ. CONST. (1999) art. 77.
	Children and adolescents are full legal persons and shall be protected by specialized courts, organs and legislation, which shall respect, guarantee and develop the contents of this Constitution, the law, the Convention on Children's Rights and any other international treaty that may have been executed and ratified by the Republic in this field. The State, families and society shall guarantee full protection as an absolute priority, taking into account their best interest in actions and decisions concerning them. The State shall promote their progressive incorporation into active citizenship, and shall create a national guidance system for the overall protection of children and adolescents.	VENEZ. CONST. (1999) art. 78.

Vietnam, Socialist Republic of	ARTICLE 64. *Protection of the Family, Freedom of Marriage.* * * * (4) Parents have the responsibility to bring up their children into good citizens. Children and grandchildren have the duty to show respect to and look after their parents and grandparents. *(5) The State and society shall recognise no discrimination among children.*	VIET. CONST. (1992) art. 64(4)-(5).

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