

Position of an illegitimate child

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ABSTRACT

Legitimacy is the status of a child born during the continuance of a valid marriage between the mother and any man, or within 280 days after its dissolution if the mother remains unmarried, unless it is shown that the parties to the marriage had no access to each other at any time when the child could have been conceived, his birth is treated as the conclusive proof of being legitimate. Whereas illegitimacy refers to the status of a child who is born to parents who are not legally married to each other or have no legal relation between each other. The Indian law is averse to declare a child as illegitimate. Illegitimacy has not always been a social problem only. It has been a personal problem, a family problem, a community problem, a religion problem and a legal problem. The motion of birth, either legitimate or illegitimate is present in most known human cultures. However, illegitimacy can mean something different, or not mean as much, to non-Europeans. This article shows the position of an illegitimate child in Indian perspective.

1. Introduction

Biologically, a child (plural: children) is generally a human between the stages of birth and puberty¹. The legal definition of child generally refers to a minor, otherwise known as a person younger than the age of majority.

Child may also describe a relationship with a parent (such as sons and daughter of any age) or, metaphorically, an authority figure, or simply group membership in a clan, tribe, or religion; it can also signify being strongly affected by a specific time, place, or circumstances, as in "a child of nature" or "a child of the Sixties"².

There are many social issues that affect children, such as childhood education, bullying, child poverty, dysfunctional families and in developing countries, hunger. Children can be raised by parents, in a foster care or similar supervised arrangement, guardians or partially raised in a day care centre.

For any society, childhood is an opportunity through which a man attempts to realize its vision. In every religion child is considered as the incarnation of divinity and its bringing up in a congenial atmosphere is not only a social intervention or cultural reconstruction but also a religion's perception and moral duty.

In the past we may discern considerable variation between and within cultures about the social image of the child, yet we cannot ignore the past that it draws its status from the parents and that natural right of the child cannot be denied.

Illegitimacy has not always been a social problem only. It has been a personal problem, a family problem, a community problem, a religion problem and a legal problem. The notion that illegitimacy is bad for society is distinct from and more recent than these other problems. There was a time, before

nineteenth century, when it did not occur to middle class, educated men and women interested in questions of social and individual wellbeing that illegitimacy had to be measured, understood or solved. People, who considered themselves respectable were, of course, concerned about the birth and legal status of illegitimate children, and disapproved of illicit heterosexual behaviour which an illegitimate pregnancy inevitably signalled. But it took a particular constellation of intellectual and political development in late eighteenth and early nineteenth centuries to make people start to think of illegitimacy as more than an individual falling or an issue of concern for the legal community, to think of it, intended as a problem of national and international significance.

2. Concept of legitimation

The process of blurring distinction and differences between legitimate and illegitimate children has begun at a fairly early time.

Conferring the Status of Legitimacy

One method has been to confer status of legitimacy on children born under certain circumstances and could not ordinarily be legitimate children. The early Hindu, law recognized a class of sons known as 'secondary sons'. In some of these cases the father was not at all responsible for their birth: they were Kanina, Sahoda, krita, punnarbhava, svayam-datta and shaudra. Of these only the punnarbhava and shaudra were the sons begotten by the father. Even among the 'primary sons' he was not responsible for the birth of a majority of them. For instance, the khetrāja, the dattaka, Kritima, were not begotten by him, but in a sense he had accepted them himself as his sons, and therefore they were considered to be his Sons and given the status of primary sons. In a majority of cases these children were born out of lawful wedlock. In the later development of Hindu law all of them became obsolete and were not recognized with the exception of aurasa, i.e., the legitimate son begotten by one on his lawfully wedded wife, and the dattaka son or adopted son.

¹ "Child". TheFreeDictionary.com. (Visited on April 10, 2018).

² "American Heritage Dictionary". (Visited on April 11, 2018).

According to Section 9 of Matrimonial Causes Act, 1950, In the modern law also this method of conferring the status of legitimacy; on children born in certain circumstances have been used. Certain children born of invalid marriage have also have been made legitimate children by legislation. Take for instance under the Matrimonial Causes Act, 1950, the child of voidable marriages which are annulled have been recognized as legitimate children³.

According to Section 2 of Legitimacy Act, 1959, the children of a void marriage have also been recognized as legitimate children provided at the time of the 'act of intercourse resulting in the birth [or at the time of celebration of marriage if later], both or either of the parties reasonably believed that the marriage was Valid⁴.

According to the Section 16 of the Hindu Marriage Act, 1955, status of legitimacy on the child of voidable marriages which are annulled and the child of void marriages which are declared null and void⁵. But on such children an inferior status has been conferred is as much as it has been laid down that such children can inherit the property of the parents alone and of none else. The same is the position under the Special Marriage Act, 1954.

Elevation of Status

Another method of elevating the status of illegitimate children to that of the legitimate children came into existence in Roman law known by the name of legitimation per subsequent matrimonium. The rule was first introduced by Constantine in A. D. 335 as one of the methods to do away with the institution of concubinage. According to Justinian legitimation by subsequent marriage was possible whether the concubine was ingenua or libertina provided the marriage was attested by instrumentum dotis or other writing, the woman was capable of marriage at the conception or birth and the child, if consented. The other methods known to Roman law by which an illegitimate child could be legitimated were legitimation by imperial rescript and legitimation by presentation to the curia.

Subsequent Marriage

The institution of legitimation by subsequent marriage of parents descended from Roman law to the Continental Europe. Under the French Civil Code illegitimate children may be legitimated by the subsequent marriage of their parents provided the children were recognized before marriage. The institutions of legitimation by subsequent marriage of parents is also recognized in Germany, Italy, Spain, Japan and some of the states of United States of America. Some states of South America also recognize the institution. Although in Scot law the rule came into existence at an early time, in English law, legitimation by subsequent marriage of parents came into existence by the Legitimacy Act, 1926. Under the Act according to the section 1(1) It is necessary that the father is domiciled in England or Wales at the time of marriage⁶. The provision does not apply to children of adulterous unions. The Royal Commission on Marriage and Divorce by majority

recommendation declined to extend the provision to the children born of adulterous union as, according to the majority Report it would 'result in a serious weakening of respect for marriage⁷.

3. Illegitimacy under codified Hindu law

Hindu cultural heritage has a versatile vastness and universality. It has its civilized traditions. Its social ethos are based on Dharma and reflected in sastric law propounded by the sages. Whenever social requirements demanded law moved accordingly due to its inherent dynamism. However, our social reformers mingled with politicians adorned with the overtones of western culture, thought of amending and codifying Hindu Law thinking that it is not in pace with the modern social outlook. Their efforts ultimately bore fruit and Hindu law was amended and codified. Dharma almost synonymous with Hindu religion was neigh given a go-by. So-called secular oriented provisions were brought in to that extent that Hindu law neither remained religious nor secular and created a turbulent legal chaos. The law was amended in such a way that it was not only distorted but brought in ambiguities and legal infirmities, particularly in the field of matrimonial law governing illegitimacy.

The Hindu Succession Act 1956 (Section 8)

Section 8 of the said Act speaks of general rules of succession in the case of males and stipulates. The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter.

- a) Right off the bat, upon the beneficiaries, being the relatives determined in class I of the Schedule;
- b) Furthermore, if there is no beneficiary of class I, at that point upon the beneficiaries, being the relatives determined in class II of the Schedule
- c) Thirdly, if there is no heir of any of the tow classes, then upon the agnates of the deceased;
- d) And lastly, if there is no agnate, then upon the cognates of the deceased.

The Hindu Marriage Act, 1955

Section 16 of the Hindu Marriage Act, 1955 "Where a decree of nullity is granted in respect of any marriage under Section 11 or Section 12, any child • begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of having been declared null and void or annulled by a decree of nullity, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

Provided that nothing contained in this Section shall be construed as conferring upon any child of a marriage which is declared null and void or annulled by a decree of nullity any rights in or to the property of any person other than the parents in any case where, but for passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.

Hindu Adoption and Maintenance Act, 1956

⁷ Royal commission Report on Marriage and Divorce (Para 1179).

³ Matrimonial Causes Act 1950.

⁴ Legitimacy Act 1959 (Chapter 73 of 1959).

⁵ Hindu Marriage Act 1955 (25 of 1955).

⁶ English Legitimacy Act 1926.

According to Section 20 of Hindu Adoptions and Maintenance Act, 1956, His obligation to maintain⁸ them has now been given statutory recognition. Under Hindu Law an illegitimate child has never been considered as *Nullius*. In some cases he has been considered to be a member of the family. Illegitimate sons under Hindu Law may be classified under two heads.

a) an illegitimate son born of casual connection b) an illegitimate son born of a *dasi* i.e. of a permanently and exclusive by kept concubine.

In the case of *Rahi v. Govind*⁹ the court said that the son former category was not considered to be the member of the father's family but he was entitled to get maintenance against the father.

4. Code Of Criminal Procedure, 1973 (Section 125)

However, this Enactment has to be read with Section 125 Cr. P., C which is an antivagrancy Act and is applicable to all persons included in the Act without any consideration of personal law and this provision is an independent provision of personal law of any community or religion.

This provision is on a different footing than the Hindu Adoptions and Maintenance Act, 1956. This Act casts a personal obligation on the parents to maintain their, legitimate and illegitimate children, whereas section 125 is riddled with many riders such as;

1. The person against whom the maintenance is sought must have sufficient means.
2. The child seeking maintenance must show that he is neglected or refused to be maintained.
3. That the child is unable to maintain itself.

5. Constitutional Imperatives

The Constitution of India is the Supreme Law and Chapter III is the soul of the Constitution. It is said that any law that asserts against the provisions of Chapter is *ultra vires* of the constitution and any law in this regard must be consistent with the spirit of fundamental rights that govern every aspect of human life.

Article 13 had a magnificent role in the constitutional development. It deals with "Laws inconsistent with or in derogation of the fundamental rights.": Having asserted its significance in serving as balance wheel between the power of judicial review and constitutional development, this Article retains itself yet as the conscience of Part III of the constitution.

When pressed into service, this Article has a double role. On the first hand, this Article is the sheet anchor of the valid laws or any provision or provisions thereof. On the other hand, this Article is a death blow to the laws or provisions thereof found to be invalid either as contravening any provision of Part III of the constitution or otherwise unreasonable or *ultra vires*.

Article 13

⁸ Hindu Adoptions and Maintenance Act, 1956 (78 of 1956).

⁹ ILR 1 Bom 97

a) All laws in drive in the region of India instantly before the initiation of this constitution, in so far as they are conflicting with the arrangements of this part, might, to the degree of such irregularity be void.

b) The State might not make any law which takes away or compresses the lights presented by this part and any law made in repudiation of this condition should, to the degree of the contradiction, be void.

c) In this Article, unless the setting generally requires,

d) "Law" incorporates any law, arrange, byelaw, control, direction, warning custom or use having in the domain of India the power of law.

e) "Laws in drive" incorporates laws passed or made by a Legislature or other skilful expert in the region of India before the initiation of this constitution....." f) Nothing in this Article should apply to any correction of this constitution made under Article 368.

In this way any law which is conflicting with the major rights is *ultra vires* and no law or lawful rule can keep a court from giving solution for infringement of principal rights once it is found to exist.

Preamble

In the case of *GolakNath v. State of Punjab*¹⁰ the court said that along with Article 13, we have to look to Preamble because the preamble of a statute conveys the general object and intention of legislature in enacting it. It sets out the main objectives which the legislation intended to achieve. It is a sort of introduction to the statute and is usually very helpful to understand the policy and legislative intent. It is a way to open the mind of the makers of the Act.

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR¹¹ DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, Social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all; FRATERNITY assuring the dignity of individual and the unity and integrity¹² of the nation; IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

In the Preamble, four expressions, "socialist secular," "Justice, social," "Equality of status," "Dignity of individual" are very relevant and have a far reaching bearing on an illegitimate child as in a sovereign socialist secular democratic Republic, the illegitimate child is denied social Justice, equality of status and dignity of individual when the constitution is outcome of a "solemn resolve." The expression "solemn resolve" can be aptly translated as "Dharma." or "sacred assurance of guarantee." Then from here we go to the various Articles of the constitution concerning the child and the various enactments that flow out of the mandate of the constitution that govern the child.

¹⁰ AIR 1967 S.C 1643.

¹¹ Words, socialist secular are inserted by the constitution (Forty second Amendment) Act, 1976.

¹² Words, "and integrity" are inserted by the constitution (Forty second Amendment) Act, 1976.

Article 14

Equity under the watchful eye of law-"The state might not deny to any individual uniformity under the steady gaze of the law or the equivalent security of the laws inside the region of India."

This Article is based on the inspiration provided by the English conception of the rule of law and the 14th Amendment of the Constitution of the United States of America. Article 14 which refers to "equality before law" is an expression of English Common Law and "Equal protection of laws." owes its origin to the 14th Amendment of Constitution of United States of America, indicates these as separate concepts by the use of the disjunctive.

Article 15(3)

"Nothing in this Article shall prevent the state from making any special provision for women and children."

This clause should be read in the light of the principle of "Correction of imbalance wherever exists to ensure equality. Women and children are considered vulnerable, weak and invertebrate and as such a constitutional mandate is provided in Article 15 and constitutional mandate is not subject to Article 13. The constitutional position as by now settled is that a constitutional amendment Act passed in exercise of the constituent power is not law under Article 13 and it can only be declared invalid if it damages the basic or essential features of the basic structure of the constitution.

So Article 15(3) covers any provision governing women and children. It may be for betterment or it may be to save them from oppression or it may be as a social reform as needed but not as a whim or caprice. The following judicial decisions illustrate this notion.

6. Concluding Remarks

Children are the leaders of tomorrow. They are affected in various ways by the conduct of the parents or their guardians. Many a times the social and psycho-development of the child is disrupted immensely by parental differences.

The international community has made immense efforts to address the plight of children through various international instruments that seek to promote the welfare of children.

The state on its part owes the child a duty of care just like the Parents. Towards discharging these obligations, the Kenyan government has set up a host of measures and safeguards to address the plight of children.

The constitution and the Children's Act provide for the right of Child. This new development has been propelled by the fact that there have been shocking revelation of how children are subjected to abuse, suffering neglect and a myriad of other problems. This could even be emotional and psychological violence. The differences between parents effect the wellbeing of their children.

The importance attached to children by society is losing meaning drastically. Innocent children are getting exposed to domestic violence whenever the parents vent their anger towards each other.

Many children are being trafficked, poisoned, strangled, hacked, other day. What has happened to humanity?

The Constitution illuminates the right of each youngster which incorporates, among others, the ideal to parental care and protection, which incorporates measure up to obligation of the mother and the father to give for the child, whether they are hitched to each other or not.