



ORIGINAL RESEARCH PAPER

Law

LEGITIMACY OF CHILDREN UNDER HINDU LAW: A CRITIQUE

KEY WORDS: Marriage, Void, Children, Illegitimate.

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ABSTRACT

Prior to enactment of Hindu Marriage act in the year 1955, unlimited polygamy was permitted. However, it was a very rear practice among Hindus to marry more than one wife, sine marriage was a sacrament which every Hindu was supposed perform to have a son, who continues his blood line. After the passing of the Hindu Marriage Act 1955 a prohibition was imposed on the Hindus to enter into second marriage during the life time of the spouse. Second marriage during life time of other spouse is void and children born to void marriage or voidable marriage which is annulled by decree of nullity are illegitimate. Children born out of unlawful wedlock were considered void and deprived of their rights available otherwise. Therefore, some provisions are made under the various laws to overcome injustice to such children.

Introduction

Under Hindu Law eight forms of marriages were recognized out of which four were approved and four were unapproved. *Bramha, daiva, arsha* and *prajapatya* were approved forms, whereas *gandharva, asura, rakshasa* and *paishacha* were approved form. Twelve types of sons were recognized under ancient Hindu law. According to *Manu* twelve types of sons were divided into two categories. In first category the *aurasa, kshetraja, dattak, krita, gudhotpanna* and *apavindha* were kinsmen as well as heirs, whereas, in second category the *kanina, sahodha, krita, paunnarbhava, svayamdatta* and *shudra* were only kinsmen. Prior to the Hindu Marriage Act, 1955 there was no prohibition for a Hindu to have more than one wife, all the children born to the wives were treated as legitimate children and members of joint family or co-parcenary, except a child born to concubine was treated as an illegitimate child. Each one of these legitimate children had a right to maintain a suit against their father for partition and separate possession of their legitimate share either in the joint family property or in the co-parcenary property.

In almost all the societies' premarital sexual relationship and extramarital sexual relationship are considered to be a sin, and as the resultant child of such offensive relationship is also kept in a state illegitimately. "Legitimacy of a child, that is, the father-child relationship, is entirely based on the lawfulness of the wedlock between both parents." In common law, legitimacy is the status of a child born to parents who are legally married to each other; and of a child conceived before the parents receive a legal divorce. Certainty of paternity has been considered important in a wide range of eras and cultures, especially when inheritance and citizenship were at stake, making the tracking of a man's estate and genealogy a central part of what defined a "legitimate" birth.

Legislative Approach

Hindus are governed by four codified laws and amendments made therein from time to time. So far marriage is concerned, a Hindu Marriage Act, 1955 is applicable, which has overriding effect. Though unrestricted polygamy was permitted among Hindus prior to 1955 i.e. commencement of Hindu Marriage Act, 1955, it was a rear practice among Hindus of having more than one wife, as marriage was considered as a sacrament to repay the debt of ancestors by having a son, who continues their bloodline. However after enactment of Hindu Marriage Act, 1955, polygamy was abolished and strict monogamy is allowed.

Thus, after the passing of the Hindu Marriage Act 1955 a prohibition was imposed on the Hindus to enter into second marriage during the life time of the spouse. Section 11 of Hindu Marriage lays down that any marriage solemnized after commencement of the Act in contravention of section 5 (l) i.e. marrying during life lime of spouse is void. A son born to the void marriage was deprived of a right under the traditional Hindu law since the provisions of the Act, excluded the application of personal law in this regard and under the Hindu Succession Act, 1956, because he was not a legitimate son.

Initially when Hindu Marriage Act was passed in the year 1955, children of a void marriage were illegitimate, irrespective of whether the marriage was declared null and void or not and children of voidable marriage become illegitimate when the marriage is annulled by decree of nullity. However, by virtue of the Marriage Law Laws (Amendment) Act, 1976 the children of void marriage and annulled voidable marriage are legitimate children. "The Parliament after realizing this injustice done to an illegitimate child for a folly of its parents thought of introducing Section 16 of the Hindu Marriage Act." It is pertinent to note that the status of legitimacy is conferred on children of the void marriage only under section 11 of Hindu Marriage Act. If the marriage is void for the reason other than under section 11, children will be illegitimate.

In case of voidable marriage, which is not annulled by decree of nullity, would be a valid marriage, thus the children would be legitimate. However, if the marriage is annulled at the instance of either party to the marriage, nonetheless children born of such marriage would be their legitimate children by virtue of section 16 (2) of the Act for all the purposes including the succession of the property of their parents. Sub sections (1) and (2) of section 16 confer legitimacy to the children even in case of a marriage void or voidable. However, sub section (3) of the said section states that by virtue of relying on the status of legitimacy conferred on them by sub sections (1) and (2) such children cannot claim any right in or to the property of any person other than the parents. "The object of section 16 is to confer a protective cover to the children and to save them from the stigma of illegitimacy and also to give them proprietary rights in the property of their parents."

Section 6 Sub-section (b) of Hindu Minority and Guardianship Act, 1956 deals with the guardianship of illegitimate children and provides that the guardianship of an illegitimate boy or an illegitimate unmarried girl first lies with the mother and in absence of mother, the father. Thus, father of illegitimate children has no preferential right and is the natural guardian only after the mother.

Earlier the illegitimate son of a Hindu belonging to one of the three higher classes by a *dasi* was entitled only to maintenance and not to any share of the inheritance, whereas, illegitimate son of a Shudra by the *dasi* was entitled to a share after his father's death in the separate property of his father. Now section 20 of Hindu adoption and Maintenance Act, 1956 makes no difference between legitimate and illegitimate so far as maintenance is concern and provides that a Hindu father or mother is bound to maintain his or her illegitimate children during his or her life time so long as the child is minor. In *Kalla Mistry v. Kanniammal*, Madras High Court held that a claim for maintenance under this section can be made by an illegitimate child of adulterous intercourse.

The purpose of section 16 is to provide social protection to such children who are born to the parents whose marriage is either void under section 11 or voidable under section 12 and annulled by decree of nullity at the instance of either party to the marriage. That is precisely what is sought to be done under Section 16(1) and

(2) of the Hindu Marriage Act. However, the parliament was conscious of the consequences of such status being given to an illegitimate child as it would affect other persons who are in no way responsible for the birth of an illegitimate child. Therefore, they made it clear by introducing Section 16(3) to the effect that such an illegitimate son who is admitted being an illegitimate son by virtue of Section 16(1) and (2), will have a right only in the properties of the parents and none else. Thus, the conferring of the status did not affect the rights of the persons other than the parents in the property.

Conclusions

Innocent children should not suffer because of their parents' failure to marry. Therefore, majority of the countries across the globe have done away from using the words 'legitimate' and "illegitimate" in differentiating between children whose parents are married or not married. Some of them adopted the Uniform Parentage Act, according to which the parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents. Others have modified versions of the Act in place, but either way, many states have now abandoned outdated notions of legitimacy. The object of section 16 of Hindu Marriage Act, 1955 is to confer a protective cover to the children and to save them from the stigma of illegitimacy and also to give them proprietary rights in the property of their parents.

REFERENCES

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2. "The mother is always certain", while the father is not) emphasized the dilemma. [http://en.wikipedia.org/wiki/Legitimacy_\(law\)](http://en.wikipedia.org/wiki/Legitimacy_(law)) accessed on 07/11/2013.
3. Hindu Marriage Act, 1955 – section- 4(a) – any text, rule or interpretation of Hindu law or any custom or usage as the part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act.
4. Hindu Marriage Act, 1955 – section 5 (i) Conditions for a Hindu Marriage– neither party has a spouse living at the time of marriage.
5. Hindu marriage act, 1955 – section 16 (1) Legitimacy of children void & voidable marriage – Notwithstanding that the marriage is void or voidable under section 11, any child of such marriage who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Law (Amendment) Act, 1976.
6. <http://www.legalcrystal.com/blog/civil-law/illegitimate-children-will-have-right-only-in-properties-of-parents-and-none-else/> accessed on 13/11/2013.
7. Section 16 (3) Nothing contained in sub-section (1) or (2) shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any right in or to the property of any person, other than the parents, in any case where, but for the 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.
8. Dr. Basant Kumar Sharma, Hindu Law, Allahabad, Central Law Publications, 2nd edn., 2008, p. 154.
9. Hindu Minority and Guardianship Act, 1956- Section 6(b) natural guardians of Hindu minor - - In case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her, the father.
10. Hindu Adoption and maintenance Act, 1956 - Sec 20 (1) Subject to the provisions of this section a Hindu is bound, during his or her life time, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents. (2) A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.
11. AIR 1982 Mad 148
12. Hindu Marriage Act, 1955 -Section 16 (2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.
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