

LEGISLATION NOTE

SECTION 94 —WOMEN'S CHARTER

Once it was clean, then came the mess and today we have a real mess. These words would be apt description of the law relating to legitimacy as expressed in the Women's Charter (hereinafter referred to as 'The Charter'). In this short comment, it is proposed to provide the historical setting of the law leading up to the present law as expressed in section 94 Women Charter¹ and to make certain suggestions.

A curious feature of the problem is that the law on legitimacy in Singapore is to be found in several Ordinances. The main provision would be section 113 of the Evidence Ordinance.² Under this section a person is *presumed* to be legitimate,

- (a) if he was born during the continuance of a *valid marriage* between his mother and any man.
- or (b) if he was born within two hundred and eighty days after the dissolution of the *valid marriage* the mother not having married again.

In addition, before the Charter, the other provisions were to be found in sections 14(3) and 16 of the Divorce Ordinance.³ The Charter upon coming into force in 1961 repealed *inter alia* the Divorce Ordinance. However, sections 14(3) and 16 were re-enacted in the Charter in sections 92(3) and 94.

This was the stage when the position could be described as clean. Under section 92(3) the status of legitimacy was retained although the marriage declared void in two limited instances thereby extending on the general law as expressed in section 113 of the Evidence Ordinance. On the other hand, it is pertinent to note that section 94 did not attempt to confer the status of legitimacy on the children of marriages avoided pursuant to the provisions of the section. In effect, the section gave certain children (*viz.* those begotten before the decree nisi is made) a right to succeed *in the same manner as legitimate children to the estate of the parent who at the time of the marriage was competent to contract.*⁴ In short, section 94 therefore, did not attempt to confer the status of legitimacy, but provided for a form of succession.

Some of the problems that could have arisen under the section are:—

- (a) where the husband who was already married but who contracted a second marriage with the full belief that his former wife was dead, provides in his will that he leaves all his property to his *children*. He leaves children by his second marriage.
 - (i) The children could not succeed to his estate under section 94 because at the time of the second marriage he was not competent to contract.

1. No. 18 of 1961.
2. Cap. 4, Laws of Singapore, 1955.
3. emphasis added.
4. Cap. 40, Laws of Singapore, 1955.
5. emphasis added.

- and (ii) The children of his second marriage could not also succeed to his estate under the terms of his will because they are not his legitimate children by virtue of section 113 of the Evidence Ordinance.
- (b) where the husband died intestate leaving children by his second marriage. Do they inherit?
- (c) where T. (a kindly old soul) leaves his property to the 'children of H' and H, whose first marriage is still subsisting leaves children by his second marriage. Can they inherit?

It was probably with a view to removing some of these problems that section 92(3) was deleted and section 94 amended in 1967.⁶ Section 94 (as amended), it would appear was meant to confer the status of legitimacy on the children of marriages annulled. The draftsmen probably intended to put in a provision identical to section 9 Matrimonial Causes Act, 1950 (c. 25) of England which is today re-enacted in section 11 Matrimonial Causes Act 1965, (c. 72). The section reads,

"Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved instead of being annulled, at the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment."

A substantial difference between the English section and section 94 (as amended) is easily seen. Where the English provision speaks of a 'decree of nullity granted in respect of a voidable marriage' (and as to what constitutes a voidable marriage is enacted in section 8(1) Matrimonial Causes Act, 1950 re-enacted in section 9(I) Matrimonial Causes Act, 1965), section 94 refers to an "annulled marriage".

Marriages are annulled or can be annulled either because they are void or voidable. Section 92(1) of the Charter lays down the grounds on which a decree of nullity of marriage may be made. It is apparent that the list in section 92(1) is not exhaustive because the ground of incapacity on account of the age of one or both of the parties is not provided for. Accordingly, the questions that can arise on the amended section 94 are:—

- (a) Does 'annulled' in section 94 refer only to a marriage declared a nullity under any of the grounds in section 92(1)?
- or (b) does it refer only to *voidable marriages* subsequently annulled at the option of one party?
- or (c) does it refer to all *void* and *voidable marriages* annulled on any ground recognised at law although not provided for in section 92(1)?

Such questions do not arise in England because section 11 Matrimonial Causes Act refers expressly to a decree of nullity granted in respect of a voidable marriage.

Alternative (c) would appear to be the most logical and sensible construction. But can such a construction prevail in view of the recent amendment to section 94 in 1969?⁷ Section 94 as existing before the amendment has been renumbered as section 94(1) and a new subsection (2) has been inserted. It reads,

"The child of a void marriage, whether born before or after the commencement of this Ordinance, shall be deemed to be the legitimate child of his parents".

It is submitted that section 94(2) is an attempt to incorporate into the Charter, section 2(1) Legitimacy Act, 1959 (c. 73) in modified form. The English section reads,

"Subject to the provisions of this section, the child of a void marriage, whether born before or after the commencement of the Act, shall be treated as the legitimate child of his parents if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage if later) both or either of the parties reasonably believed that the marriage was valid".

6. Women's Charter (Amendment) Act, 1967. Sections 32 and 33.

7. Statute Law Revision Act, 1969.

Section 2(1) Legitimacy Act is therefore the logical follow-up from section 9 Matrimonial Causes Act, 1950. But to attempt to re-enact such a provision (albeit in modified form) without attempting to amend section 94(1) to refer to annulment of voidable marriages is to create problems rather than to solve them. In addition, a further problem is raised with the enactment of section 94(2). In England section 2(5) Legitimacy Act defines *inter alia* a void marriage and Cheshire says of the definition,⁸

"The purport of this language certainly does not leap to the eye but its probable object is to exclude any union which in the eyes of English law has no claim to be a marriage at all, as for example one springing from concubinage".

Professor O. Kahn-Freund's comments on section 2 are very enlightening indeed. He says,⁹

"The child must be the child of 'a void marriage' and it is quite clear that there is (now at least under this Act) a difference in English law between a 'void marriage' and 'no marriage', between *matrimonium nullum* and *matrimonium non existens*. If a person is under the delusion of having gone through a ceremony he or she is not living in a 'void marriage'. There must so it appears be at least something like the semblance of a 'celebration' . . . The relevant belief of the parties is 'that the marriage was valid' not 'that they were validly married' and what the 'void marriage' is emerges from section 2(5) because it must be a something in respect of which the High Court could have made a decree of nullity (and not a mere declaration that the parties were not married)".

It is submitted that an *argument can be made* to say that on the language of section 94(2) coupled with the omission to define a 'void marriage' (for the purposes of the section in particular and the Charter in general) the draftsmen and our legislators did not intend to exclude any union which in the eyes of the Common Law has no claim to be a marriage at all, for example illicit unions. Was that their intention?

It is therefore respectfully submitted that some house-setting is necessary as regards the law of legitimacy. What is therefore suggested is that a new part (for example to be referred to as Part IXA) be inserted in the Woman's Charter entitled 'Legitimacy and Legitimation' and the following provisions inserted:—

- (1) Section 113 of the Evidence Ordinance, (though one can seriously question the limiting of the gestation period to two hundred and eighty days after the dissolution of the marriage and the requirement of absolute non-access to each other as the only ground to establish illegitimacy.)
- (2) (a) 'Any child born of a voidable marriage subsequently avoided shall be a legitimate child of the parties thereto notwithstanding that the marriage is so avoided.

A voidable marriage shall be defined as a marriage which can be avoided under paragraphs a, f, g, h, j of section 92(1),

and either (b) to incorporate section 94 as it was first drafted in 1961,

or (c) to incorporate substantially section 2(1) of the U.K. Legitimacy Act, 1959.

and (3) To provide that the provisions of the Legitimacy Ordinance¹⁰ (as amended) would apply to cases or claims of legitimation.

and (4) to amend section 3(2) of the Charter to read,

"Parts II to VI and Parts IX to IXA and sections 166 ... providing for the registration of Muslim marriages".

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8. PRIVATE INTERNATIONAL LAW, p. 369, (7th. ed.).

9. 'Legitimacy Act, 1959' 23 M.L.R. 56 at 58.

10. Cap. 42, Laws of Singapore, 1955.