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DISABILITY OF ILLEGITIMATE CHILDREN UNDER THE LAW

By Mr Andre Sauzier

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A. Introductory

Illegitimacy has never carried any social stigma in Seychelles and yet illegitimate children still suffer certain disabilities under the law. You may wonder why that is so. There is a historic reason for it. Nothing to do with the Victorian era as our law on the subject does not come from English law but from the Napoleonic Code. The real cause was the moral laxity which followed the French Revolution and against which Napoleon, as a legislator, overreacted. He wanted to set up the family on a sound but rather rigid basis and as a consequence the illegitimate child became an innocent victim. For example under the original Napoleonic Code, a child born as a result of adulterous intercourse could never be acknowledged by his natural father. This and similar outmoded legal dispositions have been removed from our law. Article 338 of the Civil Code now provides that the rights of an illegitimate child shall be assimilated in so far as possible with those of a legitimate child. Therefore, one may ask, to what extent and in what areas does the illegitimate child still suffer from disability under the law?

B. The problem of Establishing Status

1. Recognition

In practice it is very rare that the mother of any child does not acknowledge her child. She will be the one who will go and declare its birth at the Civil Status Office. By this acknowledgement the maternal descent of the child is secured. But what of its paternal descent?

In the case of a child conceived during a subsisting marriage there is a legal presumption that the husband is the father. (Article 312 -1). If a married woman declares her child without the husband being present, the Civil Status Officer will, by virtue of the legal presumption, register the husband as father of the child.

This will not happen in the case of the illegitimate child. Under section 35 of the Civil Status Act, when the birth of an illegitimate child is declared, the Civil Status Officer is expressly forbidden to mention in the act of birth the name of the father, unless the father consents to such mention, either by appearing and signing or marking the act, either personally or by an agent appointed under an authentic deed to sign for him.

So, when the natural father does not acknowledge the illegitimate child either in the act of birth or by an authentic document, problems arise as to establishing the paternal descent of the child. Without such descent being established the child is deprived of the right to compel his natural father to contribute towards his maintenance and education and of the right to inherit from him or from his family. How can the illegitimate child establish paternal descent?

2. Filiation

Although proof of maternal descent is allowed (Article 341) proof of paternal is not allowed except in six specified cases set out in Article 340 of the Civil Code. The more important exceptions are –

- (a) Rape or abduction.
- (b) Seduction brought about by fraudulent means or abuse of authority or promise of marriage.
- (c) Written admissions of paternity
- (d) The alleged father and the mother living together openly *en ménage* during the period of conception.
- (e) The alleged father providing for or contributing to the maintenance and education of the child in the capacity of father.

When the illegitimate child has succeeded in establishing his paternal descent what benefits does he derive therefrom?

- (a) He has a share in his father's succession to the same extent as an acknowledged natural child. (... Article 756).

(b) He has a claim against his father for a contribution towards his maintenance and education.

(c) He has the right to bear his father's name (article 340-4).

C. Right of Succession

Natural descent gives rise to rights of succession only to the extent that the illegitimate child has been recognised or whose descent has been proved otherwise than simply by an affiliation order. (Article 756).

The illegitimate child is assimilated in all respects to the legitimate child for the purposes of inheritance and succession except in the case where the illegitimate child is born during, but outside, the marriage of his parent, and at the death of such parent there are a surviving spouse and/or legitimate children born of such marriage.

The Civil Code does not make a distinction between the rights of legitimate and illegitimate children except where the principle of equality would go against the institution of marriage and against the rights of the surviving spouse or of legitimate children born of such marriage. The exceptions to equality give rise to the following disabilities:-

(a) In an intestate succession when there are legitimate children, the share of the illegitimate child is reduced by half. (Article 760).

(b) The surviving spouse and the legitimate children enjoy a choice as to particular items of the succession subject to a cash adjustment if necessary. (Article 761).

(c) A parent can exclude his illegitimate child altogether from personal participation in the distribution of the items of his succession by expressly making, before his death and by anticipation, a sufficient settlement of property upon him. (Article 762 to 764). However this settlement is treated as an advancement of the

future succession if on the death of the parent there is neither a surviving spouse nor issue of the marriage or both renounce their rights in the succession. (Article 765).

(d) An illegitimate child is to be taken into account in the calculation of the disposal but his share of the reserve shall be reduced by half if there are other legitimate children born of that marriage.

It should be stressed that if illegitimate children are in existence before or after the marriage of their parent to another person, their rights in the succession are equal to those of any legitimate children born of that marriage.

D. **Conclusion**

The question which must be set at the end of this paper is what should be done to alleviate, if not abolish, the disparity between illegitimate and legitimate children under the law?

It will appear from what has been said above that the main problems arise through the difficulty of establishing status. So it is in that area that the law must be amended. I make a few suggestions to pave the way for further thought and discussion.

(a) Article 334 should be amended to make the procedure of recognition easier and more accessible.

(b) Article 340 and 341 of the Civil Code and sections 6,7,8, and 9 of the Filiation Act (Cap 93) should be amended to do away with the restraints that exists and which curb the exercise of the action to prove paternal and maternal descent.

(c) The Affiliation Act (Cap 88) needs revision and should possibly be merged with Article 340.

It is a moot point whether the Articles of the Civil Code dealing with the rights of

succession of illegitimate children should be further amended to eradicate altogether the disabilities of the illegitimate child. I would be for liberalisation of the law as I do not believe there is any principle at stake. But of course I can honestly say that I have no interest to declare.

The above are excerpts of a paper presented by Justice SAUZIER (as he then was) in the Law and Social Policy Seminar organised here in the early 1980's by the Seychelles Judiciary. They have been reproduced by the kind permission of the Mr. Andre SAUZIER. The content of the excerpts represent the laws on illegitimate children as they are now and we have omitted the parts of the paper, which refer to the old law.

Following the seminars the Affiliation Act and the Filiation Act were repealed and replaced by the Children Act, 1982. The Children Act, amongst other, provided for Affiliation Orders in favour of the illegitimate children to establish the alleged father as the reputed father and against whom the mother of the child could claim maintenance. The child does not become an heir of the reputed father by virtue of an Affiliation Order. However, it would be strong evidence to establish status under article 340 of the Civil Code.

It also give the child the right to prove his paternal descent even if he was born in an incestuous or adulterous relationship and the right to bear his father's name. It also extends the time limit to bring an action to establish paternal descent. Paternal descent can now be established any time during the child's minority or five years of the child coming of age or within one year of the death of the alleged father, whichever is the later.