

Ideal Position of the Children in Brahminical Tradition: Perspectives from the Normative Legal Treatises (C. 400 BCE – 800 CE)

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Submitted: 28.02.2022.

Revised: 15.03.2022.

Accepted: 24.06.2022.

Abstract: *Children and childhood came under the investigation of social history when for the first time Philippe Aries published his seminal work Centuries of Childhood: A Social History of Family Life back in 1962. Thereafter emerged a lot of works in the field but nothing like a full-fledged monograph in the ancient Indian context. The lack of academic publications, especially from the historians, in the field of the history of children and childhood in ancient India lays the ground for an endeavour like the current paper. But the fact that there is this lack of previous secondary literatures in the particular theme cannot solely justify the scope of the current paper. The current paper seeks to understand the social position of the children or minors from the legal perspective and to cater to that purpose it is desirous of looking at the relevant sections in the Brahmanical normative texts produced in ancient India. After providing the definitions of children vis-à-vis adults, issues like childhood rituals, property rights and inheritance, legal protections to the children and child marriage are discussed in the following sections.*

Keywords: *Dharmaśāstra, Arthaśāstra, Minors, Adulthood, Inheritance, Child Marriage.*

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Introduction

Society is not something homogenous. It has various kinds of divisions, be it based on class, caste, gender or even age. However, in a society full of such fragments or factions, only one group dominates. The dominant group enjoys the power in various terms. Knowingly or unknowingly, the very existence of human beings is governed by their relationship with power, and one of the most important tasks of history is to diagnose this relationship.¹ Not only the dominant group enjoys power over the others but also try to legitimise their power and position through various means, convulsing their power into authority.² Amongst various tools employed in this task, production of normative legal texts has been a popular one for a long period of time. In Early India as well, a number of normative legal texts were produced by the dominant social group to cater to their needs. Although the normative texts are neither direct description of the past society nor court-proceedings, they reflect the outline of an ideal society and lay down the rules and regulations for that purpose. Looking into the Brahmanical normative texts or law codes will thus provide the perspectives and ideologies of the adults towards the ideal social position of the children, which is the objective of the current paper.

The Brahmanical Legal Treatises

A child or a minor is introduced to full status in the society when he begets adulthood. Through his puberty, a child becomes adult which is a pre-condition of marriage and sex-life. But adulthood is not always a biological construct, rather a legal and a social construct too. There are a lot of ideas surrounding childhood and adulthood that serve as the qualification for a child to get admitted into the adult group.³ The current paper seeks to examine the position of children in early Indian society from the Brahmanical legal perspectives. In that investigation, the Brahmanical legal texts known as the *Dharmaśāstras* would be consulted along with two other normative texts on governance — *Kauṭīliya Arthaśāstra* and *Kāmandakīya Nītisāra*. Definition of childhood vis-à-vis adulthood would be discussed at first to set the ground of the present research. Thereafter childhood rituals, property rights of the children, legal protections towards them and the issue of child marriage would be pointed out from the legal treatises.

The earliest part of the *Dharmaśāstra* corpus was constituted by the four extant *Dharmasūtras* composed in *sūtra*-style (aphorism), ascribed to Āpastamba, Gautama, Baudhāyana and Vasiṣṭha. According to Patrick Olivelle, 'a *sūtra* is a sentence from which most non-essential elements have been removed.'⁴ He further states that demarcating this earlier texts as *Dharmasūtras*, is a modern scholarly practice, yet the distinction from the later *Dharmaśāstras* or *Smṛtis* is not solely based on the style of composition but also on the probable dates and on the issues dealt with.⁵ Kane puts Gautama first amongst the others, between 600 and 400 BCE,⁶ followed by Baudhāyana between 500 and 200 BCE,⁷ Āpastamba between 600 and 300 BCE,⁸ and lastly, he placed Vasiṣṭha towards the end of this tradition, 300-100 BCE.⁹ However, Olivelle has revised the dates: Āpastamba is

held to be at the beginning of the 3rd century BCE, Gautama in the mid-3rd century BCE, Baudhāyana not before mid-2nd century BCE and Vasiṣṭha around the beginning of the Common Era.¹⁰ He further opines that ‘all the Dharmasūtras were probably composed in the area we today call North India’.¹¹ Taking the broad geographical provenance of these texts as North India, it is possible that the regulations exhorted in them might have been current in the Middle Ganga Valley in the 3rd century BCE.¹²

The term *śāstra* indicates both a scientific discipline and presentation of that science in textual form.¹³ Amongst various *Dharmaśāstras*, Yājñavalkya had identified as many as twenty composers or *Dharmaśāstra-prayojakas*,¹⁴ and the texts ascribed to Manu, Yājñavalkya, Nārada and Viṣṇu are the earliest ones. *Mānava-Dharmaśāstra*, according to Olivelle, ‘occupies the middle position at the point of transition from the prose and scholastic Dharmasūtras to the metrical Dharmaśāstras ascribed to authoritative divine beings’.¹⁵ Olivelle precisely puts the dates of *Mānava-Dharmaśāstra* in 2nd to 3rd century CE,¹⁶ *Yājñavalkya-Dharmaśāstra* in late 4th to early 5th century CE,¹⁷ *Nārada-smṛti* in 5th-6th century CE,¹⁸ and *Vaiṣṇava-Dharmaśāstra* in 7th century CE.¹⁹

Kauṭilya’s treatise on *artha* or governance is one of the most famous normative texts in the genre. Its dating is very much debated. Amongst the recent researchers, Olivelle proposes that the text received its shape in two redactions, the former, namely the ‘Kauṭilya Redaction’ was composed during c. 50-125 CE, while the latter, the ‘Śāstric Redaction’ came into being during c. 175-300 CE.²⁰ In the ‘Introduction’ to his latest edition and translation of the *Kāmandakīya Nītisāra*, Jesse Ross Knutson has stated that the text was likely to be composed in the late-Gupta or early post-Gupta times, and redacted and refined across centuries (c. 5th to 8th century CE).²¹ This brief outline of the Brahmanical legal treatises of ancient India justifies the time frame c. 400 BCE to 800 CE taken for the current paper. Through investigating the above-mentioned texts, the legal position of minors in the society as idealised by the composers of the legal treatises would be discussed in the following sections of the paper.

Defining the Children and Childhood

In order to inquire into the position of the minors following the Brahmanical legal texts, it is required to define first who the minors were in the eyes of the lawgivers. In the modern world, when a minor reaches certain age, he is considered an adult. Seniority-minority determined by the age is a legal construct. Defining either childhood or adulthood, automatically provides the definition of another one. *Dakṣasamhitā* informs that until his eight years, a boy would be considered a baby and just like an embryo.²² Considering a child until his eight years to be the same as an embryo, *Nārada-smṛti* further states that thereafter until his sixteenth year he is a youth, and also called a *pogaṇḍa*. After that, he is competent in commerce (*vyavahārajña*). He would be independent provided his parents are dead; and if they are alive, however, he is dependent, no matter how old he is.²³ The text clearly indicates that seniority is determined by character and age.²⁴ For example, the *Kauṭīliya*

Arthaśāstra mentions that a twelve years old woman becomes competent to perform legal transactions (*prāptavyavahārā*) while a boy requires to reach sixteenth year in order to achieve so.²⁵ It would be pertinent to colligate here with the ancient Indian Āyurvedic texts. There were three stages of childhood as per the Āyurvedic treatises: 1. *Garbhastha* – foetal stage, 2. *Bālya* – which consists of two sub-stages, namely, *Kṣīrapāka*, up to one year and *Kṣīrānnāda*, up to two years, and 3. *Kaumāra* – up to sixteen years.²⁶

The importance of sixteen years of age can be understood further from another instance in the *Vālmīkiya Rāmāyaṇa*. When Sage Viśvāmitra approached King Daśaratha to take Rāma with him in order to kill the demons who were disturbing the ritual performing of the sages, Daśaratha denied. One of the reasons Daśaratha put forward was that Rāma had not reached sixteen years of age then.²⁷ Apart from this, childhood as well as adulthood was not only a legal construct based on the age but also a social construct. In this regard, it will be pertinent to mention that an ignorant person has also been considered a ‘child’ (*ajño bhavati vai bālāḥ*) by Manu.²⁸ Childishness is thus associated with ignorance, immaturity etc. and has been in use like an abusive word. This indicates a specific form of deviance in the collective mentality.

Childhood Rituals

Nearly every society celebrates the important events of a child’s life through certain ceremonies. Through such ceremonies, the faith of the individual is expressed. Also, the ceremonies serve the purpose of indicating the relationship between the society and the individual. Kamalabai Deshpande mentioned the nine ceremonies or *samskāras* from *garbhādhāna* to *upanayana* that are related to the children in Brahmanical tradition and her work on children was based on the study of those *samskāras*.²⁹ Amongst the nine *samskāras*, the initiation ceremony seems the most important in terms of its relationship with the minors and their achievement of the adulthood. The rite of initiation acts as a demarcation in the life of a *dvijāti* or twice-born. According to *Atrisamhitā*, a person is known as *Brāhmaṇa* by birth and becomes *dvija* through initiation, *vipra* through learning; and all three accounts for his becoming a *śrotriya*.³⁰ Until his *upanayana*, a child would not be held responsible if he eats, drinks or speaks what is prohibited in the *Dharmaśāstras*. But whenever he is initiated, he would be a sinner if he eats, drinks or speaks what is forbidden.³¹

Actually, this rite was initiation to the Vedic texts and teachings. It is to note here that only the children of the first three varṇas i.e., Brāhmaṇa, Kṣatriya and Vaiśya, were allowed to undergo the rite; Śūdras did not have the right of the rite. *Āpastamba-Dharmasūtra* strongly prohibits an uninitiated man to make an offering in fire.³² It further mentions that initiation makes children come under the jurisdiction of scriptures (*atra hyadhikārah śāstrairbhavati*).³³ According to Manu, it is the initiation rite through which a child becomes twice-born i.e., *dvija*. The uninitiated person is not permitted to pronounce any Vedic texts.³⁴ According to Bhattacharyya, it is re-birth (through initiation) that makes a child

qualified for admission into the adult group.³⁵ The ideal time for initiation of the three twice-born *varṇas* i.e., *dvijātis* are prescribed and those are more or less same in all the legal texts, i.e., eight for the Brāhmaṇas, eleven for the Kṣatriyas and twelve for the Vaiśyas. Further, the highest age limit for the ceremony was sixteen for the Brāhmaṇas, twenty-two for the Kṣatriyas and twenty-four for the Vaiśyas.³⁶ So, the age of the Vedic initiation converged with the age of puberty and thereafter adulthood. Thus, minority and adulthood in Brahmanical tradition was an intermingling of biological and ritualistic construct where both the aspects were connected, not separated.

Patrick Olivelle has showed that Patañjali in his *Mahābhāṣya* is totally silent on the matter of 'twice-born', so was Āpastamba in his Dharmasūtra. As Gautama was the first to mention the notion, Olivelle opines that the 'sacred thread' associated with the ceremony of *upanayana* was introduced not earlier than the beginning of the common era.³⁷ Bhattacharyya is of the opinion that the original ritual of *upanayana* seemed to him esoteric.³⁸ He points out three things in this regard:

As the law-books hold that the *upanayana* is the second birth through which the initiated has the right over Śrauta and Smārta works, he should at least belong to such an age-group in which he is competent to have some access in those subjects. Secondly, it is important to note that supreme importance has been attached to the question of celibacy, and the initiated one has to follow a number of sexual taboos... In fact a boy of eight years does not require any sexual taboo, since his impulses are not matured, but in the case of boy attaining the age of puberty such restrictions are needed. Thirdly, the initiated one is expected to have mainly religious knowledge. Every religious system prescribes some sort of initiation at puberty.³⁹

Thus, it may be commented that the initiation rite aimed to train a *brahmacarin* not only in Vedic texts and rituals, but also provided certain ideas of self-control and celibacy in his adolescence so that he as an adult might turn out to be an ideal member of the society. Seniority was not always seen as a biological construct that enabled one to take part in legal and public affairs. In order to gain access to the ritualistic part of Brahmanical tradition, the ritual of initiation (*upanayana*) was prescribed through which a minor was believed to achieve the competence of performing ritualistic affairs. This undoubtedly falls in the socially construct side of achieving adulthood.

Legal Rights and Protections

The minors had no rights to undertake legal transactions since those were not valid.⁴⁰ It is mentioned in the *Nāradaśmṛti* that any transaction undertaken by one who is not independent, or is below the legal age, is not valid and this is known to every scholar of the scriptures.⁴¹ It further states that a boy and a slave is considered same regarding the invalidity of their transactions.⁴² That a boy until his sixteenth year would not be considered competent in legal transactions, is further mentioned in the *Dakṣasamhitā* too.⁴³ It has been stated by Manu too: Transactions carried out by persons who are intoxicated, insane,

distressed, or totally subservient, by children or the aged, or by unauthorized persons, are invalid.⁴⁴ The minors might have not known the legal procedures of transactions. So, the legal texts might have nullified their rights to conduct commerce so that no-one could deceive them in those matters.

It is true that nothing like a separate chapter with distinct kinds of laws exclusively for the minors has been laid down by the authors of the legal texts, but a protective approach is seen many times. The custom of donating⁴⁵ or selling one's children was not recognised.⁴⁶ According to Yājñavalkya, such actions fell under the *upapātaka* sins.⁴⁷ In the Prolegomena (*Mātrkā*) section of *Nārada-smṛti*, it is mentioned that a minor should neither be arrested, nor summoned by the king.⁴⁸ However, when there is no one to give testimony, a child may give testimony. In this regard, Manu writes:

*When there is no one else, even a woman, a child, an old man, a pupil, a relative, a slave, or a servant may give testimony. He should recognize the trembling in the voices of children, old men, and sick persons, as also of individuals with deranged minds, when they give false testimony.*⁴⁹

Baudhāyana-Dharmasūtra mentions that it is the duty of the kinsmen of the minors that they should closely guard the shares of minors together with the accrued interest until the minors reach the legal age.⁵⁰ Vasiṣṭha is of the opinion that the king should protect not only what he has won but also the royal children and the minors. He should also protect their properties and return them when they arrive at the legal age.⁵¹ Manu mentions that the king should protect the properties of an orphan until he reaches adulthood and comes back after completing his studies in the *gurukula*.⁵² Furthermore, the asset of minors is one of those assets which is never lost on account of enjoyment by others for a long time (such as more than ten years).⁵³

Apart from the legal protections, the degrees of punishment were reduced for the minors. If a minor drives a vehicle and it accounts for an accident, then according to Kauṭilya, he would not be punished.⁵⁴ In *Mānava-Dharmaśāstra*, reduced punishment for minors is mentioned in case of polluting the highway.

Anyone who drops filth on a royal highway, except in an emergency, should pay a fine of 2 Kāṣapaṇas and promptly clean up that filth; but if it was an individual with an emergency, an old man, a pregnant woman, or a child, that person merits a reprimand and should be made to clean it up—that is the settled rule.⁵⁵

Ludo Rocher further mentions some cases where the penance for the minors is either half or one-quarter of the prescribed one. He also put forward one case which states that if the minor is too young (not even five years old), he is not to be punished or asked for the penance.⁵⁶

Child Marriage

While the initiation and puberty rites of the male children was destined to celibacy, some mentions of child-marriage for the girls are seen. For example, Gautama clearly

mentions: A girl shall be given in marriage before she reaches puberty.⁵⁷ According to

Baudhāyana:

A man should give his daughter in marriage while she is still “naked” to a man of good qualities who has maintained his vow of chastity, or even to a man lacking good qualities; let him not hold back a girl who has started to menstruate. If a man does not give his daughter in marriage within three years after she has reached puberty, he undoubtedly incurs a guilt equal to that of performing an abortion.⁵⁸

Regarding the ideal time for marriage, Vasiṣṭha is of the opinion that a girl should find herself a husband of the same class as she when three years would pass after her attainment of puberty.⁵⁹ But again Vasiṣṭha advises the father of a daughter to give her in marriage while she would still be ‘naked’ (*nagnikā*), for ‘if she remains in the house after puberty her father becomes guilty of a sin.’⁶⁰ Manu, however, mentions that there should be proper cause behind the child-marriage. According to Manu, when there is an eminent, handsome suitor of equal status, the girl should be given to him, even if she has not reached the proper age.⁶¹ Thus, the legal conception of pre-puberty marriage for girls can be seen changing from the *Dharmasūtras* to Manu, and Manu can be seen strictly emphasising upon the character of the bridegroom over the age or maturity of the bride.⁶² But there was no scope for the daughter to make her choice on the age of her marriage. From advising or even ordering the father of the daughter, pre-pubertal marriage was being legally justified in the later law-codes, and guilt or sin was being used as a tool. However, nothing is found for the ideal age of marriage for the boys.

Conclusion

The legal texts of the Brahmanical tradition never had a separate section or kinds of laws for the minors. This might be so because the composers of that literary tradition have thought the minors too young to be subject of the laws. In this regard, Donald R. Davis, Jr. has rightfully commented, ‘The law categorizes children in line with other persons who have legal disabilities: women, the mentally challenged, the infirm, and the very old.’⁶³ Alongside, ignorance has been equated with childishness. One thing is clear that the categorisation of child or minor was well established not only through their age but also through the initiation ritual. The principal concern remained to protect the life and property of the minor as he might not be fully aware of the laws. And that is why the laws might have deliberately reduced or diminished the punishment or penance. Though child-marriage for girls has been prescribed earlier, later the character of the bridegroom was strictly emphasised upon. This is also an example of protective approach toward the minors.

Childhood seems to be a different world from the jurisdiction of the legal texts. Vedic initiation and education served the purpose of bridging the gap between the two phases of life. It may be the various aspects of Vedic initiation that transformed the

child into an ideal member of the society. Following Davis, Jr., it can be said that it is not suggested that 'parents lacked affection or that real children were neglected or mistreated because of the Dharmaśāstra'. The composers of the legal texts actually prioritised the functional position of the minors in religious and legal affairs, and separated the emotional attachments from it.⁶⁴ However, it requires other sources to be corroborated in order to find out the nature of influence of the legal texts upon the society and specially upon the 'real' children. For example, the physical aspects of the children, except for the issues like puberty, menstruation etc., are absent in the legal treatises. That the children are physically and psychologically much different from the adults, and hence require distinct forms of care, was perceived by the medical practitioners and the composers of the Āyurvedic texts, making way for *Kaumārabhṛtya* getting recognised as one of the distinct branches of the eight-fold Āyurvedic system of knowledge.⁶⁵ The epics and other aesthetic literatures can also be studied in order to corroborate the reflections of the social position of the minors.

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