



# BODILY INTEGRITY OF AN UNWED MOTHER IN A NON-MARITAL COHABITATION DESIROUS OF SURRENDERING A CHILD UNDER JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015

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**Abstract:** An unwed mother who lives in a non-marital cohabitation may cherish childbirth. But sometimes she is compelled to choose to give away her child in adoption for the sake of the stability of the child. From the perspective of an unwed mother, often the act of adoption is narrated as valorous. She plays a minuscule role during the process of adoption. She ought to be grateful for the life she cannot provide for the child. Since she did not marry, she is belittled for her bad choices and it is naturally assumed that she is unfit to be a parent.

But a Welfare State will intercede when the father discards his duties towards the child. It will take the child in its protection and endeavors to expeditiously locate such a child in a welcoming home. It itself cannot provide love, nurture and a sense of belongingness to the child. Such an expectation from a sovereign entity is not only high but is too mechanical. So under the Juvenile Justice (Care and Protection of Children) Act, 2015 a State takes care of a child who is either abandoned or surrendered, to ensure that the child is legally free for adoption.

The article examines the efficaciousness of the legal provisions for the adoption of a child born to an unwed mother living in a non-marital cohabitation. She has been legally recognized, to be in a domestic relationship like marriage and also has a right to reproductive autonomy. The point of deliberation is that if requisite rights are conferred on her and the child is declared legitimate, can she be considered under the JJ Act, 2015 to have all the rights conferred otherwise on a married couple?

**Keywords:** Unwed Mother, Reproductive Autonomy, Non-Marital Cohabitation, Adoption

## I. INTRODUCTION

Often the small family unit of husband and wife is founded on love and affection.<sup>1</sup> But when we cross paths with the law to understand this unit, we see these relationships as legal relationships instead of alliances of endearment.<sup>2</sup>

Typically a *familia*<sup>3</sup> or family includes all the individuals that are under the legal authority of the same person i.e. his children, grandchildren, or unrelated in blood, e.g. slaves.<sup>4</sup> It includes all the descendants of the same ancestor, individuals connected by agnation, slaves of a *paterfamilias*<sup>5</sup> or the property of a *paterfamilias*.<sup>6</sup>

<sup>1</sup> GEORGE ARTHUR BARTLETT. MEN, WOMEN AND CONFLICT: AN INTIMATE STUDY OF LOVE, MARRIAGE & DIVORCE 269 (1931).

<sup>2</sup> Shelley A. M. Gavigan, *Legal Forms, Family Forms, Gendered Norms: What Is a Spouse*, 14 CAN. J.L. & SOC. 138 (1999).

<sup>3</sup> A Latin word for a family unit, [https://en.wikipedia.org/wiki/Family\\_in\\_ancient\\_Rome](https://en.wikipedia.org/wiki/Family_in_ancient_Rome) (last visited May. 23, 2023).

<sup>4</sup> OSBORN'S CONCISE LAW DICTIONARY 16 (Roger Bird ed., 1993).

<sup>5</sup> A family head.

<sup>6</sup> Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332 (1992).

Traditionally a family emerges either on marriage, birth or adoption.<sup>7</sup> There is a scant understanding of families which emerge due to civil partnership, cohabitation, or qualified cohabitation.<sup>8</sup> These concepts are outside of the purview of the family as understood conventionally.<sup>9</sup> However today the law is accommodating unconventional conceptions within the ambit of the word family.<sup>10</sup>

The significance attached to a family unit has compelled researchers to understand its various contours in all its forms of existence. It is more fascinating since family plays a crucial role in all societies, putting an impact on the rights entangled among those who comprise this unit. This article shall explore the rights of an unwed mother and her capacity to form a family unit with the child born to her in the Indian legal framework.

## II. Unwed Mother Forms A Family With Her Child

It is an arduous process to comprehend the rights of a child from the viewpoint of either parent. Whereas a child may indeed have both biological parents related to each other through matrimony, it is possible that they are not.<sup>11</sup> Many a time Indian courts have declared rhetorically that a child born to an unwed mother has a legitimate status.<sup>12</sup> It was important to settle this aspect of childbirth without conjugality.<sup>13</sup> The legitimate status of the child clears ambiguity about custody<sup>14</sup>, property<sup>15</sup>, adoption<sup>16</sup> and overall preservation of child rights.

It is significant to appreciate that the idea of an unwed mother forming a family with her child<sup>17</sup> seeped gradually into our society. With the passage of time and our ever-evolving civilization, females encountered a space to explore their freedoms with a more modern perspective.<sup>18</sup> It also meant drifting away from conventional scenarios and pursuing autonomy. Females' individual decisions inspired by self-determination<sup>19</sup> to give birth in non-marital cohabitation or merely a non-marital situation were eventually accepted by society.

The Kerala High Court in *Xxx v. State of Kerala*<sup>20</sup> examined the right of an unwed petitioner to motherhood in light of Article 21<sup>21</sup>. The petitioner had conceived *via* IVF<sup>22</sup> using a sperm donor. She refused to dwell on information about the identity of the sperm donor, whilst filling out the birth registration form. The Kerala Registration of Births and Deaths Rules, 1970 necessitate the father's name to be disclosed. But in these circumstances, the anonymity of the donor had to be maintained and revealing such information was also in violation of the petitioner's right to privacy under the fundamental right to life and personal liberty.<sup>23</sup>

It is imperative under section 8(1) of the Registration of Births and Deaths Act, 1969 to furnish information about the father. That is to be maintained under section 16 of the same Act, wherein the Registrar is bound to preserve relevant data like his name, profession or education etc. It was urged that it shall thwart the attempts of an unwed mother to form a peaceful family unit with the child. The court held that even an unwed mother has a right to privacy to opt for motherhood in the absence of a legal father. Article 21<sup>24</sup> encapsulated within its scope a female's right to procreate without establishing a consortium.<sup>25</sup>

The Apex Court had elaborated on the right of females to exercise their reproductive power in *Suchita Srivastava v Chandigarh Administration*<sup>26</sup>. It went on to hold that,

<sup>7</sup> Hubert J. Barnhardt II., *Let the Legislatures Define the Family: Why Default Statutes Should be Used to Eliminate Potential Confusion*, 40 EMORY L. J. 582 (1991).

<sup>8</sup> Fergus Ryan, *Out of the Shadow of The Constitution: Civil Partnership, Cohabitation, and The Constitutional Family*, 48 IRISH JURIST. 201, 202 (2012).

<sup>9</sup> Winnie Chan, *Cohabitation, Civil Partnership, Marriage and the Equal Sharing Principle*, 33 LEGAL STUD. 49 (2013).

<sup>10</sup> *Id.*, at 49.

<sup>11</sup> Lynn D. Wardle, *The Disintegration of Families and Children's Right to Their Parents*, 10 AVE MARIA L. REV. 4 (2011).

<sup>12</sup> *Madan Lal v. Sudesh Kumari* AIR 1988 Delhi 93.

<sup>13</sup> *SPS Balasubramanyam v. Sruttayan* 1994 AIR 133; *Bharata Mehta v. R. Vijay Ranganathan* AIR 2010 SC 2685.

<sup>14</sup> *Shyamrao Maroti Korwate v. Deepak Kisanrao Tekam* 2010 (10) SCC 314.

<sup>15</sup> *Vidyadhari v. Sukhrana Bai* AIR 2008 SC 1420.

<sup>16</sup> *Xxxxxxxx v. State of Kerala* R. P. (JJ). No. 2/2021.

<sup>17</sup> Nancy S. Erickson, *The Feminist Dilemma Over Unwed Parent's Custody Rights: The Mother's Rights Must Take Priority*, 2 LAW & INEQ. 457 (1984).

<sup>18</sup> Allen, Anita L. *Taking Liberties: Privacy, Private Choice, and Social Contract Theory (Symposium: Feminist Moral, Social, and Legal Theory)*, 56:2 UNIVERSITY OF CINCINNATI LAW REVIEW 461-491 (1987).

<sup>19</sup> Hazel Biggs, *Reproductive Autonomy and Regulation: Challenges to Feminism*, 18 FEMINIST L. STUD. 302 (2010).

<sup>20</sup> *Xxx v. State of Kerala* on 13 August, 202, <https://indiankanoon.org/doc/110139869/> (last visited May. 23, 2023).

<sup>21</sup> Indian Constitution, 1950.

<sup>22</sup> In Vitro Fertilization.

<sup>23</sup> *Supra* note 20.

<sup>24</sup> *Supra* note 21.

<sup>25</sup> *Supra* note 20.

<sup>26</sup> [2009 (9) SCC 1].

“...reproductive choices can be exercised to procreate as well as to abstain from procreating. The crucial consideration is that a woman’s right to privacy, dignity and bodily integrity should be respected”.<sup>27</sup>

This judgment sought social improvement by safeguarding the right to motherhood<sup>28</sup>, even when an intellectually disabled woman intended to become a mother irrespective of the fact that she could not understand the sexual act, the process of pregnancy or the responsibility of a single parent.<sup>29</sup>

Separately in *X v. The Principal Secretary Health*<sup>30</sup> court consciously interpreted Section 3B of the Medical Termination of Pregnancy Act, 1971 to allow an unmarried female to opt for legal abortion of a pregnancy following a mutual relationship. Both married and unmarried females are equivalent and the court did not find any reason to distinguish them. Irrespective of marital status females have been conferred with the right to abort.<sup>31</sup> This long-due interpretation came along at a time when we are anticipating progress in a forward direction. The liberty safeguarded by the court is inherently embedded in Article 21.

### III. CONSTITUTIONAL RIGHT TO REPRODUCTIVE AUTONOMY OF A WOMAN

No one can deny that we all have different circumstances and the fact that we all have different circumstances also means that the same rule of society cannot apply to all of us. Some females get married and some females don't get married.<sup>32</sup> Some females want to get married and some females don't want to get married. Whatever might be the situation, all females have equal recognition under the law.<sup>33</sup> No one can be declared guilty because of her circumstances and it cannot be said that the law will be different for her, the law is one<sup>34</sup> for all.

In this regard, the purview of reproductive rights expands beyond the bounds of her decision to bear or not to bear a child. It also embraces a bundle of rights and liberties<sup>35</sup> that affords a woman the convenience of making her own decisions. It includes the right to obtain knowledge regarding sexual well-being<sup>36</sup>, contraceptive access<sup>37</sup>, the right to protected abortion<sup>38</sup>, the right to conceive<sup>39</sup> children, the right to decide the time and number of children she wants to bear etc.

“Women must also have the autonomy to make decisions concerning these rights, free from coercion or violence.”<sup>40</sup>

These inalienable rights affect her sexual and reproductive wellness regardless of the nature or status of her relationship.

The patriarchal understanding of the concept of a family often becomes an external influence that hinders women to exercise autonomy and control over their bodies, particularly when it comes to decisions regarding reproduction because the patriarchal ideology claims that childbirth is her innate calling. Nevertheless, some women might find having children to be stifling and obtrusive. But some women may feel pleasure and happiness in the job of parenting, despite the fact that feminism perceives it as oppressive.<sup>41</sup> In general, the law is of the belief that a woman should make any decision, regardless of her ideologies—whether she wants to have children or not—and that decision should not be made under social pressure.<sup>42</sup>

The legal ideology that supports a single-parent family unit was once inconceivable. The Supreme Court in *Abc v. State(Nct Of Delhi)*<sup>43</sup> was confronted with a peculiar situation. An unwed Christian mother requested the issuance of a birth certificate for her son, but without revealing the name of the father. It was essential that the mother's rights be given proper regard. If she is required to reveal the identity and information about the father of her child, her fundamental right to privacy would be breached.<sup>44</sup>

<sup>27</sup> *Ibid.*

<sup>28</sup> Ajey Sangai, *Promise of Reproductive Autonomy: Does Suchita Srivastava Walk the Talk*, 6 NALSAR Stud. L. REV. 51 (2011).

<sup>29</sup> *Id.*, at 55.

<sup>30</sup> 2022 SCC OnLine SC 905.

<sup>31</sup> Rashmi Singh & Shreya Singh, *X versus the Principal Secretary, Health and Family Welfare Department, Govt. of NCT of Delhi & Anr*, 31 SUPREMO AMICUS (2022) 217.

<sup>32</sup> CHARLOTTE COWDROY, *WASTED WOMANHOOD* 147 (1933).

<sup>33</sup> Blanca Rodriguez Ruiz, *Recognizing the Rights of Unmarried Cohabitants in Spain: Why Not Treat Them Like Married Couples*, 2 INT'L J. Const. L. 671 (2004).

<sup>34</sup> Shivangi Dubey, *Equality before Law: Article 14 of the Constitution of India*, 5 INT'L J.L. MGMT. & HUMAN. 1801 (2022).

<sup>35</sup> Catherine Albertyn, *Abortion, Reproductive Rights and the Possibilities of Reproductive Justice in South African Courts*, 2019 U. OXFORD HUM. Rts. HUB J. 88 (2019).

<sup>36</sup> Tinashe Dune, Jo. Stewart, Wendy Tronc, Vanessa Lee, Virginia Mapedzahama, Rubab Firdaus & Tensae Mekonnen, *Redefining Constructions of Sexuality and Sexual Wellbeing across Generations: Lessons from Ageing Aboriginal Women*, 6 INT'L J. SOC. SCI. STUD. 41 (2018).

<sup>37</sup> Jennifer Hickey, *Insuring Contraceptive Equity*, 17 NW. J. L. & SOC. POL'Y 61 (2022).

<sup>38</sup> Manthan Sharma, *Law of Abortion in India and Its Impact on Human Rights*, 1 NYAAYSHASTRA L. REV. 8 (2021).

<sup>39</sup> Amal Singh Patel & Pratima Pal, *A Contemporary View and Legality of in-Vitro Fertilisation*, 5 INT'L J.L. MGMT. & HUMAN. 394 (2022).

<sup>40</sup> *ABC v State of Maharashtra* (2023) SCC OnLine Bom 175.

<sup>41</sup> FEMINISM AND LEGAL THEORY PROJECT WORKSHOP ON MOTHERHOOD 6 (1992).

<sup>42</sup> *Id.*, at 8.

<sup>43</sup> (2015) 10 SCC 1.

<sup>44</sup> *Ibid.*

The court appreciated that the mysteries and challenges of life will constrain law to be ever-dynamic. The purposive interpretation given to Section 11 of the Guardian and Wards Act, 1890 does not sabotage the intention of the legislature. Since the term “parent” is left undefined, it is to be understood in a specific context and not in the abstract. The analysis of the facts in light of legal provisions makes it apparent that “parent” is a reference made to a single parent of the illegitimate child whose responsibility is incumbent upon the unwed mother. The rights of the mother were prioritized over the uninvolved father.<sup>45</sup>

While examining the right to privacy, *R. Rajagopal v. State Of Tamil Nadu*<sup>46</sup> made pertinent observations about a woman’s reproductive rights.

“The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a “right to be let alone”. A citizen has a right to safeguard the privacy of his home, his family, marriage, procreation, motherhood, child-bearing and education among other matters.”<sup>47</sup>

A dignified life means having the privilege to shape one’s own personality and ambitions. The premise of a woman’s fundamental right to equality and privacy, regarding matters of bodily and psychological integrity<sup>48</sup>, is her capacity to make autonomous decisions about her own body and reproductive processes. Particularly, aspects of her physical and social identity, such as the right to personal autonomy, personal growth, and the freedom to form and grow relationships with other people and the outside world, are all included in the concept of private life. The ability to exercise personal autonomy over the course of future events that will affect the quality of her life depends on the effective exercise of her right to privacy.<sup>49</sup>

Therefore to bear a child or terminate her pregnancy is her fundamental right. It is her preference since considering it influences her entire life. Her familial as well as professional life will get affected by her decisions. It has a significant bearing on the exercise of other human rights by women. Article 21 can be easily interpreted to accommodate the principle of the Universal Declaration of Human Rights enshrined in Article 1:

“All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.<sup>50</sup>

*Justice K.S. Puttaswamy v. Union of India*<sup>51</sup> reiterates that motherhood helps a woman evolve. To decide to become a parent i.e. biologically or genetically, is a personal choice.

#### IV. UNWED MOTHER IN A NON-MARITAL COHABITATION AND SURRENDER OF A CHILD FOR ADOPTION

The Kerala High Court was confronted with a peculiar issue of the adoption of a child born in a non-marital cohabitation in *Xxxxxxxx v. State of Kerala*<sup>52</sup> John and Anitha lived in a non-marital cohabitation. Unfortunately, John left the company of Anitha. Later she gave birth to a baby girl in the absence of the father. She did try to contact him. But it was futile at the relevant time. He was not present at the time when his presence mattered the most.<sup>53</sup>

The elusory reality of an unwed mother left her isolated, desperate and repressed. She thought that it would be best to leave the child with the Child Welfare Committee (CWC), Ernakulum.<sup>54</sup> The social worker assisted her throughout the process and was able to understand an unwed mothers plight of not being able to extend warmth and love to her child. But she was in a vulnerable position and thought it best to surrender the child for adoption. She gave the requisite consent and executed a deed of surrender, implying that the child was legally free for adoption.<sup>55</sup>

<sup>45</sup> *Ibid.*

<sup>46</sup> (1994) 6 SCC 632.

<sup>47</sup> *Ibid.*

<sup>48</sup> Christyne L. Neff, *Women, Womb, and Bodily Integrity*, 3 YALE J.L. & FEMINISM 330 (1991).

<sup>49</sup> *Griswold v. Connecticut* 381 U.S. 479 (1965).

<sup>50</sup> <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%201.in%20a%20spirit%20of%20brotherhood>. (last visited May. 23, 2023).

<sup>51</sup> (2017) 10 SCC 1.

<sup>52</sup> R. P. (JJ). No. 2/2021.

<sup>53</sup> *Ibid.*

<sup>54</sup> The government of Kerala constituted CWC under the power conferred to them under section 27 of the JJ Act, 2015.

<sup>55</sup> *Supra* note 52.

On obtaining the necessary approval the CWC duly declared the child legally free for adoption according to the Juvenile Justice (Care and Protection of Children) Act, 2015 [hereinafter JJ Act]. It followed the procedure provided under Adoption Regulations, 2017 that specify the surrender of a child by an unwed mother.<sup>56</sup>

There was no issue concerning the birth certificate of the child as it reflected the names of both parents. The discussion pertains to the procedure adopted by the CWC in order to confirm the child is legally free for adoption.

There are a few categories of the child established in the JJ Act where the State will extend care and protection to a child:

1. An orphan child<sup>57</sup>;
2. An abandoned child<sup>58</sup>;
3. A surrendered child<sup>59</sup>.

Further, the Adoption Regulations, 2022<sup>60</sup> enumerates that surrender can be made by:

1. married couple<sup>61</sup>;
2. unwed mother<sup>62</sup>.

A married couple is obviously different from an unwed mother. But the question to ponder over is whether a married couple includes a couple living in a non-marital cohabitation. There is no clear understanding under the JJ Act, that in the case of the first scenario, the married couple will also incorporate a couple living in a non-marital cohabitation. It is obvious to eradicate the ambiguity existing between various categories that one might contemplate regarding the status of a person who is either abandoning or surrendering the child.

The JJ Act provides the adoption of an orphaned, abandoned or surrendered child. The procedure is different as defined under the Act.<sup>63</sup> The Adoption Regulation, 2022 also values the differentiation of the procedure and understands the relevance of identifying a child as orphaned, abandoned or surrendered before an adoption is made.

The obvious understanding of the JJ Act is in the context of a married couple. But is it a possibility that the child born in a non-marital cohabitation be treated at par with a child born in wedlock? The investigation is important from the viewpoint of the procedure that ought to be followed while making the adoption of a child. Since the procedure for abandoned and surrendered children varies, it becomes relevant to identify the child as either abandoned or surrendered.

According to section 38(3) of the JJ Act, the child of an unwed mother is understood as an “unwanted child of a victim of sexual assault”<sup>64</sup>. Such a mother is recognized as a single mother and has the requisite capacity to consent to adoption.<sup>65</sup> But there is no acknowledgement for an unwed mother who chose to conceive, either living in a non-marital cohabitation or a casual and consensual encounter with a man.

## V. PROCEDURE FOR ADOPTION UNDER JJ ACT, 2015

When a child is orphaned or abandoned, CWC must make every attempt to find the child's parents or guardians. On conclusion of their examination, if it is determined that the child is either an orphan who has no one to care for him or her or has been abandoned, the Committee shall take the appropriate action to place the child in a family *via* adoption. Such a child will be deemed to be legally available for adoption by the committee.<sup>66</sup>

<sup>56</sup> *Ibid.*

<sup>57</sup> Kumari, Ved, *The Juvenile Justice Act 2015-Critical Understanding*, 1 JOURNAL OF THE INDIAN LAW INSTITUTE 90 (2016).

<http://www.jstor.org/stable/45163062>. (last visited May. 23, 2023).

<sup>58</sup> *Ibid.*

<sup>59</sup> Shreya Srivastava & Shubhang Swaroop, *Influence of the Human Right Instrument in Children's Right Jurisprudence: An Appraisal of JJ Act*, 3 INT'L J.L. MGMT. & HUMAN. 696 (2020).

<sup>60</sup> [chrome-extension://efaidnbmnnnibpcajpeglefindmkaj/https://wcd.nic.in/sites/default/files/Adoption%20Regulations%2C%202022.pdf](https://wcd.nic.in/sites/default/files/Adoption%20Regulations%2C%202022.pdf) (last visited May. 23, 2023).

<sup>61</sup> Adoption Regulations, 2022, Rule 7(5).

<sup>62</sup> Adoption Regulations, 2022, Rule 7(4).

<sup>63</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 38, No. 2, Acts of Parliament, 2016 (India).

<sup>64</sup> *Ibid.*

<sup>65</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 35(1), No. 2, Acts of Parliament, 2016 (India).  
Adoption Regulations, 2022, Regulations 7(4), 7(7) & 7(21).

<sup>66</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 38(1), No. 2, Acts of Parliament, 2016 (India).

On the other hand if due to ineluctable circumstances, parents or guardians want to relinquish their rights, can surrender the child.<sup>67</sup> The CWC will endeavor to counsel and assist them whilst inquiring to satisfy itself of the inevitable waiver.<sup>68</sup> The parents or guardians will have two months to reconsider their earnestness.<sup>69</sup>

The Adoption Regulations, 2022 provide the procedure that will be adopted by the CWC to further the process of adoption under the JJ Act. Regulation 6 applies to orphaned or abandoned children and Regulation 7 applies to surrendered children.

In the case of an orphaned or abandoned child, CWC will attempt to track the parents or guardians of the child. It will publish information in the local newspaper regarding the child.<sup>70</sup> It will take help from the local police to complete its task within two months, failing which it will declare parents non-traceable.<sup>71</sup> On the other hand, the Deed of Surrender ought to be signed by a female biological parent if she desires to make that surrender. Such a female parent includes an unwed mother too.<sup>72</sup>

When a child born to a married couple is to be given away, the Deed of Surrender must be signed by both parents. But if one of them is deceased, a death certificate can be provided of the deceased parent.<sup>73</sup> If one biological parent of a child born to a married couple surrenders and the other parent's whereabouts are unknown, the child is classified as an abandoned child and subsequent procedures in line with Regulation 6 are followed.<sup>74</sup> Supposing the child is born out of a non-marital condition, then only the biological mother can make the surrender.<sup>75</sup>

## VI. STATUS OF AN UNWED MOTHER IN A NON-MARITAL COHABITATION

To comprehend the surrender for the adoption of a child born to an unwed mother living in a non-marital cohabitation, we will have to be cognizant of the status of non-marital cohabitation in India.

Earlier cohabitation as spouses without legal validation under marriage law was considered salacious and vulgar cohabitation.<sup>76</sup> In various states throughout the United States, it was subjected to punishment under criminal law.<sup>77</sup> The partners must cohabit with an assumption of rights of matrimony even though they are not wedded.<sup>78</sup> The relationship must be so overt as to violate public decency, spark controversy, or threaten to undermine public morality to qualify as obscene and lascivious cohabitation.<sup>79</sup> The law constrained obscene, fornication and lewd cohabitation.<sup>80</sup>

The concept of non-marital cohabitation has no foundation in our personal laws that largely govern the institution of marriage. No protection is extended to parties who are not bound by legal matrimony. It is only an urban idea that parties live in cohabitation for various reasons<sup>81</sup> best known and applicable only to them.

Nonetheless, a Welfare State could not have shown step motherly behavior to parties who find themselves in a non-marital cohabitation. Especially women who were subjected to domestic violence at the hands of their partners.<sup>82</sup> Therefore, the Parliament has provided some protection to women by including non-marital cohabitation within the scope of "Domestic Relationship" as defined under Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 [PWDVA]. A domestic relationship refers to a relationship between two persons who share or shared a home. They could be related through consanguinity, marriage, or a relationship that has the characteristics of marriage, adoption, or are members of a joint family.<sup>83</sup>

<sup>67</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 35(1), No. 2, Acts of Parliament, 2016 (India).

<sup>68</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 35(2), No. 2, Acts of Parliament, 2016 (India).

<sup>69</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 35(3), No. 2, Acts of Parliament, 2016 (India).

<sup>70</sup> Adoption Regulation, 2022, Regulation 6(7).

<sup>71</sup> Adoption Regulation, 2022, Regulation 6(11).

<sup>72</sup> Adoption Regulation, 2022, Regulation 7(4).

<sup>73</sup> Adoption Regulation, 2022, Regulation 7(5).

<sup>74</sup> Adoption Regulation, 2022, Regulation 7(6).

<sup>75</sup> Adoption Regulation, 2022, Regulation 7(7).

<sup>76</sup> Emlin McClain. TREATISE ON THE CRIMINAL LAW AS NOW ADMINISTERED IN THE UNITED STATES (1897).

<sup>77</sup> Mississippi Code 1871, § 2486.

<sup>78</sup> *H. W. Kinard v. The State*, 57 Miss. 132 (Miss. 1879).

<sup>79</sup> *Wildman v. State*, 157 Fla. 334, 25 So. 2d 808 (Fla. 1946).

<sup>80</sup> *Supra* note 1 at 289.

<sup>81</sup> WAGGONER, LAWRENCE W., *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?* 50(2) FAMILY LAW QUARTERLY, 242 (2016). JSTOR, <http://www.jstor.org/stable/44155209>. (last visited May, 23, 2023).

<sup>82</sup> Atul Anand, *Legal Dynamics of Live-in Relationship in India*, 5 INT'L J.L. MGMT. & HUMAN. 63 (2022).

<sup>83</sup> The Protection of Women from Domestic Violence Act, 2005, § 2(f), No. 43, Acts of Parliament, 2005 (India).

Consequently, the expression “relationship in the nature of marriage”<sup>84</sup> widens the interpretation of the term “domestic relationship”<sup>85</sup>. It naturally develops the conceptualization of non-marital cohabitation. In *D. Velusamy v. D. Patchaiammal*<sup>86</sup>, the Supreme Court accepted that:

“...the expression ‘domestic relationship’ includes not only the relationship of marriage but also a relationship ‘in the nature of marriage.’”<sup>87</sup>

Further, it laid down specific parameters to comprehend a non-marital cohabitation in the context of the PWDVA. The court opined that a man's relationship with his “keep” does not possess the characteristics of non-marital cohabitation. He may be maintaining her financially and using her primarily for sexual purposes or as a servant, but that cannot be seen as a “domestic relationship in the nature of marriage”.<sup>88</sup>

In 1976, the US courts in *Marvin v. Marvin*<sup>89</sup> formulated the notion of palimony. It was developed to safeguard the right to maintenance of a woman living with a man in a non-marital cohabitation for a considerable period of time. *Velusamy*<sup>90</sup> uncovers the right to maintenance under section 125 of the Criminal Procedure Code, of a woman who is not the wife. The petitioner married an already-married man and gave birth to a child. Initially, she lived with him for two-three years before she was deserted. Later she claimed maintenance after 12 years of the desertation. It was observed that a woman will not be entitled to maintenance unless the non-marital cohabitation was proved as a “domestic relationship in the nature of marriage”. It devised a certain spectrum that may apply to identify whether the relationship is a “domestic relationship in the nature of marriage”. These parameters must be met before relief could be granted. These criteria were:

1. The couple must hold themselves out to society as being akin to spouses;
2. They must have a requisite legal age to enter into marriage;
3. They must not be legally prohibited to marry each other;
4. They volunteered to cohabit.<sup>91</sup>

The prior case cited *Marvin*<sup>92</sup> and relied on the same guidelines to determine the woman's rights. In *Marvin*<sup>93</sup>, the US Court refused the aggrieved woman's right to sue her live-in boyfriend for any financial compensation since she was unable to show that they had an express contract. Although the aforementioned verdict served as a precedent in a number of cases, American courts mostly disregarded it in many other situations. To determine the contemporary status of live-in partners in India, the Supreme Court of India has relied on an inadequate<sup>94</sup> US decision made several years ago.

Due to this judgment, there have been several legislative changes, but these changes, coupled with the altered social environment, have not received enough attention. The disintegration of cohabitation in Western nations is a major worry for women's economic rights, and cohabitation-related rights are covered by particular laws. The live-in relationship has already become socially acceptable in the US and the UK, where progressive legislation protecting women's rights is in place. One step in ensuring women have access to justice is the establishment of numerous laws and rules.<sup>95</sup>

Similarly, prior to the PWDVA, only a legally married wife's rights were protected under Indian law. The Dowry Prohibition Act of 1961, the Hindu Adoptions and Maintenance Act of 1956, the Hindu Marriage Act of 1955, Section 125 of the Code of Criminal Procedure of 1973, which provides for maintenance of a destitute wife, Section 498-A6 and Section 304-B7 of the Indian Penal Code of 1880, and the Hindu Adoptions and Maintenance Act of 1956. But the objective of PWDVA was to offer relief to women who are not legally married and do not have any civil remedy. PWDVA's broad scope in the context of the aforementioned legislation is frequently favorable to women.

Previously in *Tulsa & Ors v. Durghatiya & Ors*<sup>96</sup> the Supreme Court held that defendant No.1(Loli) was the wife of one Radhika Singh. It was well established that Loli and Radhika had been living together for a long time. The court relied on some privy council judgments wherein it was established that section 114 of the Indian Evidence Act purports that the court may presume that a particular fact existed if it believes that it is likely to have occurred. The combined reading of sections 50 and

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> [2010] 10 SCC 469.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> (1976) 18C3d660.

<sup>90</sup> *Supra* note 37.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Supra* note 39.

<sup>93</sup> *Ibid.*

<sup>94</sup> J. Thomas Oldham, *Introduction to Cohabitation Issue*, 44 Hous. J. INT'L L. xii (2022).

<sup>95</sup> J. Thomas Oldham, *Unmarried Partners and the Legacy of Marvin v. Marvin--Introduction*, 76 NOTRE DAME L. REV. 1261 (2001).

<sup>96</sup> AIR 2008 SC 1193.

114 of the Indian Evidence Act make it clear that a marriage can be presumed between two persons by their conduct as well as the natural occurrences following a predictable pattern.<sup>97</sup>

In *Dinohamy v. W. L. Blahamy*<sup>98</sup>, it was held that a valid marriage may be presumed to be existing between a man and a woman, by the law if the contrary is not proved. This presumption is based on the togetherness of a man and a woman as husband and wife and not as in a state of concubinage.<sup>99</sup> It was further reiterated in *Mohabhat Ali v. Md. Ibrahim Khan*<sup>100</sup> that if a man and a woman had spent a considerable number of years together in cohabitation, the law presumes a valid marriage and eliminates concubinage.<sup>101</sup>

But the court will not ignore the evidence which diminishes this presumption and is sufficient to rebut the same about valid marriage.<sup>102</sup> The court in *S. P. S. Balasubramanyam v. Suruttayan*<sup>103</sup> found that the legal presumption of a valid marriage in case of long cohabitation was rebutted because it was established that Pavayee led an adulterous life. The legal presumption upheld in various cases on non-marital cohabitation did not account for relationships like concubinage.<sup>104</sup>

One of the many controversies associated with non-marital cohabitation is the legal status of the child born in it. In *Badri Prasad v. Dy. Director of Consolidation*<sup>105</sup>, the court had made it clear that the law favors legitimacy and frowns on the bastardy of a child of a man and woman, who have lived together for a considerable period.<sup>106</sup>

Traditionally, a woman is only permitted to engage in sexual activity with her lawfully married husband. Women were considered as either wives or mothers, and those who didn't fit into the mould were frequently labeled as "bad women".<sup>107</sup> Any sexually inappropriate behavior by a lady would reflect poorly on her character.<sup>108</sup> In the context of the culture, women are viewed as carrying the family's good name and honor. But court decisions amply demonstrated an educated woman is capable of comprehending the effects of live-in relationships.<sup>109</sup>

But from *Xxxxxxxx v. State of Kerala*<sup>110</sup> it is reflected that in a non-marital cohabitation, the woman bears the burden of the repercussions while the man is free to abscond. In terms of social and legal reality, women experience misfortune due to the perspective of non-marital cohabitation as immoral. It is often the people who act as obstacles in the way of changes that a society might be undergoing.

*S. Khushboo v. Kanniammal*<sup>111</sup> reveals the pressure put on the legal system to reject the recognition of non-marital relationships. In this case, an actress requested the dismissal of 23 criminal charges brought against her after suggesting that live-in relationships should be permitted in India to a renowned Indian magazine. The Supreme Court made its decision on the facts of the case and held that the actress was protected by her right to freedom of speech and expression. The criminal allegations were thus dismissed. The court further ruled that an immoral act or statement need not be unlawful, and as a result, it abstained from entering the moral controversy.

The PWDVA, on the other hand, is a law for social welfare and the defense of women to represent the contemporary social reality<sup>112</sup>, the phrase "relationship in the nature of marriage" should be given a wider and more dynamic understanding. Many women are unaware of the requirements for a genuine marriage and may become victims of an illegitimate, fraudulent or bigamous union.<sup>113</sup> As the law has committed itself to the morality of society, which does not recognize non-marital cohabitations, a woman who has committed herself to a relationship may not have any rights under any of the current laws. Women who cohabit without being married are viewed with contempt and as the "other" or "evil" woman.

<sup>97</sup> *Ibid.*

<sup>98</sup> AIR 1927 P. C. 185.

<sup>99</sup> *Ibid.*

<sup>100</sup> AIR 1929 PC 135.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Gokal Chand v. Pravin Kumari* [AIR 1952 SC 231].

<sup>103</sup> 1994 AIR 133.

<sup>104</sup> *Ibid.*

<sup>105</sup> 1978 AIR 1557.

<sup>106</sup> *Ibid.*

<sup>107</sup> Shanley, Mary L., *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95(1) COLUMBIA LAW REVIEW, 81 (1995). JSTOR, <https://doi.org/10.2307/1123127>. (last visited May. 30, 2023).

<sup>108</sup> *Payal Sharma v. Superintendent, Nari Niketan* (2001) Writ Petition No. 16876/2001.

<sup>109</sup> Rishika Reddy Gangula, *Morality and Cruelty in Live-in-Relationship: Indian Scenario*, 2 Jus Corpus L.J. 553 (2022).

<sup>110</sup> *Supra* note 14.

<sup>111</sup> (2010) 5 SCC 600.

<sup>112</sup> B. Niranjana Babu, *An Analysis on the Shared Household and the Right to Reside under the Protection of Women from Domestic Violence Act, 2005*, 4 INT'L J.L. MGMT. & HUMAN. 1269 (2021).

<sup>113</sup> Juhi Damodar, *Why Is There a Need to Include Domestic Violence within Families between Parents and Children under the Protection of Women from Domestic Violence Act, 2005?*, 3 Jus Corpus L.J. 723 (2022).

## VII. UNWED MOTHER IN A NON-MARITAL COHABITATION DIFFERS VICTIM OF A SEXUAL ASSAULT

An illegitimate child is referred to as *filius nullius* under common law.<sup>114</sup> Such a child is considered an unfortunate lapse on the part of a man and a woman. It is also a burden on society. The natural rights of such a child are forgotten and the life anticipated for it is lonely. In these circumstances, a *Welfare State* is obliged to preserve the natural rights of a being.<sup>115</sup> This responsibility is discharged by the adoption statutes.<sup>116</sup> A Hindu mother is the natural guardian of such a child.<sup>117</sup> A Christian or a Parsi mother needs to send notice to the father to obtain guardianship.<sup>118</sup> This right is not absolute. Whenever a dispute arises between the rights of a child and those of its mother, the court shall preserve the rights of a child.<sup>119</sup>

There are two stages of adoption. First, to know if the child is legally free for adoption. Second, to make an adoption order. In the case of adoption of a child born out of a non-marital cohabitation, at both stages the consent of the mother is relevant. She is free to withdraw the consent at the first stage, this is her absolute right. But at a later stage, a child's best interest<sup>120</sup> comes into existence. If she withdraws the consent at a second stage, she should be respected for changing her mind because at the behest lies the welfare of the child.<sup>121</sup>

Unfortunately, in *XXXXXXXXXX*<sup>122</sup> where the Kerala High Court held that the child is legitimate and instructed the CWC to take into account the biological father's rights to request restoration of the child under Sections 37 and 40 of the JJ Act given his willingness to care for the child. But the Supreme Court has stayed the operation of this judgment and restored the rights of the adoptive parents.<sup>123</sup> It observed that the act of adoption is irrevocable and a belated production of the name of the biological father in the birth certificate shall have no repercussions. It was held that CWC had correctly declared the child free for adoption.<sup>124</sup>

Yet it leaves an exceptional question before us to understand the position of an unwed mother concerning the JJ Act. She possesses an autonomous reproductive right. She can choose childbearing. She can form a family unit with her child. She can surrender her child for adoption. The term used under the JJ Act in the context of a woman is either parent<sup>125</sup> or mother<sup>126</sup>. If the child is born to a married couple, the surrender can be made by both parents. But if the child is born to an unwed mother, she alone can make the surrender. Here an unwed mother living in a non-marital cohabitation, whose relationship is legally seen as a "domestic relationship in the nature of marriage" and whose child has a legitimate status, is not covered similarly as a married couple.

Also, the only awareness acquired by the JJ Act about a child of an unwed mother is on the lines of "unwanted child of a victim of sexual assault." It does not appreciate that an unwed mother may be living in a non-marital cohabitation before surrendering the child for adoption. Let alone an unwed mother who decided to conceive a child in a relationship without cohabiting with her partner or one who conceives in a consensual yet casual sexual encounter with a man. If "an unwed mother"<sup>127</sup> has acquired the status of a "domestic relationship in the nature of marriage", then how come she is put under a different sub-regulation than the one dealing with married couples? Can her capacity be analogous to a "victim of sexual assault"? Does not the JJ Act need to precisely explain variations of an unwed mother?

## VIII. CONCLUSION

A woman has been bestowed with the most basic rights under our Constitution. The right to dignity, privacy and reproductive autonomy ensure she ceases to be at the periphery of the societal structure. Though she endured a loss in a patriarchal society yet she has been constantly uplifted by the legislature and judiciary. Especially the judicial precedents that interpret legal provisions as abundantly as possible have acknowledged unwed mothers living in cohabitation. It has recognised legitimate status for a child born in a non-marital cohabitation.

<sup>114</sup> Jay R. Petterson, *A Return to Filius Nullius*, 48 N.D. L. REV. 61 (1971).

<sup>115</sup> Harold Zink. MODERN GOVERNMENTS 177 (1958).

<sup>116</sup> *G, Plaintiff, v. AN BORD UCHTALA* [1980] IR 32 at 52.

<sup>117</sup> The Hindu Minority and Guardianship Act, 1956, § 6, No. 32, Acts of Parliament, 1956.

<sup>118</sup> The Guardian and Wards Act, 1980, § 11, No. 8, Acts of Parliament, 1890.

<sup>119</sup> *Supra* note 64.

<sup>120</sup> The Ireland Adoption Act, 1974, § 3, No. 24, Acts of Parliament, 1974. <http://www.irishstatutebook.ie/eli/1974/act/24/enacted/en/html> (last visited May. 30, 2023).

<sup>121</sup> *Murphy v. Stewart* (1973) IR 97.

<sup>122</sup> *Supra* note 14.

<sup>123</sup> <https://www.liveweb.in/top-stories/supreme-court-stays-kerala-high-court-ruling-live-in-couple-reclaim-surrendered-biological-child-173497> (last visited May. 30, 2023).

<sup>124</sup> *Ibid.*

<sup>125</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 2(1), No. 2, Acts of Parliament, 2016 (India).

<sup>126</sup> The Juvenile Justice (Care And Protection Of Children) Act, 2015, § 45(2), No. 2, Acts of Parliament, 2016 (India).

<sup>127</sup> Adoption Regulation, 2022, Regulation 7(4).

When the adoption of a child born in non-marital cohabitation occurs under the JJ Act, it is seen that an unwed mother can surrender the child by herself. Under Section 38(3), it does not create a category different from a “victim of sexual assault”. It needs to provide a progressive meaning to an unwed mother. Which does not include “victim of sexual assault” by default but incorporates women who accept childbirth in a non-marital cohabitation. Moreover, unwed mothers must encompass women who conceive in a relationship without cohabitation or in a casual but consensual intimate rendezvous with a man.

Various judgments have clarified that an unwed mother can form a family unit with her child. Such scenarios present themselves when the biological father does not wish to take responsibility for the child born to them. Often women wait for the men to fulfill their promise to marry them. But waiting for a prolonged period does not benefit anyone and circumstances change, in such a situation the mother has to give birth to the child whether she is married or not. We also see that women may want to remain unmarried yet relish childbirth. The judiciary has acknowledged a substantial period of non-marital cohabitation to be similar to marriage and furthermore has conferred legitimate birth status to children born in this manner.

Therefore it will be in the best interest of an unwed woman in a non-marital cohabitation and her child to be distinguished from a victim of the sexual assault under the JJ Act and be treated at par with a married woman. It will create consistency in the legal provision laid down for the adoption of a child born in a non-marital cohabitation and judgments that find non-marital cohabitation as comparable to marriage under the PWDVA.

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