

Abstract

Position of Illegitimate Children

The children born out of lawful wedlock, result of rape, extra-marital relations and live-in-relationship etc. are illegitimate children. The concept of illegitimacy is not new to the society. A child who is not considered as legitimate in the eye of law is known as illegitimate. Due to prevailing norms and laws in our society the children who are born out-of-wedlock has to face lot of humiliation and discrimination. They are considered as sin in the society, therefore, the mother either kills her child in her womb or abandon it. In Indian constitution a number of fundamental rights are provided to all the citizens of the country but they are not enjoyed by the child born out of the wedlock. This research article aims to make it clear that existing laws are not adequate to protect the rights of the Children born out of wedlock and due to which a number of crimes are being committed against those children. There is a need to accept those children and to amend the existing laws to provide them a right to a life with dignity.

Article

The future of any nation depends on its children, so it is the obligation of the nation to provide all the basic necessities i.e food, clothing and education to all children without discriminating on the basis of their parentage. In our society, since time immemorial, the bond of marriage was given great importance and sexual activity was also permitted only within the bond. Besides that many children were born out of the bond of marriage in ancient time and were considered as sin in the society. Now illegitimacy is a worldwide phenomenon. All over the world, several children born out of the wedlock, but no specific data is available with us because unwanted children are not accepted by the society. Due to the norms and laws prevailing in the society it is not so easy for any girl or woman to openly accept it before the society that she conceive a baby without performing a marriage. The children born out of wedlock do not enjoy equal status and other benefits in compare to the children born within lawful wedlock. We all know that no role-played by any child in his or her birth even then the child born out of the wedlock faced humiliation and discrimination for the act done by their parents. Despite the fact that children born out of wedlock are innocent, they are not accepted by the society and they are called as 'Bastard'. A 'bastard' is a child which is

not acknowledged by its father. An illegitimate child is one who is begotten out of lawful wedlock.

Meaning and Definition of Illegitimate Child:

Illegitimate child is one conceived and born outside of the restrictive countenance of marriage. The word “illegitimacy” is derivative from the Latin word *illegitimus*, meaning “not in accordance with the law.” Illegitimacy is a negative concept. In simple language, the persons who are not “legitimate” are illegitimate.¹ Firstly, the children who are conceived and born within lawful wedlock are legitimate children. Secondly, the children who are conceived before the marriage but born within marriage. For instance, if any woman or girl conceived a child two months prior to her marriage that child will be legitimate². Under Section 12 (d) of the Hindu Marriage Act, 1956, similar situation is dealt. Thirdly, legitimate children includes those children conceived within the marriage but born after it has terminated. Thus, for instance, a posthumous child is legitimate. The fourth category of legitimate children is one which do not come under the judicial dominance, but has been recognized on certain principle. It deals with a situation where a child is conceived as upshot of pre-marital sexual intercourse and his parents then marry but his father dies prior to his birth. This child will be legitimate if he born during the lifetime of his father. Due to this fact that child born posthumously does not in itself appear to be a reason to deny him legitimate status.³ The Last category of legitimate children is that uprise from legislation by the subsequent marriage of the parents and this category was introduced into by the Legitimacy Act 1931.⁴

In Black Law dictionary the word illegitimate defined as “*something which is contrary to law.*”⁵ Apex Court of India in *Smt. Parayankandiyal v. K.Devi & Ors*⁶ also held that illegitimate children are those who are not born out of a lawful wedlock. Under Hindu law, the social status of a child depends upon relationship between their parents. The legitimacy or illegitimacy of a child depends on the fact whether their parents are legally married or not. Leon R. Yankwich, expressed that “there are no illegitimate children-only illegitimate parents.”⁷ Illegitimate children would include child born out of rape, extra-marital affairs and live-in relationships.

¹ See A. Shatter, *Family Law in the Republic of Ireland*, ch. 11 (2nd ed., 1981).

² http://www.lawreform.ie/_fileupload/Reports/rIllegitimacy.htm accessed on 10.11.2011.

³ Cf. P. Bromley, *Family Law*, 256 (6th ed., 1981).

⁴ *Supra* note 2.

⁵ *Rimjhim Vaishnavi, Guardianship of illegitimate children in India* (June 28, 2016)

http://blog.ipleaders.in/guardianship-of-illegitimate-children-in-india/#_ftn1.

⁶ 1996 SCC (4) 76.

⁷ *Supra* note 5.

Concept of Illegitimacy and Marriage :

Marriage is not a new concept to the society. In India, since the Rig Vedic period the institution of marriage exists. According to Hindu philosophy the child born out of sacred union is legitimate and the birth of any child out-of-wedlock is considered as sin. Those children who are born out of wedlock are often stigmatized. The position of the woman as well as her child born out of wedlock was not so good in Ancient time. In our famous epic “The *Mahabharata*” we read that *Karna* was *Kunti*’s illegitimate child and she knows that if she discloses this fact to anyone then she has to face lot of humiliation from the society. Therefore, *Kunti* may with heavy heart abandoned her infant child in holy river *Ganga*.

Even, when she gets a second chance in her life to meet her son *Karan* she did not dare to accept him as her son as at that time *kunti* was widow of *Pandu* and mothers of five *Pandavis*. She remained silent about this fact till the death of *Karan* as she knows her relation with *Karan* will not be accepted by her family and society. Lot of other examples exist in the ancient time like *Vyasa*, *Ghatotkacha* etc. Being a favorite epic it is like a reflector of the society and gives a new perception to the Indian society’s towards life. The epic also plays an important role in learning process of the Indians as it is widely read and watched over television. Therefore, till today same inclusive mode is adopted by any girl or woman in case she conceived a child out of wedlock and also not acknowledged by the man. We read in newspapers that infant child was found outside the hospitals, church, temples, children homes and in garbage, it may be those children whose mother conceived and gave birth out of the wedlock and their putative fathers do not acknowledge them.

Now, under the Hindu Law, three types of marriages are described i.e Valid marriage, void marriage and voidable marriage.

(A) **Valid marriage:** means marriage which is performed between two adults Hindus as per the provisions of the Section 5 and 7 of the Hindu Marriage Act, 1956.

(B) **Void marriage :** means marriages performed in contravention of any one of the conditions specified in clauses (i), (iv) and (v) of Section 5 of the Hindu Marriage Act, 1956.

(C) **Voidable marriages:** are those marriages which are valid but is subject to cancellation at the option of one of the parties on the ground mentioned in the Section 12 of the Hindu Marriage Act, 1956.

It is pertinent to mention here that Clause (d) of Section 12 of the Hindu Marriage Act deals with a situation, when wife was already pregnant at the time of the

marriage by some person other than her husband, then the husband can seek declaration from the Court that marriage is void.

In case of void and voidable marriage if, husband/wife succeeds to obtain the decree of nullity then the child born out of said wedlock becomes illegitimate in eye of society as well as law. To remove this lacuna Section 16 of Hindu Marriage Act was amended in the year 1976. Now, after this amendment the children of all void and voidable marriages shall be deemed to legitimate. But still, the children born out of void or voidable marriages cannot inherit the property of their relatives. So, on the basis of status of the marriage of their parents whether it is valid or void or voidable the rights of the innocent child will be decided.

Hardships faced by the Mother of the Child Born out of wedlock in the society:

No doubt under various laws rights has been provided to the children born out of the wedlock. But now in existing scenario there is requirement to analysis whether existing laws are adequate to protect the rights of those innocent children who are born out of the wedlock and whether they enjoy equal status as enjoyed by the children born within wedlock. To analysis the position of existing laws, lets consider the situation faced by the teenager college going girl who is a due to his gullible age without knowing its consequences conceive a child out of the wedlock. Firstly, she will try to hide this fact from all, because she knows that neither this pregnancy is acceptable to her family nor to the society. Due to this unwanted pregnancy her family has to suffered lot of humiliation in the society. Then, she will talk with that boy or man who is putative father of that child and if, that man refused to perform a marriage with that girl then her condition will become worse. In this situation, that girl and her family will plan to get rid out of that unwanted pregnancy. As at the time of conception she is not married and so called father of that child also refused to acknowledged him or her. Therefore, that girl or woman will decide to abort that child, and that innocent child without any fault on his/her part is not permitted to come in this world. Even for that abortion her family will choose a clinic or hospital where no one knows them. Sometimes these clinics or hospitals do not have proper medical facilities and due to lack of basis medical facilities that girl also lost her life.

A Child born to couple who were not legally married to each other at the time of the child's conception or at the time of the birth of the child is considered as an extra-marital child. The numerous extra-marital relations prevails in our society and child born out of these relations are illegitimate child. The putative father of the child born out of extra-marital relations generally do not recognize a child due to the fear of the

society. Then, all the parental responsibilities have to be performed by the mother alone as motherhood is certain.

As per the provisions of the Hindu Minority and Guardianship Act, 1956 father is the natural guardian of the child and after him mother is the guardian of the Child. In existing laws it is not made clear that if father of child who born out of wedlock refused to recognize or acknowledge him/her as his child then in that situation who will be the natural guardian of that innocent child. In case titled as *ABC v The State (NCT of Delhi)*⁸ an unwed mother for the benefit of her child approach the court to declare her as a natural guardian of her son. She is educated lady and in the year 2010 she gave birth to her son out of the wedlock and also subsequently raised him without any financial support or involvement of his putative father. Now, she wants to make nominee her son in all her savings and other insurance policies, so she approaches the concerned department, but was informed that she must either disclose the name of the father or get a guardianship/adoption certificate from the Court. It is misfortune that if unwed mother to secure future of her child want to make some savings even then in patriarchal social system has to disclosed the name of that man who do not dare to acknowledge that child. The father who did not dare to acknowledge that child is natural guardian of that child. On the contrary, the mother who since the conception of that child is taking care that child is not a legal guardian of her child for that purpose she has to approach the Court to get a declaration that she is guardian of her child. But when she approaches Hon'ble Delhi High Court her guardianship application was dismissed and held that same can not be entertained by the Court unless she discloses the name and address of the father of her child, so that Court can issue process to him. As under the Guardian and Wards Act, 1890 before declaring any person as a guardian notice is required to be given to the parents. Apex Court considering this fact that paramount consideration is interest of that child directed that Appellate Court to consider the appellant's application of guardianship expeditiously without requiring notice to be given to the putative father of the child.

Position of children born out of Live-in-relationship

In India, with the passage of time under the influence of foreign culture the way of living of human beings drastically changed. Now, the new generation do not want to burden themselves with the responsibilities of marriage and children. They want to enjoy their freedom and relations like a free bird, therefore, new type of relations

⁸ SLP Civil No 28367of 2011.

develops which are popularly known as live-in-relationship. A live-in-relationship is the relationship in which two adults live together without performing formal ceremonies of marriage. The concept of live in relationship is not as simple as it seems, rather it is multi-dimensional which followed by various issues and complications. Such type of relationships are only governed by a few legal obligations and moral and personal obligations are decided mutually by the couple. Since no special law that acknowledge the position of the couples in live in relationship is framed, therefore, the law as to the status of children born to couples in live in relationship is also not very clear.

The prime agenda of every legislation is to protect the rights of the children. Therefore, it is necessary to ascertain the status of children who born out of the live-in-relationship. The parliament also has taken notice of a new social phenomenon which has egressed in our country. Therefore, to deal with the new type off relationships, Parliament has enacted new legislation known as Protection of woman from domestic violence Act, 2005. Certain aspects of live-in-relationship was clarified by the Apex Court in Landmark judgment titled as *D. Veluswamy v D. Patchaiammal*⁹. In this case, the Court laid down that all live-in relationships will not amount to a relationship in the nature of marriage to get the benefit of the Act of 2005. The Court further clarified that if a man has a “concubine’ mainly to fulfill his sexual desire and only financially maintains her. Then, such type of relation would not amount to be a relationship in the nature of the marriage. One night stand and spending weekends together would not make it a ‘domestic relationship’. In India, this kind of relationship are not common due to the norms prevails in our country. But few such couples who are living in live-in-relationship are found in big urban cities in India. But such type of relationships are very common in foreign countries like North America and Europe. In India, the position of the children who born out of such type of relationships are not clear.

Status of Children born out of Rape:

We all read in newspapers and also watched on television regarding the *Nirbhya* rape case, *Rohtak* gang rape case and much other incidence of rape. In this article, an effort has been made to deal with the situation if girls or woman got pregnant as result of heinous crime known as rape. 'Rape' not only tarnished the body of the victim rather, the soul too. The incidence of rape are increasing at alarming rate in our society. Even, the commission of such a barbaric act with her body and soul is not the end, the

⁹ (2010) 5 SCC 600.

afterwards series of incidences through which she has to undergo leaves her shattered. Despite, being a victim, she has to tolerate the hatred feelings of the society and sometimes of the family members too. Such an untoward behavior of the society leaves her no option in many cases but to put an end her life.

The victim of rape and his family has to faced many hardships, if as a result of that heinous crime, she conceives a child. In *Suchita Srivastava & Anr. v Chandigarh Administration*¹⁰ a mentally retarded girl of 19-20 year who become pregnant as a result of rape took place with her. In this case, the Hon'ble Punjab High Court allowed the writ filed by the Chandigarh Administration for the abortion of the girl. Thereafter, in appeal Hon'ble Supreme Court discussed substantive questions whether the victim's pregnancy could be terminated even though she had expressed her willingness to bear a child and whether her `best interests' would be served by such termination. Finally, Apex Court reached to the conclusion that the victim's pregnancy cannot be terminated without her consent and proceeding with the same would not have served her `best interests'. Due to her mental condition, she is unable to make distinction between a child born within wedlock or outside the wedlock. But as per the provisions of our existing laws child born to that mentally retarded girl is an illegitimate child. It is unfortunate that by birth the stigma of bastardization attached to that innocent child. In such like situation other question which is required to be discussed is that who will perform parental responsibilities.

In another sensational case, *Premanada Swami's* a godman was charged with the rape of several teenage girls in his *ashram*. It is duly established with the help of DNA test that *Swami Premananda* is a biological father of the fetus as a result of rape of 19-year-old *Arun Jyothi*. There are lot of incidence where the rape of girl or woman was done by number of persons in that situation the condition of the woman is worse as if she conceived a child then which rapists name she would mention in the hospital record and thereafter in the school. No doubt with DNA test the paternity of a child can be established but it will again cause great mental pain and humiliation to that girl or woman and her children. No doubt the children born out of the rape are an illegitimate child but the question which strike in our mind is that whether in our country existing laws are sufficient to meet out the situations faced by that innocent girl and her child. But with heavy heart the researcher wants to submit that at every step of their life they have to faced discrimination and humiliation from the society and even to enjoy the existing laws they have fight for their rights.

Suppose that girl dare to gave birth to that child, then her journey of life will be full of difficulties. First of all she has to face rude behaviors of her family who will force her

¹⁰ AIR2010SC235.

to abort that child. If, she does not agree for this heinous act then she was asked to leave that home in order to create pressure on her. In case that girl to save life of her innocent child left her home then she her struggle starts for the basis necessities of life i.e. food and home. If she managed a house for her stay even then she has to worked to earn her livelihood but in that condition when she has not completed her school or college what type of job she will get. She also required medical assistant which is also not possible without money. Her life will be full of difficulties and humiliation as she decided to gave birth to a child out of wedlock. In these circumstances, how we can expect from the society that it will have any soft corner for that child who born out of wedlock. We all know that for birth of a child only woman is not responsible as we all very well aware about this fact that it is act of two human beings i.e. man and woman. But no such humiliation will be faced by the putative father of that child. That innocent child has to faced lot of discrimination and humiliation for the act done by other. For that rude behavior and discrimination and humiliation our social set up and laws are responsible because still in 21st century we are living in patriarchal social system, in which men are in authority. Therefore, every child right from his or her birth till the end moment of his life is required to disclose the name of father to establish his or her identity in the society.

Conclusion and Suggestion:

aAny discrimination with the innocent child on the basis of his or her birth would also amount violation of his or her Fundamental rights like right to life, right to education and right to live with dignity etc. granted to all the citizen in Indian constitution. Those children which are abandoned by their parents could not enjoy all these fundamental rights. Such type of children who doesn't have family assistance can have social and emotional problems which can jeopardise his complete physical, mental and social well-being later. Human beings, born in any part of the world, are equal in dignity and rights. Earlier, under the English common law the illegitimate child was considered as *filius nullius*. But with the passage of time, the common law changed its attitude towards the illegitimate children. Therefore, in the year 1969 the Family Law Reform Act was passed, which was later on amended relating to the property rights of illegitimate children and of other persons whose relationship is traced through an illegitimate link. By this Act the distinction between legitimate and illegitimate children was vanished. With the help of this law the illegitimate child was put almost on a par with legitimate child in respect of property rights. Thereafter, by passing the Children Act, 1989 the concept of illegitimacy was completely abolished. This Act

introduced a new concept of parental responsibility¹¹ which ensures that a child may have a legal father even if the parents were not married.

In India, we also required such type of laws for the welfare of those children who are born out of the wedlock so they can also live their life with dignity. Proper medical facilities and financial assistance must be provided to those mothers who can not bear the financial burden. The freedom also be provided to those girls or woman if due to certain reasons they do not want to disclose the name of the father of her child and also have capability to child care. Rather, in such like situation mother will be considered as guardian of that child. The single mother concept must be accepted by the Indian society with open-heart. There is also requirement to make specific laws regarding the rights of children born out of the live-in-relationship. It will more appropriate if like United States of America, we also totally removed the distinction between the legitimate and illegitimate children. Illegitimate children also be given the same rights to inherit their parents property as anyone else.

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The Children Act, 1989, Section 3(1): parental responsibility means all the rights, duties, powers, responsibilities and authority which by law a parent of a child have in relation to the child and his property.