



ISSN: 0975-833X

## RESEARCH ARTICLE

# CHANGING DIMENSION OF THE CONCEPT OF MARRIAGE-A CONTEMPORARY CHALLENGE TO INDIAN LEGAL SYSTEM

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### ARTICLE INFO

#### Article History:

Received 19<sup>th</sup> January, 2012

Received in revised form

22<sup>nd</sup> February, 2013

Accepted 14<sup>th</sup> March, 2013

Published online 13<sup>th</sup> April, 2013

#### Key words:

Though Indian society has not accepted such relationship, Children born out of such relationship, Share in property, Stands unanswered.

### ABSTRACT

It is believed that from the time Adam and Eve were born the bond of marriage, the concept of marriage took its birth. Marriage is a sacramental relationship under Hindu law. It is a legal contract under Mahomedan law. Whether it is sacramental relationship or a contract, it has got its own ethics and principles. It is also treated as God made relationship. It is a relationship between a man and a woman, basically to beget children and also share each other companionship through the life. But things are changing. The definition of marriage given under different personal laws does not carry weight age as a new concept called live-in-relationship has been introduced by the young generation to the society. No commitment and no bond in such relationship. It purely based on an oral/written contract. Though Indian society has not accepted such relationship, but the problem pertaining to certain aspects like the status of the children born out of such relationship, share in property, violence against women who is into such relationship, stands unanswered. Our Apex courts decisions pertaining to maintenance, share in property to children born out of such relationship, are in par with the decision given in case of marriage. The matter is also true in case of homosexual marriages. Hence, it would be anathema to hold such relationship in par with marriage.

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## INTRODUCTION

*"Man perfected by society is the best of all animals; he is the most terrible of all when he lives without law, and without justice."* -- Aristotle. Marriages are made in heaven is an old adage. With the dawn of civilization, the concept of marriage and family emerged as basic institutions of the society. The institution of a marriage is an oldest social institution and provides a foundation on which whole superstructure of civilization and prosperity is built. In ancient times marriage was considered as some sort of divinity attached to the institution. Marriage is defined as the "legal status, condition, or relation of one *man* and one *woman* united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."<sup>1</sup> Unfortunately, the concept of marriage and family has undergone considerable changes due to pressure of modern living which is visible slackening of moral standards. A common dictionary of family is "the basic unit in society having two or more adults living together and co-operating in the care and rearing of children". Our young people are changing this definition and the old institution of marriage to a new way of living together called "living-in-relationship". Then again the 21<sup>st</sup> century is also witnessing homosexuality, which is making strides towards equal recognition of their families. All these changes are having serious ramifications on the institution of marriage and try to change the customary concept of marriage.

### Marriage under Hindu Law

According to the tenets of Hinduism, marriage is sacred relationship, a sacrament and a divine covenant meant for procreation and continuation of family lineage.

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Vedic era was considered as golden era of the Hindu society. There were three categories of marriage-Brahma, Asura and Gandharva. According to Brahma Narayan Upanishad, marriage is considered as a sacrament, a holy union, a union of flesh with flesh, bone with bone and soul with soul to continue even in next world. Marriage is one of the essential *sanskaras* (sacraments) for every Hindu. Every Hindu must marry. "To be mothers were women created and to be fathers men, the Vedas ordains that Dharma must be practiced by man together with his wife".<sup>2</sup> Thus, Hindu conceived marriage as a sacramental union, as a holy union. Marriage as a sacramental union implies that it is a sacrosanct. It meant for the performance of religious and spiritual duties and for procreation of legitimate children and continuation of family lineage. It means a lawful union of opposite sex for procreation of legitimate children.

### Marriage under Mahomedan Law

Nikah is an Arabic term used for marriage. Nikah is pre Islamic Arabia different forms of sex relationship between a man and a woman established on certain terms. Under Mohammedan law marriage is a legal contract between bride and bridegroom. The Quran specifically refers to marriage as "Mithaqun Ghalithun" means "a strong agreement". Different authors have defined of marriage under Muslim law. According to Hedaya "Marriage is a legal process by which the several process and procreation and legitimating of children between man and women is perfectly lawful and valid". According to Baillie's Digest, a Nikah in Arabic means "Union of the series" and carries a civil contract for the purposes of legalizing sexual intercourse and legitimate procreation of children. According to Ameer Ali "Marriage is an organization for the protection of the society. This is made to protect the society from foulness and unchastity".<sup>3</sup> Marriage or Nikah among Muslims is a 'Solemn Pact'

<sup>2</sup> Manu, IX, p. 96

<sup>3</sup> Rakesh Kumar Singh, 'A Text book on Muslim Law', Universal Law Publishing, 2011, p. 59.

<sup>1</sup> Black's Law Dictionary 972 (6th ed. 1990)

or 'Mithaq-e-ghalid' between a man & a woman, soliciting each others life companionship, which in law takes the form of a contract.<sup>4</sup>

### Live-in-Relation and the Concept of Marriage

Live-in-relationship is the arrangement in which a man and a woman live together without getting married.<sup>5</sup> Live in relationships, also called as 'cohabitation' is an alternative for marriage, by which two person of same or different sex can live together without any legal rights against each other. Youngsters accept cohabitation to flee from responsibilities and commitment or to explore each other's life before marriage. The legal definition of live in relationship is "an arrangement of living under which the couples which are unmarried live together to conduct a long-going relationship similarly as in marriage."<sup>6</sup> The basic idea of cohabitation or conducting a live in relationship is that the interested couple wanted to test their compatibility for each other before going for some commitment; the other reasons are some financial concerns. Live in relation is a relation in which people of two opposite sex would enter into a written agreement to be friends, live together and look after each other. A change is visible in our society from arranged marriages to love marriages and now to 'live-in-relationships'. If an analysis is made of need of such relationships, *avoiding responsibility* would emerge as the prime reason. The lack of commitment, the disrespect of social bonds and the lack of tolerance in relationships have given rise to alternative to marriages. Live in relation i.e. Cohabitation is an arrangement whereby two people decide to live together on a long-term or permanent basis in an emotionally and/or sexually intimate relationship. The term is most frequently applied to couples who are not married.<sup>7</sup>

### Argument in Favour of live in Relationship over Marriage

**Freedom:** This is the prime benefit of Live in relationship. In this, any of partners neither has to accept any obligations nor has to give up any rights. There is no commitment like marriage; relationship lasts longer if both of them are happy with each other. Live-in relationship offers personal freedom to partners compared to Marriage.

**Responsibility:** There is a very less load of responsibility as compared to marriage. Married people have to manage all the responsibility of family while cohabiters have only their own responsibility.

**Easy to break-up:** It takes a lot of effort and money to dissolve a marriage because it is a very strict and unassailable arrangement. If they decide to dissolve then it is a cumbersome procedure where they have to make arrangements as to custody of children and is expensive as they need to hire a lawyer, calculate maintenance, deal with matrimonial property, etc. But cohabiters can break their relation easily.

**Rehearsal for a married life:** Live-in is the perfect rehearsal of a married life. Partners know each other's common interests and views on money, sex, religion, and politics.

**Easy to change the partner:** If partners could not satisfy or find it difficult to adjust, they can pack their bags any day and move out without doing any legal procedure.

**No legal hassle:** There are absolutely no financial complications, complex negotiations or legal hassle like marriages. The arrangements are similar to a dream come true, like have physical relations, live together, and move out when getting bored.

<sup>4</sup> Section 2 of Muslim Women (Protection of Rights on Divorce) Act, 1986

<sup>5</sup> <http://www.mightylaws.in/705/liveinrelationship-problem-solution> visited on 27/2/2012

<sup>6</sup> <http://blogs.rediff.com/ajay-gautam/2010/07/31/live-in-relationship-living-relationship-definition> visited on 27/2/2013

<sup>7</sup> <http://airwebworld.com/articles/index.php?article=1266> visited on 28/2/2013

### Argument in Favour of Marriage over Live in Relationship

Barnett Bricker, a social analyst states "success in marriage does not come merely through finding the right mate, but through being the right mate". Hence when compared to sacred relationship in marriage live-in-relationship suffers flaws.

**Legal and Social recognition:** It is the main benefit of marriage. Marriage is sheltered by the law and the society respects the relationship. While in Live in relationship, partners can not get this benefit and they don't have their clearly defined obligations and rights. And Indian society being patriarchal in nature doesn't accept such relationship.

**Emotional support and commitment:** Married people give devotion and fidelity to their partners and they can share all their secrets with each other and also share their savings to buy possessions for the family. Live in relationships can not match the legal rights, social recognition and emotional support that provided by a marriage.

**Unconditional sacrament:** In Marriage, Husband and wife are complementary to each other and they prepare to die for each other so the depth of love is supreme which is lacking in live-in-relationship.

**Children's development:** It has been observed by the social researcher that for overall development of the children's, cohabiting of parents is essential. In live-in-relation the situation is complex as the parents may part at any time and the children are in a fix. The bond between the parents plays a pivotal role in the development of a child which is lacking in cohabitation.

**Physical and sexual abuse:** According to some estimates, aggression is at least two times more common among cohabiters than married, so cohabited women have to suffer more from physical and sexual abuse than married women.

**Relationship with parents:** Live in relationships may affect relations with parents. All parents give more support to marriage than the cohabitation. Many Cohabiters loose the support of their parents and family because some families consider that it is morally wrong.

**Economic equality:** Married couples are better in case of economic equality while cohabiters always try to protect their financial futures with separate bank accounts, personnel properties etc.

### Whether Live-in-Relationship Fits Legal definition of Marriage?

#### Under Hindu Law

The 'live- in-relationship' is a living arrangement in which a unmarried couple lives together in a long-term relationship that resembles a marriage. The Hindu Marriage Act 1955 does not recognize 'live-in-relationship'. It threatens the security and stability of institution of marriage in India. Society considers it immoral and hence under Hindu samskara after civilization institution of marriage was introduced. Within this traditional framework, marriage is undoubtedly the most important of all the Hindu samskaras or life cycle rituals.

The institution of marriage found its recognition amongst Hindu Marriage Act. A marriage may be solemnized between any two Hindus if the following conditions are fulfilled<sup>8</sup> viz.-

- Neither party has a spouse living at the time of the marriage-
- At the time of marriage neither party is incapable of giving valid consent to it in consequence of unsoundness of mind; or
- Though capable of giving a valid consent has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children or has been subjected to recurrent attacks of insanity.

<sup>8</sup> Section 5 of the Hindu Marriage Act, 1955.

- The bridegroom has completed the age of 21 years and the bride the age of 18 years at the time of marriage.
- The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of marriage between the two.
- The parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Hence it is submitted that intention alone can neither confer nor take away the status of marriage.<sup>9</sup> If requisite ceremonies are not performed, they cannot claim to be husband and wife whatever might have been their intention.<sup>10</sup> In *Anand Prakash v. Ramadevi*<sup>11</sup>, it was held that the priest must not have performed the marriage without 'shuddhikaran ceremony'. The bare fact of a man and woman living as husband and wife does not at any rate normally give them the status of husband and wife. Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto<sup>12</sup>. Sub-section (2) of section 7 lays down that when such rites and ceremonies include the saptapadi, the marriage becomes complete and binding when the seventh step is taken. The ceremony and rite fall under two heads:

The shastric ceremonies and rites as prescribed by Hindu law, or

- 1.The customary ceremony and rites which prevail in the caste or community to which one of the parties (or both) belongs.
  - 2.Thus, the shastric ceremonies and rites are still necessary. These can be dispensed with only if one of the parties to the marriage can establish a customary in substitution of the shastric ceremony.<sup>13</sup>
- The above decision and the provision of the law depicts that a couple can get the status as married only when they have adhered to the above conditions. In live-in-relationship there is not such ceremony; the couples live in furtherance of companionship and not marriage.

A sacramental marriage among Hindus has thus three characteristics-

- 1.A permanent and indissoluble union.
- 2.An eternal union &
- 3.A holy union.

First element is destroyed by recognizing the concept of divorce, second by widow remarriage and the third by stating living in relationship as equivalent to marriage. Now the concept of live-in-relationship doesn't fit into the definition of marriage under Hindu law. This is when both the parties are Hindus.

#### Under Mohamedan Law

Marriage among Mohamedan is a civil contract. It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be same and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential.<sup>14</sup> As to live in relationship and Mohamedan marriage, in *Ghazanfar v. Kaniz Fatima*<sup>15</sup>, their Lordships of the Privy Council said "The learned judges fully recognized that prolonged cohabitation might give rise to a presumption of marriage, but the presumption is not necessarily a strong one. So live-in-relation is not a marriage or doesn't fit into the concept of marriage even under the Muslim law when the parties are Muslims.

#### Supreme Court and Live in Relation

Yet our Hon'ble Supreme Court in the case of *D. Velusamy v.D. Patchaiammal*<sup>16</sup>, held that, a live in relation is in the nature of marriage and thus stated, a 'relationship in the nature of marriage' under the Protection of Women from Domestic Violence, Act, 2005, must also fulfill the following criteria:

- (a) The couple must hold themselves out to society as being akin to spouses.
- (b) They must be of legal age to marry.
- (c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
- (d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act<sup>17</sup>. Merely spending weekends together or a one night stand would not make it a 'domestic relationship'. It also held that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'.

In *Madan Mohan Singh & Ors v. Rajni Kant & Anr.*,<sup>18</sup> has once again the debate on legality of the Live-in Relationship as well as legitimacy of Child born out of such relationship was questioned. The Court while dismissing the appeal in the property dispute held that there is a presumption of marriage between those who are in live-in relationship for a long time and this cannot be termed as 'walking-in and walking-out' relationship. The Hon'ble Supreme Court accepted the principle that a long term of cohabitation in a live-in relationship makes it equivalent to a valid marital relationship. The Court went further on the issue and stated children born out of live-in-relationship are legitimate and they are entitled to property except right in coparcenary property. In *Bharata Matha & Ors v. R. Vijaya Renganathan & Ors.*,<sup>19</sup> dealing with the legitimacy of child born out of a live-in relationship and his succession of property rights, the Supreme Court held that child born out of a live-in relationship may be allowed to succeed inheritance in the property of the parents, if any, but doesn't have any claim as against Hindu ancestral coparcenary property. These decisions show that live-in-relationship is in par with the marriage. Hence the requirement of marriage as laid down in our personal laws, may be dispensed for various matters like seeking alimony, compensation for domestic violence, legitimacy of children, then the property rights to children born out of such relationship. Marriage whether sacramental or contract was foundation of morality but the above decisions does put us into dilemma as to what is marriage.

#### Homosexuality and Marriage

Same-sex marriage (also known as gay marriage) is marriage between two persons of the same biological sex or gender identity. Supporters of legal recognition for same-sex marriage typically refer to such recognition as marriage equality. The recognition of such marriages is a civil rights, political, social, moral, and religious issue in many nations. The introduction of same-sex marriage has varied by jurisdiction, resulting from legislative changes to marriage laws and court challenges based on constitutional guarantees of equality. Conflicts arise over the issue, whether same-sex couples should be allowed to enter into marriage, be required to use a different status (such as a civil union, which either grant equal rights as marriage or limited rights in comparison to marriage), or not have any such rights. In many countries homosexual marriages have been legalized for the reason that human rights mandate that all should be treated equally. One argument in support of same-sex marriage is that denying same-

<sup>9</sup> *In re Dolgontii*, AIR 1968 AP 117

<sup>10</sup> Paras Diwan, 'Hindu Law', 18<sup>th</sup> ed., Allahabad Law Agency, Faridabad, 2008, p 91.

<sup>11</sup> 1998 HLR p.149 (P&H)

<sup>12</sup> Section 7 of Hindu Marriage Act, 1955.

<sup>13</sup> *Rabindra Nath v. State*, AIR 1969 Cal 55

<sup>14</sup> *Gagu Bibi v. Mesal Shaikh* (1936) 63 Cal. 415.

<sup>15</sup> (1910) 12 BOMLR 447

<sup>16</sup> (2010) 10 SCC 469

<sup>17</sup> Protection of women from Domestic Violence, Act.

<sup>18</sup> AIR 2010 SC 2933

<sup>19</sup> AIR 2010 SC 2685

sex couples legal access to marriage and all of its attendant benefits represents discrimination based on sexual orientation. Another argument in support of same-sex marriage is the assertion that financial, psychological and physical well-being are enhanced by marriage, and that children of same-sex couples benefit from being raised by two parents within a legally recognized union supported by society's institutions. The other arguments for same-sex marriage are based upon what is regarded as a universal human rights issue, mental and physical health concerns, equality before the law.<sup>20</sup> What ever kind of human rights we speak; universally all developed countries have accepted marriage and cohabitation of homosexuals. In India acceptance of such marriage will be difficult as our culture and tradition do not accept such relationships. Homosexuality is treated as crime under our penal system<sup>21</sup> and makes it an offence, commonly known as the 'Anti-sodomy Law'. This section considers "consensual homosexuality as an "unnatural offence" and is punishable with an imprisonment of 10 years. But the recent development of decriminalizing homosexuality in India has raised many eyebrows. It will lead to decrease in the number of traditional marriages and this, in turn, will undermine the whole institution of the family. Recent decision of Delhi High Court<sup>22</sup> where the petitioner submitted that right to privacy is implicit in the right to life and liberty and guaranteed to the citizens, in order to be meaningful, the pursuit of happiness encompassed within the concepts of privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that privacy dignity claim concerning private, consensual, sexual relations are also afforded protection within the ambit of the said fundamental right to life and liberty given under Article 21<sup>23</sup>. If this decision is implemented, than homosexual marriage is not accepted with the ambit of marriage. Hence, homosexuality does not come within the ambit of Article 21 as it is not pursuit human need and is not dignified in the eyes of Indian society. Under Hindu law, marriage with an eunuch is voidable marriage<sup>24</sup>. "Obviously, a marriage between two males or two females is void".

<sup>20</sup> *Loving v. Virginia*. 388 U.S. 1 (1967).

<sup>21</sup> Section 377 of the Indian Penal Code, 1860.

<sup>22</sup> *Naz Foundation v. Government of NCT of Delhi and Others*, SCC, 2009, p.5

<sup>23</sup> *ibid* at 5

<sup>24</sup> Section 5 of Hindu Marriage Act, 1955.

<sup>25</sup> All E R, 1970 p. 83.

<sup>26</sup> 1969, Mad. 124

In an English case, *Corbett v. Corbett*,<sup>25</sup> a marriage between a male and another person who was registered as male at birth had been solemnized and a question as to the validity of the marriage arose, and was held to be void. With the pass of time, western countries have been legalizing such marriages. In *Parnaswami v. Somathammal*,<sup>26</sup> while deciding marriage with eunuch, Madras High Court held that marriage with eunuch or between eunuchs is voidable, but marriage between two persons of the same sex is void *ab initio*. Under Muslim law the provisions are clear that the marriage can be solemnized only between people of different sex.

### Conclusion

Marriage is a culturally sanctioned union between two or more people that establishes certain rights and obligations between the spouses and their children, and between them and their in-laws and with the whole World. The definition of marriage varies according to different cultures, but it is principally an institution in which interpersonal relationships, usually intimate and sexual, are acknowledged. When defined broadly, marriage is considered a cultural universal. Marriage is an institution which can join together people's lives in a variety of emotional and economic ways. Cohabitation is not a pre-requisite of marriage. To consider live-in relationship and homosexuality legality would be as anathema by those who view institution of marriage as relevant and absolutely essential to hold together the social fabric today. Our country is known for its rich culture and heritage. Every effort should be made to stabilize the institution of marriage so that our future generation can stabilize their lives and wind it with morality. Their offspring's would get social status. It is for the youth to build a strong nation and maintain the rich decorum of our culture and heritage. And if live in relationship and homosexual marriages are legalized, then the very definition of marriage put forth in our personal laws needs to be amended or there may be no requirement to define marriage at all. It is to the legislature and the courts to look into the matter seriously and protect the institution of marriage and in the long run the institution of family which is the very basis of sound legal system.

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