

## Challenges Before the Institution of Marriage in the Era of Globalisation

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### Abstract

*Globalisation has set off many social changes and has impacted upon the family in many ways posing a threat to the survival of the institution of marriage. This article discusses the many changes that the institution of marriage faces. Just as marriage is much more than just an institution for legitimate sexual relations, "globalization" too is a phenomenon that involves much more than just the economic dealings between the developed and developing nations. Modern cultural values such as expressive and utilitarian individualism cannot sustain marriage without a public theology of covenant and subsidiarity that defines marriage not only as a deeply meaningful personal and spiritual relationship but as a public institution. Today the question is what kind of institutional support does marriage need. Can we do away with the institution of marriage? The 19th-century antidote to the negative impact of the market on family life was the family model of the breadwinning father and domestic and economically dependent mother is no longer tenable. The 19th-century divided spheres, paternal authority, and power hierarchy should be put at rest. A middle position of a complex cultural transformation to support marriage and a solution for the tensions between work and family wrought by the forces of modernization is the need of the hour.*

**Key words:** *Concept of Marriage, Family, Globalization and Private International Law.*

### I. The Canvas

Marriage is an important social institution of the civilised world. It gives rise to change of status -that of bachelor to "husband", maiden to "wife", and "legitimate" and "Legitimated" (those who are conferred legitimacy under the law of the land) children. Process of globalisation and modernisation has given rise to several possibilities of conceptual changes regarding family that have the potentiality of threatening the stability of the family and quality of marriage.

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Marriage is the coming together of not only two individuals of the opposite sexes and all that it entails, these two individuals also represent two distinct cultures, family traditions and values. On marriage, these two people pass on the combined (or should we say hybrid?) wisdom of their own traditions and experiences to their next generation. This is the basic unit of human society,

In a world where the concept of individual freedom is obtaining ever greater significance in people's lives, the challenges that come with marriage, involving people needing to go beyond their stereotypes, defined comfort zones, has led to an increasing number of people opting out of marriage or staying out of wedlock. Empowerment and education has enabled the women and men alike to make informed choices, express defined needs, and decide on preferred attitudes and lifestyles. Especially in today's world of integration, marriage means the coming together of people with completely different cultural backgrounds age differences, values etc. that may not conform to the so called societal norms. However, the breaking up of families is not a sign of the invalidity of marriage or the family. In a world of changing values, the family, is being restructured. It now requires that those stepping into this fundamental social unit to be more mature and wiser and capable of making informed choices. Gone are the days when the parties to the marriage (specially girls) were merely informed that their marriage has been fixed with "so and so" and "your parents know what is best for you". This is the wisdom that the current generation of parents needs to accept and encourage and pass down to their children.

Just as marriage is much more than just an institution for legitimate sexual relations, "globalization" too is a phenomenon that involves much more than just the economic dealings between the developed and developing nations. What some might label as the "abusive" relations between the "haves" and "have-nots" in today's world should not cause people to want to stop and drop the progress that is being made. Globalisation has the immense potentiality for homogenisation. It can undo hetero culturalism. Give rise to identity crisis of the individuals, extinction of distinct races and cultures.

Globalisation can therefore change the traditional cultural approach to marriage. It will do away with old stereotypes and values. Since it will take some time to adjust to these changes there will be more conflicts of interest. Perhaps personal awareness brought through education, need to be sought after.

Human life is a process of growth and development, and there are certain pains involved when one has to go beyond the comfort zone that one has gotten accustomed to.

Education, employment and empowerment has led to many women being employed. In the event of both spouse being employed, a considerable time is spent in the work place or being apart from each other in two far off places. A person turns to a co-worker to share emotions and alleviate loneliness, in many cases leading to emotional alignment or extramarital relationships. In such situations the marriage may break or subsist with each of the partners continuing with their relationships out of wedlock.

## II. Concept of Marriage

Marriage may be stated to be a voluntary union between two persons to the exclusion of all others. Usually the union is perceived to be between man and woman. But same sex marriages are no strangers.

<b>WESTERN CONCEPT</b>	<b>MUSLIM CONCEPT</b>	<b>HINDUS &amp; BUDDHIST CONCEPT</b>
Contract. Sacrament for the Roman Catholics.	Civil Contract	Sacrament
A monogamous union	Limited or controlled Polygamy	Polygamous prior to 1955 Monogamous after HMA, 1955
Non-dissoluble under Canon Law. Dissoluble under State law-Indian Divorce Act, 1869	Dissoluble under Customary Law & Dissolution of Muslim Marriage, 1939 ; Muslim Women (Protection of Rights on Marriage) Act, 2019	Dissoluble under Hindu Marriage Act, 1955

The union is monogamous for some, controlled and potentially polygamous for others and polyandrous for yet others. When person from these trans-border communities enter the institution of marriage there are cultural challenges. Because each community recognise different grounds of divorce there are litigational complications. The formal validity of marriage and the material

validity of marriage differ from country to country and community to community.

### **A. English Position**

In English law marriage is defined as a voluntary union between a man and a woman to the exclusion of all others. This definition leads to hardship in relation to polygamous marriages.

In *Hyde v. Hyde*<sup>2</sup>, a husband of a potentially polygamous Mormon marriage performed in Utah, petitioned for divorce in an English court. After renouncing his faith, the groom became a dissenting minister at Derby, and the wife remarried. The English court refused to recognise polygamous union and did not make available their matrimonial jurisdiction to the case.

In *Harvie v. Farnie*<sup>3</sup> the Court of Appeal took an extreme view that polygamous marriages could not be recognised for any purpose. According to the judges, the nature and incidence of marriage is determined by *lex loci celebrationis* and the characterisation of marriage whether it is monogamous or polygamous is determined by *lex fori*. Even if there was a possibility of converting a polygamous marriage into a monogamous marriage, due to the potentially polygamy marriage remained a polygamous union and could not thus be recognised.

The English courts did not even recognise those marriages where the personal laws permitted only monogamous marriage but allowed concubines holding them to be polygamous in nature<sup>4</sup>. If the person whose personal laws allowed only monogamous marriage but the person got married in a place where polygamous marriage is prevalent the English courts still did not recognise such a marriage<sup>5</sup>. However, a contrasting view was taken by Lord Denning in

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<sup>2</sup> L. R. (1866)1P. M. 130.

<sup>3</sup> L. R. (1880) 6 P & D 35 on appeal (1882) 8 A. C. 43.

<sup>4</sup> *Lee v. Lau*, (1964) 2 All E. R. 248.

<sup>5</sup> *Re Bethelle*, (1887) 38 Ch. D. 220, where a marriage solemnized between a Englishman domiciled in Bechuanaland married a woman belonging to Barlong tribe was not recognised by an English court. However a contrasting view was taken by Lord Denning in *Kenward v. Kenward*, (1951) held that a marriage solemnized in a polygamous form in a country where polygamy is lawful between a domiciled

Kenward v. Kenward, (1951) where he held that a marriage solemnized in a polygamous form in a country where polygamy is lawful between a domiciled Englishman and a woman domiciled there belonging to a community that recognizes polygamy should be recognised. After 1972, the English Courts recognise all monogamous marriages<sup>6</sup> and now it is not necessary that the union should be a “permanent union” all that is necessary for recognition now is that when entered into, it must be for an “indefinite duration” even if it is dissoluble in future at the instance of either or both of the parties. It is now a settled principle that whether a marriage is of a definite<sup>7</sup> or indefinite duration, Dissoluble or not it is governed by *lex loci celebrationis*.

### B. Indian Position

In India the institution of marriage is governed by personal laws which vary from sect to sect, religion to religion, hence there is no single or uniform concept of marriage.

RELIGION	CONCEPT
<b>HINDU</b>	Governed by the Hindu Marriage Act, 1955. Monogamous, sacrament with elements of contract. Marriage is dissoluble. Act applies to any two Hindus whether domiciled in India or not, whether Indian nationals or foreigners. May be solemnized by customary rites of either party to the marriage. The Act defines who is a Hindu
<b>Muslim</b>	Ibadat (prayerful submission) and a civil contract whose objective is procreation of children and legalization of children. Written contract is called Nikahnama. Muslims practice limited or controlled polygamy. Marriage may be solemnized between a Muslim and a kitabia. It may be sahih, fasid or kharij. Shias may enter into temporary marriage i. e. muta marriage. Marriage is dissoluble
<b>Christian</b>	Marriage solemnized under Christian Marriage Act, 1872. Marriage may be solemnized by a registrar or a priest licensed to do so. Marriage with a non Christian is permitted

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Englishman and a woman domiciled there belonging to a community that recognises polygamy should be recognised.

<sup>6</sup> Thus Chinese, Japanese, Jewish, Hindu marriages are recognised.

<sup>7</sup> Like mutha marriage among the shia muslims.

	only under the Act. Marriage is dissoluble
<b>Parsi</b>	Monogamous union. A contract. A religious ceremony is also essential called Ashirbad. Regulated by Parsi Marriage and Divorce Act, 1936. Marriage can be performed between two Parsees. A Parsee cannot marry under any law during his life time if he has a spouse living. Marriage is dissoluble
<b>Jew</b>	A contract. A written contract is called Katuba. A religious ceremony is also essential. Marriage is dissoluble.
<b>Secular law</b>	Special Marriage Act, 1954. Any two persons may marry. Marriage is dissoluble.
<b>Foreign Marriage</b>	The Foreign Marriages Act, 1969 facilitates the marriage of an Indian national in a foreign country with another Indian National or a foreigner or a person domiciled in that country. The marriage is a contract, monogamous, registerable under the Act provided the marriage is valid under <i>lex loci celebrationis</i> . Marriage is dissoluble.

Since inter community, inter religious or inter caste marriages are not recognized under the respective personal laws but may be solemnized under the Special Marriage Act, 1954, direct conflict seldom occurs but is not unknown.

### III. Characterisation of Nature of Marriage

#### A. English Position

The most vexed questions are under which law the nature of marriage is to be characterized? Should it be personal laws of either parties, or pre-marriage domicile, or law of matrimonial home, or *lex loci celebrationis*.

It was decided by the English courts that *lex fori* decided the nature of marriage. So if a Muslim married at a registry office, then the marriage would be monogamous<sup>8</sup> and if an English man married in Pakistan then the marriage would be polygamous<sup>9</sup>.

The English law has now come to recognise all the marriages both polygamous and monogamous under the Matrimonial Proceedings (Polygamous Marriages) Act, 1972. The Act empowers courts in England, Wales, Northern Ireland, and

<sup>8</sup> Russ v. Russ (1964) K. B. P. 135.

<sup>9</sup> Re Bethelle, (1887) 38 Ch. D. 220.

Scotland to grant matrimonial relief to parties of marriages whose legal system permits polygamy and irrespective of the fact whether the marriage was potentially polygamous or in fact polygamous<sup>10</sup>. And these provisions apply even when there is a spouse living.

It was held that existence of another spouse does not amount to bigamy<sup>11</sup>.

### **B. Indian Position**

The problem of characterisation occurs when one of the spouses converts to another religion. In such a situation, the question is what law applies under such a situation? The law applicable before conversion or the law after conversion?

Initially the court was of the opinion that the law of the religion after conversion applies<sup>12</sup>. However the opinion of the court changed in *Saeeda Khatun v. Ovedia*<sup>13</sup> when the court held that if both the spouses convert then they are governed by the law of the religion to which they are converted. However, if one of the spouse convert, then the personal law prior to conversion apply. It is to be noted that all the personal laws allow divorce on the ground of conversion.

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<sup>10</sup> Sections 1, 2, 3 & 4 ; Now corresponds to Section 47, Matrimonial Causes Act, 1973  
Section 1 (1)- A court in England and Wales shall not be precluded from granting matrimonial relief or making a declaration concerning the validity of marriage by reason only by reason only of that marriage was entered into under a law which permits polygamy. Sections 2 say the same thing in respect Scotland and Section 3 says the same about Northern Ireland.

Section 1 (2)- Defines "Matrimonial Relief" as:

- a. A decree of divorce, nullity of marriage, or judicial separation
- b. A decree under Section 14 of Matrimonial Causes Act, 1965 –Dissolution of marriage on presumption of death.
- c. An order under Section 8(willful neglect to maintain) and Section 14 (Alteration of maintenance agreement) of Matrimonial Proceeding for property Act, 1970.
- d. An order under Acts of 1965, 1970 and Divorce Reforms Act, 1969 with regard to above matters
- e. An order under Matrimonial Proceedings (Magistrates Court) Act, 1960.

All this is now Section 47, Matrimonial Causes Act, 1973.

<sup>11</sup> *R v. Sagoo*, (1975) K. B. P. 885.

<sup>12</sup> *Khambatta v. Khambatta*, AIR 1935 Bom. 5, *Nurjahan v. Tisanco*, (1941) 45 CWN 1047

<sup>13</sup> (1945) 49 CWN 754.

Under the Native Convert's Dissolution of Marriage Act, 1886, if one of the native spouse belonging to Hindu or Parsi community converts to Christianity, and on account of this if the other abandons him or deserts him for six months or more, then a decree of divorce can be passed on the petition of the convert-spouse. If the respondent is wife, then the court allows her one year's time to enable her to convert to the religion of the husband or cohabit with her husband. If she fails, the divorce is granted.

#### **IV. Characterisation of Validity of Marriage**

The issue of validity of marriage has two aspects:

1. The parties to the marriage must have capacity to marry. This is called the essential or material validity of marriages
2. Parties must have performed the necessary ceremonies and rites of marriage. This is called the formal validity of marriage

If any of the above requirements is not fulfilled, the marriage is void. The question is by what law the formal and/or material validity is to be characterised? Moreover the same matter may be of formal validity in one country and of material validity in another<sup>14</sup>.

According to Graveson<sup>15</sup>, a functional test must be resorted to which will disclose the reason for a legal system to hold something as material in importance and others as mere formality. These requirements depend on the degree of public or social interest attached to it. Those practices which are considered to be important for maintaining a minimum standard in marital/family relationship is considered to be of material. They can be matters of consanguinity, religion, etc. Matters of less vital social interest would be issues like length of notice before marriage; number of witnesses is formal validity and depends upon the law of the place of celebration.

Under which law the classification of marriage is to be made. Graveson says that it must be as per the law of domicile of each party to the marriage since

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<sup>14</sup> Ogden v. Ogden, (1908) L. R. P. 48, where parental consent was characterized as material validity in France but formal validity in England.

<sup>15</sup> Graveson, Conflict of law, p. 262.

material matters are determined according to their personal laws. Cheshire<sup>16</sup> opines that it should be determined by the law of matrimonial home. The English view is where either or both parties are English subjects the characterisation should be according to English law.

Now it is established that the material validity of a marriage in private international law is determined by law of domicile of each party at the time of marriage i. e. by pre marriage domicile and the formal validity of marriage is determined by the *lex loci celebrationis*.

#### **A. Material Validity of Marriage**

##### ***English Law***

As a general rule, capacity to marry is governed by the ante nuptial domicile of each party.

**i. Consent of Parties:** Consent of the parties to the marriage has been characterised as a matter of essential validity and is governed by ante nuptial domicile of each party.

**ii. Non-Age:** Age of marriage differs from country to country. A marriage will be considered valid if the age of consent is valid in the country of one of one of the parties, then the marriage will be considered valid.

**iii. Prohibited Degree:** Performance of marriage within prohibited degree of relationship is governed by the ante nuptial domicile of each party.

##### ***Indian Law***

Capacity is governed by various personal laws prevailing in India.

#### **B. Formal Validity of Marriage**

Formal validity of law is governed by *lex loci celebrationis*.

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<sup>16</sup> Cheshire, Private International Law, P. 277.

### C. Other Challenges

#### *The Challenge of Gay Marriages*

On 2 July 2009<sup>17</sup>, the Delhi High court decriminalised homosexual intercourse within its jurisdiction of the national capital between consenting adults and judged Section 377 of the Indian Penal Code violates the fundamental right to life and liberty and the right to equality as guaranteed by the Constitution of India. Even so, Indian views on sexuality remain widely very conservative, and homosexuality is generally considered to be a taboo. However, this verdict can only be considered as a temporary relief for the gay community in India. The main reason to consider this as temporary is because the then ruling UPA government did not have a strong stand in the issue.

Prime Minister Manmohan Singh said that legalizing homosexuality will not be appreciated in India as we are culturally very different society. Contrastingly the then Health minister under his government, Dr. Anbumani Ramadoss advocated decriminalizing homosexuality but he faced stern opposition from the home ministry. Even now after Delhi high court's verdict no one from the ministry gave direct support to the LGBT community. Today the government is like a cat on a wall on this issue. "The law is settled, either with or without the Navtej Johar case (a reference to the judgment decriminalizing homosexuality), personal laws are settled and marriage, which is contemplated, is between a biological man and biological woman," solicitor general Tushar Mehta told a bench of chief justice DN Patel and justice Jyoti Singh. The bench was also hearing a plea by three persons, Joydeep Sengupta, an OCI (overseas citizen of India), Russell Blaine Stephens, a US citizen, and Mario D'Penha, an Indian citizen and queer rights academic and activist pursuing a PhD at Rutgers University, for allowing a foreign-origin spouse of an OCI cardholder apply for registration regardless of gender or sexual orientation.<sup>18</sup>

Same-sex marriages are not legally recognised in India nor are same-sex couples offered limited rights such as a civil union or a domestic partnership. In

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<sup>17</sup> Naz Foundation v. Govt of NCT in Delhi and others, WP(C) No.7455/2001, Navtej Singh Johar vs Union of India Ministry of Law and justice on 6 September, 2018.

<sup>18</sup> <https://www.hindustantimes.com/india-news/samesex-marriage-plea-only-marriage-between-man-woman-valid-says-centre-in-delhi-high-court-101635188830742.html>  
Retrieved 10 February 2022.

2011, a Haryana court granted legal recognition to a same-sex marriage involving two women<sup>19</sup> and it will not be long before India will have to recognise same sex marriages. That day the concept of marriage will undergo further transformation. The laws relating to marriage will require further evaluation.

And religion, why do religion come into the picture in a secular country while making law? India has Hindu Marriage Act, 1955; Christian Marriage Act, 1872; and Parsee Marriage and Divorce Act, 1936. And there is also the Special Marriage Act, 1954. As per the current marriage acts a person can get married as per the marriage act of their faith they belong to or under the Special Marriage Act, 1954. There is going to be no change in their marriage law even if a new LGBTQ Marriage Act is introduced. There are many instances when the cultural and religious protocols were broken when it was realized that they were gross mistakes (like polygamy, kulinism, widow remarriage). Now it's again time to make another mistake disappear. Reasons to legalize gay marriage are not limited and the LGBT community should not be marginalized.

In staunchly conservative India, where heterosexual marriage is viewed as a cornerstone of family structure, the thought of a same-sex couple raising a child once seemed unthinkable. But today surrogacy and adoption are encouraged and legally regulated practices. Recognising same sex marriages should not be a problem. For India's gay community, the joy that greeted the court ruling legalizing gay sex is tempered by the fact that, although the law now accepts them, society still does not.

For all the celebrations and talk of an historic milestone, many believe it will take more than a court decision to change public attitudes toward homosexuality, which is largely taboo in India even after the judgment of the apex court. Although the Delhi High Court's verdict has served as a morale booster for men and women who lived in constant fear of being criminalized, they say it is unlikely to encourage those in the closet to come out.

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19 *"In a first, Gurgaon court recognizes lesbian marriage - Times of India". The Times of India. Retrieved 10 February 2022.*

#### **D. The Challenge of “Living Together”**

In a nation that frowns on premarital sex and prefers arranged marriages, more young, unmarried couples are choosing to live together, oftentimes quietly. Though nascent, the “live-in” phenomenon is part of India’s huge social and economic transition and impact of globalisation.

Youngsters are leaving small towns and swarming the booming metropolises in search of employment. This demographic exodus is bringing about changes in social attitudes through its mobility. These young Indians are free not only to choose their careers and how they spend their money, but also to pick whom they love and decide whether to marry or live together.

In the landmark case of *S. Khushboo v. Kanniammal*<sup>20</sup>, the Supreme Court held that a living relationship comes within the ambit of *Right to Life* under Article 21 of the Constitution of India. The Court further held that live-in relationships are permissible and the act of two major living together cannot be considered unlawful or illegal.

In *Indra Sarma v. V.K.V. Sarma*<sup>21</sup>, the Supreme Court laid down the conditions for live-in relationships that can be given the status of marriage. A two-Judge bench of the Supreme Court constituting of K. S. P. Radhakrishnan and Pinaki Chandra Ghose held that “*when the woman is aware of the fact that the man with whom she is in a live-in relationship and who already has a legally wedded wife and two children, is not entitled to various beliefs available to a legally wedded wife and also to those who enter into a relationship in the nature of marriage*” as per provisions of Protection of Women from Domestic Violence Act 2005.

In a landmark judgement of *Dhannu Lal v. Ganeshram*<sup>22</sup>, the Supreme Court decided that couples living in live-in relationships will be presumed legally married. It was also held that the woman in the relationship would be eligible to inherit the property after the death of her partner.

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<sup>20</sup> Criminal appeal no. 913 of 2010 (arising out of slp (crl.) No. 4010 of 2008].

<sup>21</sup> In the supreme court of India criminal appellate jurisdiction criminal appeal no. 2009 of 2013 @ special leave petition (Crl.) No.4895 of 2012).

<sup>22</sup> Civil Appeal No.3410 & 3411 of 2007.

Meanwhile, many of the old mores prevail in rural India. Young couples who fall in love, defying strict caste codes and their parents' views, often face social ostracism and even honour killings. Despite the dramatic shift in attitudes among young Indians, their faith in the age-old tradition of arranged marriages endures.

### **V. Postscript**

Families, today, are disrupted by divorce, out-of-wedlock births, the emerging culture of non-marriage, and the increasing absence of fathers from their children. The collapse of marriage is also a contributing factor to world poverty. Modern cultural values such as expressive and utilitarian individualism cannot sustain marriage without a public theology of covenant and subsidiarity that defines marriage not only as a deeply meaningful personal and spiritual relationship but as a public institution. Today the question is what kind of institutional support does marriage needs. Can we do away with the institution of marriage? The 19th-century antidote to the negative impact of the market on family life was the family model of the breadwinning father and domestic and economically dependent mother. A strong antithesis to an unmitigated market economy today, however, cannot be sustained by this family model alone. The women's movement questions the subordination of women which this arrangement implies, and accepts the disruptions that market employment and market-driven consumption have visited on families. Increased divorce, later marriages, more single parenthood, and stepfamilies are seen simply as "family change" and fitting tradeoffs for the increased freedom and autonomy of women. Some Social scientists differ as to the societal options before this dilemma. Some say there is little to do to stem the tide of family disruption. Society must provide social supports for disrupted families. Others call for a return to the 19th-century divided spheres, paternal authority, and power hierarchy. Yet others suggest a middle position of a complex cultural transformation to support marriage and calls for a solution of the tensions between work and family wrought by the forces of modernization. Religion is dispensable for a solution that goes beyond the tendency of modern life to reduce problem-solving to the right set of technical and economic fixes.