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Women Victims of Marriage: A Clarion Call for International Status of Marriage

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ABSTRACT

There is no chance for welfare of the World unless the condition of women is improved. It is not possible for a bird to fly on only one wing."

– *Swami Vivekananda*

As observed by Swami Vivekananda, about one-half of mankind is suffering from prejudice, discrimination and oppression in a male dominated society. Thus, there are grave inequalities between nations and there are also serious inequalities within the nations and everywhere women are lacking in position, power and overrepresented amongst the poor. There is growing evidence showing that women tend to represent the highest proportion of claimants in family disputes. Family law is, therefore, a critical avenue for transforming women's lives. This article unpacks subtle violations of women's rights in the private domains of marriage and family. The family domain is a space in which women's rights are violated.

The central question revolved in the researcher's mind is whether the Overseas Indian marriages cause any problem so far as it relates to rights of women in international scenario or how much do the Overseas Indian marriages protect the rights of women? Is there any legislation regarding Overseas Indian marriages and what is the international perspective? To get answer to this problem, this research is conducted.

In this study, it will be shown why the legislation relating to Overseas Indian marriages in the 21st Century becomes an integral part of marriage institution and how it gains the attention of Sociologists and Law Reformers that rights of women should be protected throughout the World. It will make an analysis of the various statutory provisions pertaining to marriage institution under various personal laws. This would enable to make appropriate modifications in existing legal provisions, and in the absence of any such legal provisions, the urgent need for Statutory provision relating to Overseas Indian marriage and international status of marriage.

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I. INTRODUCTION

Law is derivative of and independent upon social, environmental and human factors at a given time and place. Law does not operate in a vacuum, it has to reflect societal values, attitudes and behaviour. ***“The Law Is a Living Growth, Not a Changeless Code”***.² Law endeavours to mould and control these values, attitudes and behavioural patterns so that, they flow in a proper channel. There is growing evidence showing that women tend to represent the highest proportion of claimants in family dispute.³ Therefore, Family Law is a crucial avenue for transforming women’s lives. *The present study is primarily based on the examination of case laws, various legislations, books, journals and articles. The research is based on doctrinal research method.*

(A) Methods or Techniques of Data Collection

The primary sources of this study are all the major substantive Marriage Laws, viz., The Hindu Marriage Act, 1955⁴; The Special Marriage Act, 1954⁵; and many Government Reports. As regards the Procedural Laws in India, our primary source is Code of Criminal Procedure, 1973⁶ as amended up to date; and notification and orders issued by the Ministry of External Affairs, Government of India from time to time. The Parliamentary Standing Committee on External Affairs of India recently approved the Registration of Marriage of Non-Resident Indian Bill, 2019. Various International Documents such as Universal Declaration of Human Rights, 1948⁷ (UDHR); Convention on the Elimination of All Forms of Discrimination against Women, 1979⁸ (CEDAW); International Covenant on Civil and Political Rights, 1966⁹ (ICCPR); International Covenant on Economic, Social and Cultural Rights, 1966¹⁰ (ICESCR); Convention on the Nationality of Married Women, 1957¹¹; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962¹²; and related United Nations

² Benjamin N. Cardozo, *The Growth of the Law*, v (New Haven and London Yale University Press, 1924).

³ A Practitioner’s Toolkit on Women’s Access to Justice Programming, *MODULE 2: Marriage, Family and Property Rights (The United Nations Entity for Gender Equality and the Empowerment of Women, The United Nations Development Programme, The United Nations Office on Drugs and Crime and The Office of the United Nations High Commissioner for Human Rights) UN Women: ISBN-13: 978-1-63214-116-3, OHCHR: HR/PUB/18/2, 2018 United Nations*; available at https://www.unodc.org/pdf/criminal_justice/WA2J_Consolidated.pdf

⁴ Act 25 of 1955.

⁵ Act 43 of 1954.

⁶ Act 2 of 1974.

⁷ United Nations General Assembly Resolution 217 A (III), December 10, 1948.

⁸ United Nations General Assembly Resolution 34/180, December 18, 1979.

⁹ United Nations General Assembly Resolution 2200 A (XXI), December 16, 1966.

¹⁰ United Nations General Assembly Resolution 2200 A (XXI), December 16, 1966.

¹¹ 309 U.N.T.S. 65, entered into force on August 11, 1958.

¹² United Nations General Assembly Resolution 1763 A (XVII), November 7, 1962.

General Assembly resolutions and recommendations have also been taken into account.

Secondary sources of data have been taken from books, journals, articles of various authors; encyclopaedias, dictionaries; and from Internet. The secondary sources of law are those publications which refer and relate to the law while not being themselves primary sources.

(B) Review of Literature

For the preparation of the present research paper, text books and articles played a pivotal role. Judicial pronouncements also help to give shape this paper. A large number of works have undertaken on the sufferings of women in the arena of family law. But the following works have not explored all the aspects of law relating to marriage and the typologies of problems in NRI marriages.

Ahmed, Aqil in his book *Mohammedan Law (Central Law Agency, 23rd ed. 2009)* vividly discussed the law relating to marriage, dower, guardianship, divorce, inheritance, succession relating to Mohammedan.

Cardozo, Benjamin N. in his book *The Growth of the Law (New Heaven and London Yale University Press, 1924)* elucidates the need of a philosophy of law as an aid to growth, the problems of legal philosophy and the meaning and genesis of law. In this book the author authoritatively discussed the growth of law and the methods of judging and the functions of law.

Cardozo, Benjamin N. in his locus classicus *The Nature of Judicial Process (Yale University Press, U.K. 1961)* vividly discussed the subconscious elements of judicial process, method of philosophy and how Judges play a crucial role as a Legislator and the importance of Precedent.

Diwan, Paras in his book *Law of Marriage & Divorce (LexisNexis, 7th ed. 2016)* elucidates the concept of marriage and divorce laws in the arena of various personal laws (Hindu, Muslim, Christian and Parsi Law of Marriage and Divorce) which helps the researcher to conduct this research work.

1. Concept of Marriage under Different Personal Laws

Marriage is not a linear or monolithic institution. Its different forms present both opportunities and challenges for women.¹³ It provides a foundation on which the whole structure of civilization is built. Different Personal Laws have given different meanings to the concept of marriage ranging from sacramental to contractual union. Now, it becomes necessary to know

¹³ *Ibid.*

the meaning of 'marriage'.

II. MEANING OF 'MARRIAGE'

The *Black's Law Dictionary*¹⁴ defined the word 'marriage' in the following words –

- (1) "The legal union of a man and woman as husband and wife.
- (2) 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.
- (3) A contract, according to the form prescribed by law, by which a man and woman capable of entering into such contract, mutually engage with each other to live their whole lives (or until divorced) together in a state of union which ought to exist between a husband and a wife.
- (4) The act, ceremony, or formal proceeding by which persons take each other for husband and wife."

(A) Marriage under Hindu Law (Vivah)

Hindu marriage refers to *kanyadan*¹⁵. The Sanskrit word 'Vivah' literally means the ceremony of 'carrying away' the bride to the house of bride-groom. Though the Hindu Marriage Act, 1955¹⁶ has not defined the term 'marriage' but laid down certain conditions¹⁷ for a valid Hindu marriage. These are –

- (1) *Monogamy*¹⁸ – Neither party should have a spouse living at the time of marriage.¹⁹ If anyone contravenes this provision such marriage will be *void*.²⁰
- (2) *Soundness of mind* – (a) Neither party at the time of marriage should be incapable of giving a valid consent in consequence of unsoundness of mind; or (b) Neither party at the time of marriage though capable of giving a valid consent, should be suffering from mental disorder of such a kind or to such an extent that he or she becomes unfit for marriage and procreation of children; or (c) Neither party at the time of marriage should

¹⁴ Henry Campbell Black, *Black's Law Dictionary* 972 (St. Paul, Minn. West Publishing Co., 6th ed. 2nd Reprint 1990).

¹⁵ *Kanyadan* is a gifting (daan) of a daughter (Kanya) by her father to the bride-groom with all the tradition and rites or custom.

¹⁶ Act 25 of 1955.

¹⁷ Section 5, *The Hindu Marriage Act, 1955*.

¹⁸ The practice of marrying to one person at a time.

¹⁹ Clause (i), Section 5, *The Hindu Marriage Act, 1955*.

²⁰ Section 11, *The Hindu Marriage Act, 1955*.

be suffering from the recurrent attacks of insanity.²¹ If anyone contravenes this provision such marriage will be **voidable**²² at the option of the party.²³

- (3) *Age* – The bridegroom must have completed the age of twenty-one years and the bride, the age of eighteen years at the time of marriage.²⁴ If anyone contravenes this provision such marriage will be neither void nor voidable, but punishable. But after the passing of the **Prohibition of Child Marriage Act, 2006**²⁵; it is provided that every child marriage is **voidable** at the option of the contracting party who was child at the time of solemnization of marriage.
- (4) *Beyond the degrees of Prohibited Relationship* – The parties should not be within the degrees of prohibited relationship *unless* the custom or usage governing each of them permits of a marriage between two.²⁶ If anyone contravenes this provision such marriage will be **void**.²⁷
- (5) *Beyond Sapinda Relationship* – The parties should not be *sapindas* of each other, *unless* the custom or usage governing each of them permits of a marriage between two.²⁸ If anyone contravenes this provision such marriage will be **void**.²⁹

(B) Marriage under Muslim Law (Nikah)

The Arabic term '*nikah*' literally means the union of sexes and in law this term means 'marriage'. Thus, *nikah* is a civil contract made between two persons of opposite sexes with the object of legalising sexual intercourse, procreation of children and legitimation of children.³⁰ Following are the essentials of marriage under Muslim Law –

- (1) There should be a proposal (*Ijab*) by or on behalf of one of the parties to the marriage;
- (2) There should be an acceptance (*Qabool*) of the proposal by or on behalf of the other party to the marriage;

²¹ Clause (ii), Section 5, *The Hindu Marriage Act, 1955*; By the Amendment Act of 1999, the word "epilepsy" in Clause (ii) of Section 5 has been omitted.

²² It can be avoided. It depends on the choice of the aggrieved party.

²³ Section 12, *The Hindu Marriage Act, 1955*.

²⁴ Clause (iii), Section 5, *The Hindu Marriage Act, 1955*

²⁵ Act 6 of 2007.

²⁶ Clause (iv), Section 5, *The Hindu Marriage Act, 1955*.

²⁷ Section 11, *The Hindu Marriage Act, 1955*.

²⁸ Clause (v), Section 5, *Supra*

²⁹ Section 11, *The Hindu Marriage Act, 1955*.

³⁰ The provisions of '*Nikah*' apply to all Mohammedans in India, except those who are married under Special Marriage Act, 1954.

- (3) The *Ijab* and *Qabool* may be either oral or in writing. Where it is laid down in a written document, such a document is called *Kabin-nama* which is an important documentary evidence of marriage;³¹
- (4) There must be reciprocity between *Ijab* and *Qabool*. The acceptance must not be conditional. For e.g., where A offers to marry B on Rs.3000/ as dower and B accepts the proposal on condition that Rs. 5000/ should be paid to her as dower, there is no reciprocity between offer and acceptance, and therefore, there is no marriage;
- (5) The *Ijab* and *Qabool* must both be expressed at one meeting. A proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage (*Nikah*);
- (6) The *Ijab* and *Qabool* must be made in the presence of two male or one male and two female witnesses. Under *Sunni Law*, absence of witnesses does not render marriage void but irregular. But under *Shia Law*, witnesses are not necessary at the time of marriage. But when the guardian of a minor contracts the marriage on his or her behalf, such marriage also requires two adult witnesses;
- (7) The witnesses must be of a person of sound mind, adult and Muslims;
- (8) The parties contracting a marriage must be acting under free will and consent;³²
- (9) The parties to a marriage must be competent, that is the parties must be Muslim, of sound mind and should attain the age of puberty³³;
- (10) Neither writing nor any religious ceremony is essential;
- (11) The words with which the marriage is contracted must be clear and unambiguous;
- (12) Dower³⁴ should be specified.
- (13) If the parties to marriage are minor or lunatic, then their marriage may be contracted by their guardian. It should be noted that the marriage of a minor without the consent of the guardian is invalid unless it is ratified after the attainment of majority.³⁵

The Dissolution of Muslim Marriage Act, 1939³⁶ provides that in order to exercise this right (*Option of Puberty*³⁷) by a woman, three conditions must be fulfilled –

³¹ Aqil Ahmed, *Mohammedan Law* 115 (Central Law Agency, 23rd ed. 2009).

³² The consent of the parties should be free without fear or undue influence or fraud;

³³ *Puberty* means the age at which a person becomes capable of performing sexual intercourse and procreating children.

³⁴ *Dower* or *Mahr* is a sum that becomes payable by the husband to the wife on or after marriage, either by agreement between the parties or by operation of law. Dower may be of two kinds – *Prompt Dower* (Payable at the time of marriage) and *Deferred Dower* (Payable at the time of dissolution of marriage).

³⁵ *Abdul Kasem v. Jamila Khanum*, AIR 1940 Cal 251.

³⁶ Act No. 8 of 1939.

³⁷ '*Option of Puberty*' is the right of a minor boy or girl, whose marriage has been contracted through a guardian, to repudiate or confirm the marriage on attaining puberty.

- (a) The marriage took place before the age of fifteen years,
- (b) She repudiated the marriage before attaining the age of eighteen years, and
- (c) The marriage has not been consummated.

If any of these requirements of '*Nikah*' is not fulfilled the marriage becomes either void or irregular, as the case may be. On the basis of the validity, a marriage may be of three kinds under Sunni Law, namely – 1) Valid Marriage (*Sahih*); 2) Void Marriage (*Batil*); 3) Irregular or Invalid Marriage (*Fasid*). It may be remembered that the Shia Law does not distinguish between void marriage and irregular marriage. According to Shia Law, marriage may only be either – (a) Valid (*Sahih*) or (b) Void (*Batil*). So, a marriage, irregular under Sunni Law, will be void under Shia Law. However, a marriage without witnesses is irregular under Sunni Law, but valid under Shia Law.

Apart from these three kinds of marriage, there is another kind of marriage under Muslim Law, known as '*Muta Marriage*'. Muta marriage is a kind of “temporary marriage” recognised in the Shia Law. The term *Muta* implies ‘enjoyment’ or ‘use’ or ‘marriage for pleasure’. It is not recognised in Sunni Law. So, Muta marriage is void under the *Sunni Law* but valid under *Shia Law*. The specified period may be a day, a month or a year or a term of years.

(C) Marriage under Christian Law

With the advent of Christianity all over the world, marriage came to be regarded as sacrament, with its concomitant doctrine of indissolubility of marriage and the Church of Rome became the supreme ecclesiastical authority in matrimonial matter also. Under Christian law, “marriage is a sacramental and indissoluble union likened the relationship of man and his wife to that of Christ and His Church”. Thus, marriage became a holy and hallowed institution – a mystic union of soul and body never to be put to an end. There was no escape from the holy tie of marriage, only death could put it apart.³⁸ Both Hindu and Christian agree that marriage being a sacrament is sacrosanct and inviolable union.³⁹ The only difference between the Hindu concept and the Christian concept of marriage is that the former regard it as an immutable union, a union for all lives to come, thus death did not dissolve it; while the latter considered it to stand dissolved on the death of either party.

In India, the law relating to solemnization of marriages of persons professing the Christian religion⁴⁰ is recognised under the Indian Christian Marriage Act, 1872⁴¹. Under this Act, among

³⁸ Paras Diwan, *Law of Marriage & Divorce* 17 – 18 (LexisNexis, 7th ed. 2016).

³⁹ *Ibid.*

⁴⁰ Preamble, *The Indian Christian Marriage Act, 1872*.

⁴¹ Act 15 of 1872.

the Indian Christians, *marriage is regarded as a civil contract*, though it is solemnized by Minister of religion licensed under the Act, 1872. It can also be solemnized by the Registrar of Marriages. Section 4 of the Act, 1872 lays down certain conditions for a marriage to be valid. These are –

- (1) The parties to the marriage must be Christian as defined under Section 3⁴² of the Act or at least one of them must be a Christian;
- (2) The marriage must have been solemnized in accordance with the provisions of Section 5 of the Act by a person duly authorised to do so; and
- (3) The marriage must be performed in a particular form duly entered in the Marriage Register, maintained for this purpose.

Section 60 lays down certain *conditions of marriage for Indian Christian*. These are – Every marriage between Indian Christian applying for a certificate, shall without the preliminary notice required under Part III, be certified under this Part⁴³, if the following conditions be fulfilled, and not otherwise –

- (1) The age of the man intending to be married shall not be under twenty-one years and the age of the woman intending to be married shall not be under eighteen years;
- (2) Neither of the persons intending to be married shall have a wife or husband still living.

The Act does not contain a similar provision in respect of non-Indian Christians.

(D) Marriage under Parsi Law

Among the Parsis the *marriage is regarded as a contract* (consenting mind is essential), though a religious ceremony, known as “*Ashirvad*” is mandatory for its validity. The word “*ashirvad*” literally means “blessings”. It is a prayer or exhortation to the parties to observe their marital obligations.⁴⁴

*Section 3(1) of the Parsi Marriage and Divorce Act, 1936*⁴⁵ lays down some requisites to validity of Parsi marriages. These are –

- (a) The contracting party shall not have been related to each other in any of the degrees of consanguinity or affinity set forth in Schedule I;

⁴² The expression “Christian” means persons professing the Christian religion; and the expression “Indian Christian” includes the Christian descendants of natives of India converted to Christianity, as well as such converts; See Section 3, *The Indian Christian Marriage Act, 1872*.

⁴³ Part VI, *The Indian Christian Marriage Act, 1872*.

⁴⁴ See Section 3(1)(b), *The Parsi Marriage and Divorce Act, 1936*.

⁴⁵ Act No. 3 of 1936.

- (b) Such marriage should be solemnized according to the Parsi form of ceremony called “*Ashirvad*” by a Priest in the presence of two Parsi witnesses other than such Priest⁴⁶;
- (c) The male Parsi⁴⁷ must have completed the age of twenty-one years and the female Parsi must have completed the age of eighteen.

If anyone contravenes any of the provisions as above-mentioned, such marriage will be invalid. Section 3(2) of the Act of 1936 provides that a child of an invalid marriage shall be legitimate.

(E) Marriage under Jewish Law

Among Indian Jews the *marriage is regarded as a contract*, though a religious act is essential. It is mandatory to perform the *ceremony of betrothal and nuptial* for the marriage contract to have legal validity. This ceremony is called “*Kaseph Kiddushin*”.

- (1) The *ceremony of betrothal* includes certain pronouncement of words by the husband;
- (2) The *ceremony of nuptial* is called *Chuppa* or *Nissuin* and comprises the ritual of the groom taking the bride from her natal home to the bridal chamber. The ritual indicates that now the bride is under matrimonial authority and after the ceremony of nuptial, the marriage is considered to be valid irrespective of whether the marriage was consummated or not.

Before the nuptial, the groom is required to make a commitment in writing which would entitle the wife to receive a certain sum from his estate in the case of his death or a divorce. This written contract is called *Ketubah*. This is an economic safeguard just as *mehr (dower)* in the case of Muslims.

III. INTER-RELIGIOUS AND INTER-COMMUNITY MARRIAGES

In some countries inter-religious marriages are not allowed. In India every religious community has its own personal law. Under the Hindu Marriage Act, 1955 only Hindus can marry, under the Indian Christian Marriage Act, 1872 only Christian can marry, under the Parsi Marriage and Divorce Act, 1936 only Parsis can marry and under Muslim Law only Muslims can marry. But it is only under the Special Marriage Act, 1954⁴⁸ that inter-religious and inter-community marriages can take place.⁴⁹ A marriage performed under any personal law, can also be

⁴⁶ *Priest* means a Parsi priest and includes Dastur and Mobed. See Section 2(8), *The Parsi Marriage and Divorce Act, 1936*.

⁴⁷ A *Parsi* means a Parsi Zoroastrian.

⁴⁸ Act 43 of 1954.

⁴⁹ Section 4 of the Special Marriage Act, 1954 provides that a marriage between “*any two persons*” may be solemnized under this Act if *at the time of marriage*, the following conditions are fulfilled – (a) The parties should not have a spouse living; (b) The parties should be sound mind; (c) The male should have completed the age of

registered under the Special Marriage Act, 1954.

(A) Changing Dimension of Marriage

1. In Hindu Law

In the patriarchal society of the *Rig Vedic Hindus*, marriage is considered as a sacramental and indissoluble union of flesh with flesh, bone with bone, and it continued to be so in the next world. The sacramental nature of marriage among Hindus has three characteristics⁵⁰ - *firstly*, it is a permanent union (which means marriage is a tie, once tied cannot be untied); *secondly*, it is an eternal union (it is valid not merely in this life but in lives to come); *thirdly*, it is a holy union (means performance of sacred rites and ceremonies without which a marriage cannot take place).

The modern concept of marriage as a contract is an outcome of industrial revolution, of its lofty ideals of liberty and equality.⁵¹ It is evident that the *first element* i.e., permanent union has been destroyed by the Hindu Marriage Act, 1955 by providing – several Matrimonial remedies such as *divorce* under *Section 13 of the Act of 1955*. The *second element* i.e., eternal union was destroyed by the Widow Remarriage Act, 1856. Probably, to some extent, the *third element* i.e., a holy union is still retained. In most of the Hindu marriages a sacred or religious ceremony is still necessary.⁵² But ceremonial aspect of the sacramental marriage is of least importance. The *Andhra Pradesh High Court* states that the sacramental character of marriage is still preserved under this Act. It was observed by the Court that there can be no doubt that a Hindu marriage is a religious ceremony. According to all the text it is a *samaskara* or sacrament throughout one's life for purification of because the marriage ceremony is completed by '*Saptapadi*'.⁵³ It has been observed by the *Kerala High Court* that mere agreement without ceremonies does not constitute any marriage. The *Calcutta High Court* once observed that Hindu marriage is "more religious than secular in character".

i. Reform under Hindu Marriage Act, 1955

The Hindu Marriage Act, 1955 has reformed the Hindu law of marriage. *Sections 5, 11 and 12 of the Hindu Marriage Act, 1955* are the pertinent provisions. *Section 5* of the Act of 1955

twenty-one years and the female eighteen years; (d) The parties should be beyond the degrees of prohibited relationship.

⁵⁰ See Paras Diwan, *Law of Marriage & Divorce* 14 - 17 (LexisNexis, 7th ed. 2016).

⁵¹ For more details See

<https://www.legalserviceindia.com/legal/article-5879-hindu-marriage-is-a-contract-or-a-religious-sacrament-.html>

⁵² Incorporated in Section 7, *The Hindu Marriage Act, 1955*

⁵³ The taking of seven steps by the bridegroom and the bride jointly around the sacred fire.

deals with Conditions for a Hindu Marriage. **Clause (ii)** of Section 5 deals with mental capacity i.e., parties to a marriage should be of sound mind and **Clause (iii)** relates to the age of marriage, i.e., at the time of marriage, the bridegroom must have completed the age of twenty-one years and the bride the age of eighteen years.⁵⁴ The soundness of mind and the age of marriage provided in **Clause (ii) and (iii) of Section 5 of the Act, 1955** relate to the consensual element of marriage. But the violation of the requirements of Clauses (ii) and (iii) does not render the marriage void.

If marriage is looked upon as a Contract, consent of both the parties is condition precedent to marriage. **Section 11 of the Indian Contract Act, 1872** lays down that a contract of a minor or of a person of an unsound mind is void. The fact of the matter is that marriage of a person who is of *unsound mind* is not a void marriage. Such marriage is voidable which means it can be avoided. It depends on the choice of the aggrieved party. Again, if a marriage is solemnized between parties in contravention of the condition of Clause (iii) of Section 5 i.e., age of marriage, such marriage is neither void nor voidable. It is mere punishable, but after passing of the **Prohibition of Child Marriage Act, 2006**, any child marriage is voidable at the option of the contracting party.

The well-established rule of contract is that a contract for want of capacity is totally void, it is *void ab initio* means void from the very beginning. Thus, it is amply clear that the Hindu Marriage Act, 1955 does not consider the question of consent as of much importance. **Section 12 (1)(c) of the Act, 1955** lays down that in case consent of either party to a marriage or the consent of the guardian of marriage, wherever necessary, is obtained by force or by fraud as to nature of ceremony or as to material fact of circumstances concerning the Respondent, the marriage is voidable, i.e., if one shows that consent was obtained by force or fraud, then the marriage is voidable at the instance of the party whose consent was so obtained. Thus, a marriage without consent is valid. A consenting mind is even now not a condition precedent to a marriage.

ii. Registration of Marriage⁵⁵

According to Section 8 of the Act, 1955 registration is optional but State Government has given power to make rules to make registration of marriage is compulsory. In renowned case *Seema v. Ashwini Kumar*⁵⁶, the Apex Court held that registration should be made compulsory by the

⁵⁴ See Sec 5 (iii), *The Hindu Marriage Act, 1955*.

⁵⁵ *Section 8, The Hindu Marriage Act, 1955*.

⁵⁶ 2006 (2) SCC 578.

State Government for all citizens irrespective of caste, religion, or sex.

In the light of the above study, it comes to the *conclusion* that Hindu marriage has neither remained a sacramental marriage nor has become a contract, though it has semblance of both. Therefore, Hindu marriage is neither purely a sacrament nor a civil contract. It has a semblance of a contract as consent is of some importance; it has a semblance of a sacrament as in most marriages a sacramental ceremony is still necessary.

2. In Muslim Law

There is divergence of opinion with regard to the nature of Muslim marriage. Some jurists are of the opinion that Muslim marriage is purely a civil contract while others say that it is a religious sacrament in nature.⁵⁷ In order to better appropriate the nature of Muslim marriage it would be proper to consider it in its different notions.

i. Muslim Marriage as a Civil Contract

Muslim marriage, by some text writers and jurists, is treated as a mere civil contract and not a sacrament. This observation seems to be based on the fact that marriage, under Muslim Law, has similar characteristics as a contract. For instance –

- (1) Just like contract, marriage is based on a bilateral transaction between two parties;
- (2) marriage requires proposal (Ijab) from one party and acceptance (Qubul) from the other so is the contract;
- (3) There can be no marriage without free consent and such consent should not be obtained by means of coercion, fraud or undue influence just like contract;
- (4) Just as in contract, the parties must be major and of sound mind, similarly in nikah the parties must have attained the age of puberty and must not be of sound mind;
- (5) Just as in case of a contract, entered into by a guardian, on attaining majority, so can a marriage contract in Muslim Law, be set aside by a minor on attaining the age of puberty;⁵⁸
- (6) As there is no contract without consideration, in case of nikah dower is the consideration of marriage;

Describing the nature of Muslim marriage, Justice Mahmood in *Abdul Kadir v. Salima*⁵⁹, observed that marriage among Muhammedans is not a sacrament, but purely a civil contract.⁶⁰

ii. Muslim marriage is something more than a Civil Contact

⁵⁷ For more details See <https://theindianlaw.in/muslim-marriage-its-nature/>

⁵⁸ *Supra*.

⁵⁹ (1886) 8 All 149.

⁶⁰ Aqil Ahmed, *Mohammedan Law* 150 (Central Law Agency, 23rd ed. 2009).

Though there are some similarities between contract and marriage under Muslim Law, there are so many basic differences between the two. These are –

- (a) Unlike civil contract, marriage cannot be made contingent on future event;
- (b) Unlike civil contract, it cannot be for a limited time (Muta Marriage is an exception);
- (c) The Dower (Mahr) in Muslim marriage should not be confused with consideration in the context of civil contract. In Hedaya, it is laid down that the payment of dower is enjoyed by the law merely as a token of respect for its object (the woman).⁶¹

Therefore, Muslim marriage is not merely a civil contract. Another view is that marriage is not purely a civil contract but a religious sacrament too. *Anis Begum v. Mohammad Istafa*⁶² is a leading case on the point where Chief Justice Sir Shah Sulaiman has tried to put a more balanced view of the Muslim marriage by holding it both a civil contract and a religious sacrament.⁶³

IV. IMPACT OF MALE AUTHORITY ON MARRIAGE AND DIVORCE

Male authority assumes that husbands are the heads of households, or legal representatives of households, and possess the authority to make decisions on behalf of the family or to exclusively administer property without consulting or seeking spousal consent.⁶⁴ Such power can be transferred to a son or other male family members in the absence of a husband. The exercise of male authority in domestic settings can be sanctioned by law and extends to State sanction of male household supervision, wife obedience, the right of a husband to grant his wife permission to leave the house, the husband's right to choose the family residence, object to the wife's choice of profession and enter into contracts on the wife's behalf.⁶⁵ Discriminatory divorce laws can leave women impoverished and at risk of violence and exploitation, particularly where the wives and children have no means of sustenance outside of the family. Fault-based divorce regimes draw a direct link between grounds for divorce and the financial consequences of divorce. As a result, women deemed at fault in divorce are generally not provided alimony or other forms of financial support. Apart from being used by husbands to eliminate any financial obligation towards their wives, in many legal systems, fault-based divorce regimes may include different standards of fault for wives and husbands, such as requiring proof of greater infidelity by a husband than by a wife. Fault-based economic

⁶¹ *Ibid.*

⁶² (1933) 55 APP 743.

⁶³ *Supra.*

⁶⁴ OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources*, p. 36.

⁶⁵ *Supra.*

frameworks therefore frequently work to the detriment of the wife, who is usually the financially dependent spouse.⁶⁶

(A) An Example of discriminatory Divorce Law

Under Sharia law, only husbands have the right to divorce (by *talaq*). This gives him unilateral power to divorce his wife without giving any reason. Women have three limited options open to them in divorce: *mubarah*, whereby the husband has leverage and is not bound to consent to her release; *khul*, whereby she buys her release by returning her dower; and *talaq-e-tafwaz*, which confers upon her the right to divorce her husband if he delegates such power to her. Fault-based divorce, therefore, results in economic frameworks that frequently work to the detriment of women who are usually the financially dependent spouse and who are then subject to discriminatory rules on child custody and the right to remarry.⁶⁷

V. INTERNATIONAL PERSPECTIVE ON THE PROTECTION OF WOMEN'S EQUAL RIGHTS IN MARRIAGE

International legal standards on the protection of women's equal rights in marriage, family and property relations serve as a solid foundation for national law and policy-setting. The advancement of women has been a *focus of work* of the United Nations, since its creation. The Universal Declaration of Human Rights, 1948⁶⁸ proclaims that all human beings are born free and equal in dignity and rights.⁶⁹ Article 2 of the Declaration provides, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW) seeks to advance "appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations". In addition to CEDAW, International Covenant on Civil and Political Rights, 1966⁷⁰; International Covenant on Economic, Social and Cultural Rights, 1966⁷¹; Convention

⁶⁶ CEDAW/C/GC/29, para. 39.

⁶⁷ Niaz A. Shah, "Women's Human Rights in the Koran: An Interpretive Approach", *Human Rights Quarterly*, vol. 28, No. 4, pp. 892-93, (2006).

⁶⁸ The General Assembly of the United Nations adopted 'the Universal Declaration of Human Rights' on December 10, 1948 [Resolution 217(iii)].

⁶⁹ *Article 1*, Universal Declaration of Human Rights, 1948.

⁷⁰ The International Covenant on Civil and Political Rights (ICCPR), adopted and appears in the annex to the United Nations General Assembly Resolution 2200A(XXI) of December 16, 1966 and entered into force on March 23, 1976; UN doc A/6316 (1966).

⁷¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted by the United Nations General Assembly Resolution 2200A(XXI) of December 16, 1966 and entered into force on January 3, 1976; UN doc A/6316 (1966).

on the Nationality of Married Women, 1957⁷²; Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962⁷³; and related United Nations General Assembly resolutions and recommendations represent the key international human rights treaties.

(A) The Convention on the Nationality of Married Women, 1957

The Convention on the Nationality of Married Women, 1957⁷⁴ provides that each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality, by the husband during marriage, shall automatically, affect the nationality of the wife.⁷⁵ The Convention further provides that each Contracting State agrees that neither the voluntary acquisition of nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.⁷⁶ Article 3 of the Convention provides that each Contracting State agrees that the alien wife of one of its nationals may, at her request, acquire the nationality of her husband through specially privileged naturalization, procedures. However, the grant of such nationality may be subject to such limitations as may be imposed in the interests of national security or public policy.

(B) The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962

The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962⁷⁷ provides that there must be full and free consent of both parties to the marriage and such consent must be expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and witnesses, as prescribed by law.⁷⁸ Article 2 of the Convention further provides that State Parties shall specify a minimum age for marriage and no marriage shall be legally entered into by any person under this age except where a competent authority has granted a dispensation as to age for serious reasons in the interest of the intending spouses. Article 3 of the Convention further states that all marriages shall be registered in an appropriate official register by the competent authority.

⁷² United Nations General Assembly Resolution 1040(XI).

⁷³ United Nations General Assembly Resolution 1763A(XVII)

⁷⁴ Adopted by the General Assembly of the United Nations on January 29, 1957.

⁷⁵ The Convention on the Nationality of Married Women, 1957, *Article 1*.

⁷⁶ The Convention on the Nationality of Married Women, 1957, *Article 2*.

⁷⁷ Adopted by the General Assembly of the United Nations on November 7, 1962.

⁷⁸ *Article 1*, The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 1962.

VI. TYPOLOGIES OF PROBLEMS IN NRI MARRIAGES

The problems in Overseas Indian marriages may take the shape of women being abandoned because of various reasons. It may be before she is taken to the foreign country of her husband's residence or going to the foreign country but coming back within a year, either sent back or forced to flee. The problems may arise due to woman herself or her parents held to ransom for payment of huge sums of money as dowry, both before and after the marriage or due to women learning later that the person she had married was already married in the other country to another woman, whom he continued to live with or and domestic violence cases. Cases of spouses learning later that they were given false information on any or all of the following: spouse's job, immigration status, earning, property, marital status, woman's husband obtaining an *ex-parte* decree of divorce in the foreign country behind her back without her knowledge, woman being abandoned in the foreign country with absolutely no support or means of sustenance or escape and without even the visa to stay on in that country, woman going to court for maintenance or divorce but repeatedly encountering legal obstacles related to jurisdiction of courts, service of notices or orders, or enforcement of orders, woman being coaxed to travel to the foreign country of the man's residence, getting married there and later discovering that Indian courts have even more limited jurisdiction on such marriages, have also come to light.

VII. CONCLUDING OBSERVATION AND SUGGESTIONS

Women assume various roles and responsibilities as daughters, wives, mothers and they hold multiple identities. The patriarchal structure of society entails the perception that women are dependents of male household members; the exercise of male authority in the household (for example, where the law recognizes a husband's right to demand obedience from his wife, control her movements or enter into contracts on her behalf); inheritance practices that favour males over females; and discriminatory marital property arrangements.⁷⁹

"I am the woman who holds up the sky.

The rainbow runs through my eyes.

The sun makes a path to my womb.

My thoughts are in the shape of clouds.

⁷⁹ A Practitioner's Toolkit on Women's Access to Justice Programming, *MODULE 2: Marriage, Family and Property Rights (The United Nations Entity for Gender Equality and the Empowerment of Women, The United Nations Development Programme, The United Nations Office on Drugs and Crime and The Office of the United Nations High Commissioner for Human Rights) UN Women: ISBN-13: 978-1-63214-116-3, OHCHR: HR/PUB/18/2, 2018 United Nations.*

But my words are yet to come.”

Women’s right, among other issues related to human rights, occupies an important position. It has attracted the attention of both national and international communities including scholars, activists, governmental and non-governmental organisations and others mainly due to the fact that women have been assigned a secondary position in the society. Although the concept of women’s right is often understood as the outcome of post-world war period but its essence can be found in the philosophical writings of early centuries. Social activist like Mary Wollstonecraft in her book “A Vindication of the Rights of Women” (1833) argued for the citizenship rights to women; to make women as parties to the social contracts. Women should be treated equal with men in all spheres and they should be given right to education equal with men.⁸⁰

John Stuart Mill, a 19th century political philosopher, in his “The Subjection of Women” (1869) argued that women should be given the opportunity of suffrage, education and employment. For Mill development of women is necessary not only for women’s sake but for humankind itself.⁸¹ As a member of English Parliament, he also argued for the rights of women in the sphere of property, inheritance and custody. He even, like Wollstonecraft and Margaret Fuller, argued for the right of women to be considered as free rational beings that shall choose their own style of life without following dictations of others.⁸² It is thus clear that Mill propounded for women’s rights for equal political participation, education and employment and above all the rights of women to be considered as human being. During 19th century different movements for women’s rights such as, for equal status of women with men in political, economic and social spheres, for legal protection of women against discriminations etc. were important steps contributing towards the integration of the holistic concept of women’s rights. In spite of all those philosophical writings, social and political movements the condition of women throughout the world did not improve much till the middle part of 20th century mainly because of the inadequacy of legal protections granted towards them.

Justice prescribes equality among equals and not among unequals. As Friedrich observed ‘Justice is never given, it is always a task to be achieved.’⁸³ People are born equal and they have been pervaded with some inherent, inalienable, indivisible and non-negotiable natural and

⁸⁰ James Meadowcroft, ed., *The Liberal Political Tradition Contemporary Reappraisals* (UK: Edward Elgar Publishing Limited, 1996) at pp. 118 – 19.

⁸¹ Subrata Mukherjee and Sushila Ramaswamy, *A History of Political Thought – Plato to Marx* (New Delhi: Prentice Hall of India Private Limited, 1999) at p. 330.

⁸² *Ibid*, at p. 333.

⁸³ Friedrich ‘Justice: The Just Political Act’ 6 *Nomos, Justice* 34.

basic rights. Women's right, among other issues related to human rights, occupies a significant position. The effective implementation, recognition and cognizance by the member States of the United Nations for the purpose of effective, efficient, desired and service-oriented outcome for enhancement and nourishment of the rights of women towards gender justice and all forms of elimination of discrimination against women, shall, undoubtedly, lead more and more on the charted and devised route in the declaration of human rights and for the welfare and upliftment of oppressed and suppressed, deprived and dejected, tormented and terrorised class of women.⁸⁴ A legislation relating to Overseas Indian marriages in the 21st Century becomes an integral part of marriage institution. So, there is the urgent need for Statutory provision relating to Overseas Indian marriage and international status of marriage.

⁸⁴ Dr. Justice Jitendra N. Bhatt, "Gender Justice: Human Rights Perspective Triumph or Turmoil; Victor or Vanquished?" *Eastern Book Company—Practical Lawyer (2006) 4 SCC (J) 3*.