

# Law on Marriage

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## Marriage:

### Is it something just between two persons?

#### Nature of Marriage

1. “So the Lord God caused a deep sleep to fall upon the man, and he slept; then He took one of his ribs, and closed up the flesh at that place. And the Lord God fashioned into a woman the rib which He had taken from the man, and brought her to the man. And the man said, "This is now bone of my bones, And flesh of my flesh; She shall be called Woman, Because she was taken out of Man.“ For this cause a man shall leave his father and his mother, and shall cleave to his wife; and they shall become one flesh.” *Bible, Genesis 2:21-24*

2. “Marriage is *an institution*. It confers a status on the parties to it, and upon the children that issue from it. Though entered into by individuals, it has a *public* character. It is the basis upon which the framework of civilised society is built: and as such, is subject in all countries to general laws which dictate and control its obligations and incidents, independently of the volition of those who enter upon it. “

Lord Penance in *Mordaunt v Mordaunt* (1870) LR 2 P & D 109 at 126.

3. “Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.” Marshall, C.J., *Goodridge v. Department of Health* (2003) 440 Mass. 309

4. “...marriage is *an agreement* by which a man and a woman enter into a certain legal

relationship with each other and which creates and imposes mutual rights and duties. Looked at from this point of view, marriage is clearly a contract.” Lowe & Douglas *Family Law* (1998)

5. “...marriage is *an agreement* by which a man and a woman enter into a certain legal relationship with each other and which creates and imposes mutual rights and duties. Looked at from this point of view, marriage is clearly a contract.

But it is, of course, quite unlike any commercial contract...

...A marriage may only be contracted if special formalities are observed.

...A contract of marriage cannot be discharged by agreement...Apart from death, it can be terminated only by a formal legal act, pronounced by a court of competent jurisdiction” Lowe & Douglas *Family Law* (1998)

### **Legal Definitions of Marriage in the World**

#### 6. China

“Article 2. A marriage system based on the free choice of partners, on monogamy and on equality between man and woman shall be applied.

Article 4. Marriage must be based upon the complete willingness of both man and woman. Neither party may use compulsion on the other party, and no third party may interfere.”  
*Marriage Law of the People’s Republic of China*

#### 7. Common Law

“the voluntary union for life of one man and one woman, to the exclusion of all others.” Lord Penzance in Hyde v. Hyde and Woodmansee (1866), L.R. 1 P. & D. 130 at 133

#### 8. Hong Kong

40. (1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.

(2) The expression "Christian marriage or the civil equivalent of a Christian marriage" implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others. *MARRIAGE ORDINANCE (Cap. 181)*

#### 9. Ireland

“...the Constitution makes clear that the concept and nature of marriage, which it enshrines, are derived from the Christian notion of a partnership based on an irrevocable personal consent, given by both spouses which establishes a unique and very special life-long relationship”.  
Costello J Murray v Ireland [1985] IR 532 at 535)

#### 10. Thailand

“Section 1448. A marriage can take place only when the man and woman have completed their seventeenth year of age. But the Court may, in case of having appropriate reason, allow them to marry before attaining such age.

Section 1452. A marriage cannot take place if the man or woman is already the spouse of another person.” *Civil and Commercial Code*

#### 11. Algeria

“Article 4: Marriage is a contract which takes place between a man and a woman according to the legal formulae. It has amongst its aims the founding of a family based on affection, compassion and cooperation, the protection of the morals of the spouses and the preservation of family relations.” *Family Law*

#### 12. India

“Article 5: A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

Neither party has a spouse living at the time of the marriage;

The bridegroom has completed the age of [twenty-one years] and the bride, the age of [eighteen years] at the time of the marriage;” *Hindu Marriage Act*

### **Formation of Marriage: Capacity**

13. Sex (a man and a woman); Age (16); Not married (monogamy; bigamy is a crime and polygamy is prohibited); Not within the prohibited degrees of consanguinity (parent and child, brother or sister) or affinity (step-relations and in-law relationships)

### **Formation of Marriage: Formalities**

14. Chinese customs (before 7 October 1971); Public Notice of marriage (3 months); Celebration in a Registry or licenced place of worship (Churches and Taoist temples); Certificate

### **Wedding Ceremonies in the World**

15. There are some common features: (a) rituals; (b) active involvement by family members (c) participation by a wider community (d) celebration and feast (e) backed by religious beliefs and practices in many human groups.

### **Effect of Marriage: Sex in Marriage**

16. R married his wife on 11 August 1984. They had one son who was born in 1985. On 21 October 1989, as a result of matrimonial difficulties, the wife left the matrimonial home with their son, who was then aged four, and returned to live with her parents. She had by this time already consulted solicitors regarding her matrimonial affairs.

17. Shortly before 9 o'clock on the evening of 12 November 1989, while the parents were out, R forced his way into the parents' house and attempted to have sexual intercourse with the wife against her will. In the course of that attempt he assaulted her.

18. The question is whether in those circumstances, despite her refusal in fact to consent to sexual intercourse, the wife must be deemed by the fact of marriage to have consented.

19. "...there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse..." *R v R* [1992] 1 A.C. 599

### **Dissolution of Marriage**

20. Ireland

"Article 41(3) No law shall be enacted providing for the grant of a dissolution of marriage."  
Constitution of Ireland

21. "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." Article 12, European Convention for the Protection of Human Rights and Fundamental Freedoms

22. Mr. Johnston, Ms. Williams and their daughter Nessa, lived together as a family. Mr. Johnston had previously been married, and divorce was not permitted in Ireland, which prevented him from marrying Ms. Williams. Under the applicable Irish laws, which only recognized a family based on marriage, Ms. Williams was not legally entitled to maintenance and had no intestacy rights with respect to Mr. Johnston. As an illegitimate child, Nessa could not be legally recognized by her father, had no rights to support by him or intestacy rights. Similarly, they were treated less favorably as regards to their social welfare rights, taxes and

their ability to adopt a child.

They brought their case to the European Court of Human Rights, claiming that the absence of a provision providing for the dissolution of marriage violated their rights under Article 12 of the European Convention on Human Rights.

23. Decision of the European Court of Human Rights in *Johnson v. Ireland*:

*“In determining whether the one could derive the right to divorce from “the right to marry” under Article 12, the ordinary meaning of the words include the formation of marital relationships but not their dissolution. Therefore, prohibition on divorce, which restricts one’s capacity to marry does not violate Article 12 in a society adhering to the principle of monogamy.”*

24. Constitution of Ireland is now amended to: “Article 41(1) The State pledges itself to guard with special care the institution of Marriage...

(2) A Court designated by law may grant a dissolution of marriage where..

.. the spouses have lived apart from one another for a period of... at least four years during the five years,

there is no reasonable prospect of a reconciliation between the spouses...”

25. Grounds for petition for Divorce in HK:

that the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent;

that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent; (acts: violent act, abusive manner; omission: neglect, indifference and failure to provide maintenance)

that the parties to the marriage have lived apart for a continuous period of at least 1 year immediately preceding the presentation of the petition and the respondent consents to a decree's being granted;

that the parties to the marriage have lived apart for a continuous period of at least 2 years immediately preceding the presentation of the petition;

that the respondent has deserted the petitioner for a continuous period of at least 1 year immediately preceding the presentation of the petition.

### **How will it affect the children after the dissolution of a marriage?**

26. Custody order (usually granted to one spouse and the other has access to the child)

27. To which spouse will the order be granted: the first and paramount consideration is the

welfare of the children with their wishes to be taken into account having regard to their ages and understanding and to the circumstances if it is practicable to do so.

28. Subsidiary list of considerations:

(a) the respective childcare plans of the parties should be compared, which includes the furtherance of the education and recognition of special needs, ability to provide primary care and assistance where necessary.

(b) children should be kept together where possible.

(c) a status quo that has been settled for a while and is working should not be disturbed.

(d) joint custody should only be considered where the parties are able to bury the differences which have led them to end the marriage and share by discussion, negotiation and decision plans that affect the children's development.

(e) the wishes of the parties should be heeded.

(f) the wishes of the children should be paid heed to, if they are old enough to be capable of having an informed view.

(g) by and large infant children should be with their mother, and young girls similarly.

(h) the recommendations of a social worker should be accorded much weight; and rightly so, for they emerge from an investigation which gives the officer the opportunity to make an informed view without bias; indeed if a court departs from the recommendations it should give cogent reasons for doing so.

(i) the viewpoint of any other court-appointed expert should be given due consideration.