

Bigamy: Law V Social Reality

Kashika Goel

Student, Op Jindal Global University

Abstract

This paper examines the practice of bigamy among Hindus in India, highlighting the disparity between legal prohibitions and social realities. Despite the criminalization of bigamy under the Hindu Marriage Act, 1955, and the Indian Penal Code, 1860, the practice continues in Indian society. The essay explores three key factors contributing to the persistence of bigamy: underreporting by women due to social pressures and abuse, the shift of second marriages into secrecy, and men exploiting legal loopholes to avoid punishment. The legal system's rigid evidentiary requirements, particularly the burden of proof placed on the first wife to prove the completion of essential marriage rituals, further complicate the prosecution of bigamy. Cases such as *Bhaurao v. State of Maharashtra* and *Mukta Jesing v. Vallabhadas* illustrate the challenges women face in seeking justice. This paper argues that the current legal framework, while well-intentioned, is inadequate in addressing the underlying social dynamics, inadvertently allowing the practice to persist in various forms.

I. Introduction

Bigamy refers to the act of marrying someone while a previous marriage is still legally valid.¹ This practice of polygamy has been historically celebrated in Hindu mythological texts, such as the Mahabharata, where Draupadi is depicted as marrying all five Pandavas, and the Ramayana, which describes King Dashrath having three wives. Although polygamy was once commonplace and permitted under classical Hindu Law, it has been increasingly prohibited and penalised under the Hindu Marriage Act, 1955 (hereafter, "HMA") and the secular Indian Penal Code, 1860 (hereafter, "IPC").² Despite these legal prohibitions, bigamy persists in at least 1.4 crore Hindu households.³ This paper examines the practice of bigamy among Hindus in India from a legal perspective, aiming to address the disparity between legal prohibitions and societal practices

II. The Present Day Law and The Asymmetrical Social Reality

As of today, the practice of bigamy is not only strictly prohibited amongst Hindus but is also a punishable crime. The first condition of a valid Hindu marriage as per Section 5 of HMA is that "neither party has a spouse living at the time of marriage".⁴ Under Section 11 of the Hindu Marriage Act (HMA), any second marriage conducted while the first marriage remains legally subsisting is deemed null and void. To

¹ The term 'bigamy', although gender neutral, is prominently used parochially to indicate the act of a man marrying a second woman. The correct term though is bigyny as distinguished from biandry which is the practice of a woman having two male partners. This paper shall use "bigamy" in its conventional sense indicating bigyny.

² This paper shall limit its scope to the practice of bigamy amongst Hindus and shall analyze it under the codified Hindu Personal Laws. Additionally, while the Bharatiya Nyaya Sanhita has come into force, the paper refers to the Indian Penal Code for ease of contextual background and interpretation of statutes and case law.

³ International Institute for Population Sciences (IIPS) and Macro International, National Family Health Survey III (2005-06).

⁴ Hindu Marriage Act 1955, s 5(i).

discourage such practices, the HMA includes Section 17, which stipulates penalties for bigamy as outlined in Sections 494 and 495 of the Indian Penal Code (IPC).

Many scholars like SY Quraishi⁵ have argued that these laws have been successful largely in combatting bigamy as the figures have gone down. They base their conclusion on two main studies. The most cited survey is the 1974 study by the Committee on the Status of Women in India,⁶ which indicated that 5.06% of the Hindu population was engaged in bigamous relationships as of 1960. The second study, which surprisingly was also the last nationwide study conducted on bigamy, is the National Family Health Survey from 2005-6.⁷ It indicates that only 1.7% of married Hindu women revealed that their spouses have more than one wife.

These figures, while seemingly optimistic, might be misleading. This paper argues that the apparent reduction in bigamous marriages may reflect a decline in 'reported' instances rather than a true decrease in the occurrence of such marriages. Several factors support this argument:

Firstly, the data from the NFHS-III on bigamy relies on voluntary responses from women reporting instances of polygamy involving their husbands.⁸ The veracity of their responses remains doubtful. Women in bigamous relationships often endure severe physical, mental, and sexual abuse compared to other married women.⁹ As a result, it is unreasonable to expect these women to disclose their husband's additional marriages to an interviewer. Additionally, the complexity and barriers within the legal system make it challenging for a wife to file a complaint against her husband. This issue will be further explored in the next section. Furthermore, the patriarchal structure often forces women to accept their subjugation, leading them to tacitly 'consent' to the presence of a second wife. Consequently, the first wife may refrain from reporting bigamy out of fear of criminal charges against her husband.

Secondly, prior to the Hindu Marriage Act, 1955, bigamy was openly practiced under classical Hindu personal law. The criminalisation of bigamy by the HMA likely drove men to move their second marriages from the public domain into the private sphere. Faced with the threat of legal repercussions, men began to evade the law by engaging in secretive second marriages rather than abandoning the practice altogether.

Thirdly, building on the second point, men have discovered and exploited legal loopholes to avoid punishment while continuing to commit bigamy. They may deliberately refrain from completing certain essential marriage rituals or treat the second partner as a concubine. By doing so, the second relationship is not officially recognized as a "marriage" under the law, thus circumventing the legal definitions and charges of bigamy.

III. Critiquing The Rigid Requirement of Proof by Courts– Cause of Asymmetry Between Law and Social Reality

The three reasons outlined above effectively highlight the legal system's shortcomings in addressing bigamy. This section will focus on one aspect of the first point, specifically the substantial burden of proof

⁵ S. Y. Quraishi, *The Population Myth: Islam, Family Planning and Politics in India* (HarperCollins 2021).

⁶ Committee on the Status of Women, *Towards Equality* (Ministry of Education & Social Welfare, Government of India 1974).

⁷ International Institute for Population Sciences (n 3).

⁸ The 1960 report of the Committee on status of Women (n 14) was rather prepared more comprehensively. *First*, it wasn't purely based on the responses of the concerned woman but also other people surrounding them such as family members, landlords, neighbours etc. *Secondly*, the responses were verified using alternate sources to make the data as authentic as possible.

⁹ Jaya Sagade, 'Polygamy and Woman's Right of Maintenance: Survey of Judicial Decisions' [1989] 31(3) *Journal of the Indian Law Institute* 336.

placed on the aggrieved first wife, which creates a significant barrier to filing complaints due to the slim chance of a successful outcome. This trend, where courts rigidly require procedural and substantive proofs, has been exploited by men, allowing bigamy to persist in new forms.

Indian courts have consistently maintained that to secure a conviction for bigamy, it must be demonstrated that the second marriage was completed with all requisite ceremonies. The responsibility to provide evidence and witnesses to substantiate this claim rests solely on the first wife. Moreover, the evidentiary burden imposed on the wife is notably stringent, approaching the 'beyond a reasonable doubt' standard used in criminal law¹⁰ For example, in the Gujarat High Court case *Mukta Jesing v. Vallabhadas*,¹¹ despite the first wife presenting a marriage registration certificate (Nondh), which was duly attested by her husband, his second wife, and an office bearer, the court astonishingly acquitted the husband. The court dismissed the certificate as insufficient proof, arguing that it was not a **recognised** practice in the *Luhana* community and thus not an **essential** practice. The court required the wife to produce evidence showing that all essential 'rituals and ceremonies' of the marriage had been completed.

Subsequently, in 1975, the Calcutta HC¹² caused significant controversy by ruling that registration of a marriage under the Special Marriage Act (SMA) was insufficient to prove that a marriage had occurred. The couple had married under Hindu law and registered their marriage under SMA. Although SMA itself prescribes such registration to be sufficient proof of marriage¹³, the court deemed it inadequate, labelling it as 'optional.' This reasoning is problematic, as the option to register under SMA was intended to provide legal validity to the marriage.

The foundational case for these troubling judgments is *Bhaurao v State of Maharashtra*.¹⁴ In this case, the husband had conducted a Gandharva marriage, which was customarily accepted, and the first wife presented substantial evidence to prove this. Nevertheless, the Supreme Court acquitted the husband, stating that no Hindu marriage could be recognised without the saptapadi (seven steps ritual). Since saptapadi was not part of the couple's custom, this form of marriage was deemed invalid. This paper will argue that this judgment is legally flawed, as saptapadi is only required if the custom specifically designates it as an "essential rite or ceremony".¹⁵ The implications of this verdict have been severe, disadvantaging the first wife significantly.

This paper contends that the courts' rigid stance is problematic due to its minor legal inconsistencies and its failure to anticipate the significant negative consequences of such decisions. The critique of this position will be elaborated upon in four key points:

Presumption of Valid Marriage: Section 50 of the Indian Evidence Act, 1872, establishes that when a couple is living together in a manner consistent with a marital relationship (i.e., as husband and wife), their marriage is presumed to be valid. This presumption includes the assumption that the marriage was conducted with all necessary rituals unless evidence to the contrary is presented.¹⁶ Hence, the burden of proof shall be on the husband to discredit the claim of bigamy and not on the first wife. However, courts have sidestepped this provision and unfairly placed the burden of proof on the first wife.

¹⁰ *Priya Bala Ghosh v Suresh Chandra Ghosh* AIR 1971 SC 115.

¹¹ 1974 Cri LJ 121 (Guj)

¹² *Baby Kar v Raim Rati* 1975 Cri LJ 836 (Cal).

¹³ Special Marriage Act 1955, s 18.

¹⁴ AIR 1965 SC 1564.

¹⁵ Hindu Marriage Act 1955, s 7(2).

¹⁶ Sir Dinshaw Fardunji Mulla & Satyaajeet A Desai (n 5) 321; Also see – *Gokal Chand v Pravin Kumari* MANU/SC/0077/1952; *Authikesavulu v Ramanujam* (1909) 32 Mad 512; *Bijay Lal v Bhubaneswar* AIR 1963 Cal 18.

Societal Conditioning of Women: As highlighted by Flavia Agnes, the situation for wives, especially those whose husbands engage in bigamy, is extremely challenging.¹⁷ The resources and courage needed to file a case against one's husband and prove his guilt beyond a reasonable doubt are often beyond reach. Additionally, due to the criminalisation of bigamy, most second marriages occur in secrecy with minimal public involvement, making it nearly impossible for anyone, including the first wife, to provide evidence or witnesses about the completion of marriage ceremonies.

Defeats The Purpose of Law – The outcomes of cases such as *Bhaurao* and similar judgments allow men to maintain multiple wives as long as they: a) Avoid performing the saptapadi, b) Omit other minor ceremonies considered essential by their community, or c) Conceal evidence about their second marriage effectively.

This essentially permits men to keep "concubines" or "mistresses," which closely resembles polygamy and ignores the issues that led to the prohibition of polygamy. Consequently, the fundamental intent of the law against bigamy is undermined. Second wives persist, albeit without legal recognition or rights.

Rights of Children Arising from Second Marriages – Under Section 16 of the HMA, children born from void marriages (such as bigamous marriages) are recognised as 'legitimate' and can claim inheritance and maintenance rights. While this provision aims to prevent the bastardisation of children, problems arise when a second marriage is not recognised as void under Section 11. If proving a bigamous marriage is overly difficult, the second marriage might not be recognised at all. This could leave children from such unions without the rights afforded by Section 16, resulting in their legal status being compromised, which is clearly against their best interests.

IV. Conclusion

The paradox between the legal prohibition of bigamy and its ongoing prevalence in Indian society highlights a significant discrepancy between legislative intent and social reality. Despite the robust framework established by the Hindu Marriage Act, 1955, and the Indian Penal Code, 1860, which criminalise and penalise bigamy, the practice continues, exposing flaws in both enforcement and societal norms.

This paper's analysis reveals that, although legal reforms aim to eradicate bigamy, their effectiveness is compromised by several factors. Firstly, the apparent decrease in reported instances of bigamy may not signify a true reduction but rather a shift towards unreported or concealed practices. Structural issues, including the difficulties women face in reporting bigamy and men's exploitation of legal loopholes, contribute to the persistence of this practice. Furthermore, the legal system's approach to proving bigamy—emphasising rigid procedural requirements and imposing an undue burden on the first wife—intensifies the issue. The courts' insistence on stringent proof of essential marriage ceremonies, as demonstrated in cases such as *Mukta Jesing v. Vallabhadas* and *Bhaurao v. State of Maharashtra*, not only complicates the pursuit of justice but also inadvertently sustains the practice of bigamy. This inflexible approach fails to consider the societal and procedural challenges faced by women and undermines the effectiveness of the legal framework intended to protect them.

¹⁷ Flavia Agnes, 'Hindu Men, Monogamy and Uniform Civil Code' (1995) 30 Economic and Political Weekly 3238.