CHAPTER – II

HISTORICAL AND CONTEMPORARY ASPECTS OF
LIVE-IN RELATIONSHIP

2.1 INTRODUCTION

Live-in relation or unmarried cohabitation of a man with a woman has been the focus of many social as well as legal researchers in last two decades. Increase in the acceptance of this new living arrangement by youth has also been a concern for historians to research that whether such a living arrangement or any similar concept was prevalent at any times throughout the human civilization. Past experiences lead us to a better future hence it is important to explore the canvas of human development that any concept which is new to us is actually a new concept or is a forgotten concept. So before going in the legal battle of concept of live-in-relationship in this chapter researcher has discussed the historical aspects of live-in-relation. After this researcher has highlighted different arrangements by which this new living arrangement was known in history at different times and in different countries; and then theories of origin and development of concepts similar to live-in relations or cohabitation in United States of America, United Kingdom, France, Philippines, Scotland and India have also been explored. Since religion has an important role in our relation making process it is also worth discussing the view point of different religions on the matters of non-marital and pre-marital relationships. Researcher has further elaborated the cohabitation or non-marital relationships as demographic transition or change in the history of human relationship developments. After the historical exploration of the concept researcher has explained contemporary forms of non-marital relationships in different countries and regions. For the purpose of highlighting the contemporary concept of non-marital relationships researcher have attempted to explain concisely the concept of non-marital relations in United States, United Kingdom, China, Australia, Canada, Scotland, France and Philippines.
2.2 HISTORICAL EXPLORATION OF CONCEPT OF LIVE-IN RELATIONSHIP

The phrase ‘live-in-relation’ might be a newly coined term in post-modern India, but this relationship can be traced back to origin of humans i.e. Adam and Eve. They could be termed the first non-married couple in history. As the institution of marriage did not exist then, neither Adam nor Eve was aware of the status of their relationship. Their relationship in the midst of nature survived basically on their interdependence on each other and the Darwinian battle for survival of the fittest which drove them to live-together. Neither marriage rituals, mandatory symbols of marriage like the proverbial wedding ring, the mangal sutra back this union of souls, nor a marriage registration certificate. A bite on the apple of desire changed everything forever. The fig leaf gave birth to the first two decent human beings on earth, bringing along the selfish need for security and stability in the relationship, culminating in the birth of the institution of marriage.¹

Different cultures, different regions have its own theory and expression of union formations throughout the world. There are different forms of marriage rituals and ceremonies in the world. The variety of relationship formation in the world drives us to explore the different concepts which are like the concept of non-marital relations or live-in relationship. The rise in the non-marital relationships in the developed and most of the developing countries also makes it necessary to explore the history of these relationships so that we could fully understand the reasons and conditions which were responsible for this new form of relationship formation. As already mentioned, different countries and regions has its own history and theory of origin of non-marital relationships, so researcher has discussed the theories and history of various regions as following:

2.2.1 United States of America

In 1958 there was no law of cohabitation in America and members of the American Bar Association were not expecting the new opportunities to master the law

of cohabitation. Prostitution was regulated by the criminal code and legal regulation of cohabitation was scanty. In between these two extremes of Non-regulation of cohabitation and criminal nature of prostitution, it could be clearly observed that the attitude towards the cohabitation had to create no rights and obligations based on their intimate relationship. Prior to the development of modern doctrines protecting cohabitants, those who lived together without benefit of formal marriage were not totally stripped of remedy. Some were protected by the doctrine of common-law marriage, which provided a remedy for many long-term cohabitants. The doctrine of common-law marriage was used to address injustices resulting from cohabitants’ dependence upon one another. Thus it becomes imperative to discuss the doctrines of ‘common law marriage’, its origin and how it transformed the non-marital relationships.

2.2.1.1 Doctrine of Common Law Marriage

The doctrine of common-law marriage presumes the marital status of a couple and does not require solemnization or registration. Instead, any unmarried couple of a man and a woman that agrees to live together as husband and wife and do so and holds themselves out to the community as spouses, are treated as married for all purposes. The doctrine functioned primarily to protect women at the end of long relationships of dependence; if they qualified, courts would grant them all the rights of a wife or widow. The doctrine of common law marriage was similar to contemporary long term cohabitation.

According to Lind (Professor at University of Uppsala) ‘the common law marriage had its origins in Roman law and medieval canon law that had the broadest international application in Western world during ancient times. It guided Lind to deny the theory that common law marriage is an American innovation. It also leads

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4 Id. at 122
him to criticize the fact that contemporary trends relating to cohabitation have taken a different approach. One would also anticipate an investigation of the origins of common law marriage to incorporate a detailed contemplation of the period in which the English settlers were first established in North America. Lind further states that the expansion of the law of England is important because it comprises an important phase in the colonization of North America, during which English legal ideas were exported to the colonies.  

This escape is one of the key puzzles for scholars who have considered common law marriage, if common law marriage in the United States did derive from English law, did it not emerge until the decision of Fenton v. Reed? Some commentators have assumed that it did exist previously but that the decision in Fenton v. Reed in 1809 was responsible for publicizing the possibility; others, by contrast, have argued that the doctrine set out in Fenton v. Reed was an innovation. Since no authenticated material is available on existence of common law marriage doctrine in United States before the Fenton v. Reed, researcher will explore the history of cohabitation and its regulation through the doctrine of common law marriage from the case of Fenton v. Reed only.

**Fenton vs. Reed**

When Mrs. William Reed's husband died in 1806, she requested an annual payment of twenty-five dollars from the Provident Society, of which her husband had been a member. Although the society guaranteed such support to the widows of all its members, it refused to recognize Mrs. Reed as Mr. Reed's widow, claiming that the Reeds were never lawfully married.' In the trial that ensued, the following story emerged: In 1785, John Guest, Mrs. Reed's first husband, left his wife for unspecified 'foreign parts’. In 1792, when it was reported and generally believed that Guest had died, his wife married Reed. Following the marriage, Guest resurfaced in New York, where he lived until his death in 1800, never objecting to the marriage between Mr. and Mrs. Reed. Mrs. Reed lived with her second husband and ‘sustained a good

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6 Id. at 589  
7 Id. at 590  
8 4 Johns. 52 (N.Y.Sup.Ct.1809)
reputation in society’ until his death. In a *per curiam* opinion written by Chancellor Kent, the New York Supreme Court of Judicature held, in *Fenton v. Reed*\(^{10}\), that the Reeds' marriage was valid. Although their marriage was null and void while Guest was alive, Kent held, no proof of solemnization after his death was needed for their marriage to be valid. The court wrote that a marriage may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred. No formal solemnization of marriage was requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage, and is valid as if made in *facie ecclesice*\(^{11}\). In the Reeds' case, the court reasoned that because the parties cohabited together as husband and wife, and under the reputation and understanding that they were such, and the wife, during this time, sustained a good character in society, an actual marriage between them could be inferred.\(^{12}\)

### 2.2.1.2 The Rise of Common Law Marriage

New York became a common law marriage state with Chancellor Kent’s 1809 opinion in *Fenton v. Reed*, applauding informal marriage i.e. relationship that was neither solemnized before any authorized officiant nor celebrated in near and dear in general, but following the pattern of legally married couple. The precise requirements for a common law marriage varied among the states that recognized the doctrine. All recognizing states, however, agreed with Chancellor Kent that a marriage contracted *per verba de presenti*, with words of present consent, was valid and binding.\(^{13}\) It was in 1877 that the debate over common law marriage was considered in the nation’s highest court in the matter of *Meister v. Moore*\(^{14}\). In this case the court added its approval in favor of the doctrine of common law marriage and recognized a growing consensus among courts and commentators on the doctrine.\(^{15}\)

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10 4 Johns. 52 (N.Y.Sup.Ct.1809)
11 *Supra* note 9 at 1886
13 *Id.* at 1888
14 96 U.S. 76 (1877)
15 *Supra* note 9 at 1888-1889
In seventeenth and eighteenth centuries the common law marriage was entered into by a private contract between the parties. Parties had option of exchanging consent in present or in future tense. Where the exchanged words between the parties were in the present tense, a common law marriage occurred. This was called *sponsalia per verba de praesenti*.\(^{16}\) When the parties exchange words in the future tense, it was not a marriage but they were engaged to marry. Further, when the exchanged words between the parties were in the future tense and they had intercourse, then it was presumed a marriage and not a betrothal by courts and ecclesiastical tribunals. This was called *sponsalia per verba de futuro cum copulo*.\(^{17}\) The metaphysical and impractical nature of the doctrine is apparent when one considers how unlikely it is that parties will be meticulous about tenses in tense moments. American scholars disagree as to whether American law as to common law marriages ever recognized the form of *sponsalia per verba de futuro cum copulo*, but if it was recognized it was probably in dictum. Moreover, it is important to note that the so-called common law marriage has meant different things to different groups and different places. Most American states have abolished common law marriages, although they will be recognized as valid if valid where entered into. Nine states\(^{18}\) and the District of Columbia still permit common law or private contracts of marriage, but the quantum of proof necessary to establish a common law marriage differs substantially from state to state.\(^{19}\)

The common law marriages had been recognized by the majority of states with the start of the last decade of the nineteenth century. The prominent writers of that time also gave support to the doctrine. On a powerful argument that marriage is a civil contract the Courts, first and foremost, grounded their opinions recognizing common law marriages. This was an influential argument at that time and the premise of civil contract deployed extraordinary influence in legal thought.\(^{20}\) The virtue of contract competed with the sanctity of marriage on equal terms. The US Supreme Court thus


\(^{17}\) *Ibid.*

\(^{18}\) Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah.

\(^{19}\) *Supra* note 16 at 86

\(^{20}\) *Supra* note 9 at 1890-1891
in *Meister v. Moore*\(^{21}\) adduced powerful causes when it declared authoritatively that marriage is everywhere regarded as a civil contract.

It is true that the statutes in many of the States in United States regulate the mode of entering into the contract without conferment of the rights. Court reasoned that since marriage was a civil contract between persons, the basis of marriage like other contracts is consent and not formality thus without any formal officiation by a third party, they should be able to form a marriage on their own. Ariela quotes "Marriage is regarded by our law in no other light than as a civil contract, highly favored, and depending essentially on the free consent of the parties capable by law of contracting."\(^{22}\)

The formulation of marriage as a contract was essential for judicial recognition of common law marriages. Various practical reasons and concerns lead courts to recognize doctrine of common law marriages and applaud sexual unions as matrimonial in nature and to grant these unions the sanction of the state. Especially, in civil cases involving the validity of common law marriages, courts were often called upon to decide questions of vulnerable women's financial support and child's legitimacy. Generally in matters concerning women's support, courts confront with the potential illegitimacy of the children of such common law marriages. Thus the need to confer legitimacy on children was a compelling reason to recognize such relationships as matrimonial in nature. The vision of large numbers of illegitimate children threatened the nineteenth-century courts as a prospect to be avoided through any means possible.\(^{23}\)

2.2.1.3 The Social Context of the Common Law Marriage

The nineteenth century documentation of the common law marriage cases establishes the historical present of the number of heterosexual couples under relationships outside the legal boundaries of marriage. However, within the social norms of marriage, few of these extralegal relationships still exists and some others, though, conformed to neither the legal nor the social norms. These cases unfortunately give restricted insights into pasts of the choices that parties lay and from these case

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\(^{21}\) 96 U.S. 76 (1877)

\(^{22}\) *Supra* note 9 at 1890-1891

\(^{23}\) *Id.* at 1892, 1894-1895
laws it is particularly difficult to deduce matters of subjective understanding. However one element that is clear from subjective understanding of these cases is that courts were alert to the social reality parading before them when confronted with common law marriage cases.24 The nineteenth-century judges recognized that though legal practice of marriage was not in ideology a highly contested one, in practice, it is in the diversity of relations presented to them in a society, a society in which the socio-economic class is likely to bring common law marriage suits. Thus throughout the nineteenth century the common law marriage cases provide the diversity of heterosexual unions and diversity of relationships. This diversity acclaims how different communities viewed legal marriage at that and how community norms varied tremendously across decades and geographical regions. Thus with respect to patterns of non-marital couples there appear to be a class-salient story. 25 The unavailability of divorce enhanced the self-executed dissolutions of failed relationships and the subsequent informal remarriages as a remedy for unhappy marriages.

However, these self-consciously lie outside legal bounds relationships did not necessarily lie outside of the social norms of marriage. These extralegal solutions against the unhappily marriages resulting in ‘breakdown of older, rural patterns of community control over marital and sexual behavior’ reflected an increasingly urban and transient society. Judges following the Kentian model in recognizing common law marriages could not be deemed to accepted gamut of alternative heterosexual relationships. The proponents of the common law marriage doctrine's like its opponents attempted to ensure social stability through traditional marital unions and perceived the elements of social change as threatening. In the nineteenth century individual contracts in the form of Common law marriage shielded the state from financial responsibility and dependencies of women and children. The rise of welfare programs in the start of the twentieth century reverted to the state the responsibility for dependent women and children. Thus it is evident that today the state is once again attempting to shift the responsibility of dependent women through contract.26

Although family law provided equitable remedies for cohabitants by sanctioning business contracts, however, it did not provide for relationship-based relief i.e. legal status on such relationships has not been conferred. The postulate that cohabitation is a ‘meretricious relationship’ created no legal rights or obligations,

24 Id. at 1895-1896
25 Id. at 1895-1896
26 Id. at 1897,1906 and 1920
during this time period. Several different public-policy concerns flowed from this approach, first, courts wanted to discourage such arrangements as they viewed non-marital cohabitation as socially undesirable. Second, relational contracts between cohabitants were widely viewed as thinly veiled prostitution contracts. Third, because the parties' arrangement was private and litigation occurred only when their relationship had broken down, solid evidence of their understanding was often lacking. Finally, open cohabitation was rare, and those who engaged in the practice were generally very poor, very bohemian, or both; existing equitable remedies seemed adequate to handle the legal problems such cohabitants brought to court. The last point deserves special emphasis.27

Till 1958, middle-class Americans cohabited very rarely and cohabitation outside of marriage was widely viewed as shameful. In 1958 almost no one foresaw the rapidity with which the stigma traditionally attached to non-marital cohabitation would vanish. The culturally devastating 1960s were about to begin and, by the time the decade ended, youthful attitudes toward cohabitation had already shifted dramatically.28

According to American historian Elizabeth Pleck cohabitation cannot be understood without scrutinizing the complex role of race and class in United States’ history. She holds the view that the practice of cohabitation is nothing new. Informal marriages were frequent and legally accepted in early America. It was only after the civil war that cohabitation declined but it largely regained acceptance since the sexual revolution of the 1960’s and 70’s.29 According to Pleck, anti cohabitation penalties have consisted of discrimination in housing, jobs, social benefits, parole and custody battles. Other penalties have included forcing couples to marry, denying the right of privacy to cohabitors and providing benefits to legally married couples that are refused to cohabiting couples.30 Pleck demands that we look at this demographic explosion of cohabitation more closely and see who exactly is cohabiting and why. She says that currently white middle class and upper class couples may practice cohabitation as a prelude to marriage, sometimes as a form of cost sharing housing and sometimes as a serious form of dating. But these cohabitors, who are often found

27 Supra note 2 at 311
28 Ibid.
30 Ibid.
in urban or university areas, are not the largest group. She explains, in fact it is on the lower end of the socioeconomic scale that cohabitation has remained the most common. Cohabitation has often been considered poor people’s marriage because it is more flexible than formal matrimony, separating a couple’s coresidence from consideration of support and division of property. Historically, in many states of America inter-racial and poor couples have faced punishments and state surveillance for cohabitation as interracial cohabitation and interracial marriages were illegal until the 1960’s when both practices became legal.\textsuperscript{31}

Although cohabitation has existed for a very long time, modern trends in cohabitation are qualitatively different from those of the past. Cohabitation after 1960’s has special importance because it indicates a clear shift in normative behaviour related to how families are formed and perceived. ‘Among the astonishing cultural swing of the 1960s was a new attitude toward premarital sex. To be more precise, the 1960s endorsed a profound shift in attitudes toward female premarital sex. During the 1960s, the combination of technology and social change transformed these traditional norms.’\textsuperscript{32} One of the most noticeable facts about cohabitation is how much widespread it has become since the 1970’s in the United States.

In United States there have been considerable transformations in patterns of marriage and divorce since 1950. American couples are more likely to divorce and marry later and increased number of men and women do not marry at all. Cohabitation has become a common practice that may be a precursor or an alternative to marriage. This decoupling of marriage, increasing number of births outside marriage and unmarried parenthood has received a prominent attention of public and scholars.\textsuperscript{33}

Revolution in women’s economic status since 1970 has lead to extensive redefinition of men’s and women’s roles in the household. The adherence to wage earning men and their stay-at-home wives was central to marriage in the first half of the twentieth century; however, it became outdated as the labor force involvement of married women increased. Changes in family law and social norms weakened the

\textsuperscript{31} Ibid.
\textsuperscript{32} Supra note 2 at 312
marriage commitment by making divorce easier to obtain. In recent years, the number of older couples cohabiting without marriage but already had been married is increasing. Some of these older couples cohabiting together without marriage have already been divorced and thus feel hesitant about a new marital commitment; and some others are making use of propriety of cohabitation over marriage for more practical reasons. The repercussion is that cohabitation is now a multifaceted and multi generational phenomenon that includes young men and women who are sharing living space with a dating partner in order to save money, committed couples who view their relationship as marital but have chosen to avoid marriage for practical reasons, more committed couples who are testing the strength of their relationship, engaged couples who are planning to marry and many couples whose motives are mixed or who disagree about the nature of their relationship. This incredible intensification of cohabitation is not unique to the United States. Commensurate expansion has taken place in other common-law countries and across the civil-law nations of northern and central Europe.

R. Rettner analyses the report of Centers for Disease Control and Prevention and finds that more couples are choosing to live together before they get married. Between 2006 and 2010 nearly half of heterosexual women ages 15 to 44 said they were not married to their spouse or partner when they first lived with them. And nearly seventy five percent of women ages 30 or younger said they have lived with a partner outside of marriage at some point in their lives, compared to seventy percent in 2002 and 62 percent in 1995. The report of the Center also found that white women and those with a higher education were more likely to get married during the study period, compared with Hispanic and dark women and those with less education.

2.2.2 Europe

Traditional perceptive of a family i.e. a husband, a wife and children is still considered to be common in Europe though at the same time, other institutions of a family formation are also recognized. One of these so called new forms of family life is non-marital cohabitation. This type of family formation is to be understood as a union between a man and a woman living together on a permanent basis without having registered an official marriage. In recent decades the cohabitation of heterosexual couples has emerged as a staunch alternative to civil and religious

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34 Id. at 242
35 Supra note 2 at 313-314
marriage. The number of cohabitating couples, as well as the number of children born in such non-marital unions, has been steadily increasing.\textsuperscript{37}

As the public opinion for concept of traditional family system has considerably changed, cohabitation has been accepted as a new family formation and legal phenomenon of 21st century. The concept of cohabitation has a long history, likewise the institute of marriage. While discussing the historical development of regulation of non-marital cohabitation Olga Beinarovica quotes, “Bradley stressed that the principle declared by Napoleon \textit{les concubins se passent de la loi, la loi se désintéresse d’eux}’ (concubines ignore the law, but law is indifferent towards them) was echoed in 1960’s English law. Lord Devlin mentioned that a man and a woman who lived together without registering a marriage were not punished in according to law, while were protected by law. They were beyond the law and their union was not binding to any obligations”\textsuperscript{38}.

To quote Olga Beinarovica, “There is an opinion that origins of the cohabitation are to be found in ancient Rome, equalizing the institute with concubinage, which refers to a legal outside-marriage union which differs from both marriage and legal prostitution. Another similar concept is reflected in French law, where the term \textit{concubinage}\textsuperscript{39} to define outside-marriage cohabitation has been used”.\textsuperscript{40} In ancient times concubinage was considered a relationship durable and exclusive under Roman law. In practice the concubinage allowed a Roman man to enter into an informal but recognized relationship with a woman who was not his wife and generally a woman whose lower social status was an obstacle to marriage. It was not considered derogatory to be called a concubina.\textsuperscript{41}

In ancient times, there was an option for a man to take a woman as a


\textsuperscript{38}Id. at 31-32

\textsuperscript{39}Note: [Webster dictionary defines concubinage as cohabitation of persons not legally married or the relationship between persons who are cohabiting without the benefits of marriage. According to 1902 Webster International Dictionary, in some countries concubinage is marriage of an inferior kind, or performed with less solemnity than a true or formal marriage; or marriage with a woman of inferior condition to whom the husband does not convey his rank or quality. Under Roman law, it was the living together of a man and woman in sexual relations without marriage but in conformity with local law.]

\textsuperscript{40}Supra note 37 at 31-32

concubine as long as it pleased him without any promises and signed contract, consequently the woman had scanty legal protections. The early church and social reformers strive long and tough against concubinage. It asserted that such a sexual relationship without the permanent and total commitment was immoral and unjust. Over the course of a thousand years, concubinage retreated into the shadows of social disapproval; however, in the recent few decades it implies that concubinage has come to light again under a different name. Similar to ancient concubinage the contemporary concept of cohabitation is also dubious relationship. The cohabitators make no promises and have no legal obligations to one another. This arrangement has no specified duration that means it can be terminated at any moment. The supporters of cohabitation depict it as just a more flexible form of marriage; they find all that is missing in cohabitation is ‘a piece of paper’, the marriage certificate. The love is the same as in marriage. However, some others see cohabitation as a trial marriage; they find that social science does not brace any of these contentions and in every aspect cohabitation is a very different relationship from marriage. One of the reasons for this disparity may be that the uncertainty of cohabitation leaves much room for differing perceptions about how exclusive the relationship is. However, cohabitation and concubinage should not be seen as mutually substitute, because concubines have never gained a legal status, nor have their children.

In Sweden, there were two forms of cohabitations. One was known as ‘marriage of conscience’ and it was practiced by a group of intellectuals as a dissent against the fact that only church marriages were allowed at that time and the second was known as ‘Stockholm marriages’. The term ‘Stockholm marriage’ was coined for people coming to the urban areas too poor to marry and so cohabiting under marriage-like conditions and under high population density.


43 Ibid.


2.2.2.1 France

The evolution of cohabitation to its contemporary form may also be traced especially in France, where until 1884 divorce was not legally available.\textsuperscript{46} It forced persons to cohabitation without marriage as they could not conclude official registered marriage. However, it did not affect the circumstances of cohabitation directly the Civil Code of France of 1804 contained several provisions for setting paternity of children. Further, a wife was authorized to request a divorce in a situation if a husband brought his concubine to a family home.\textsuperscript{47} Though the legislation comprised no direct provisions on cohabitation, the institute continued to exist. During the second half of the 20th century the attainment of emotional needs was given main priority in family relations. This dogged the expansion in the process of ‘demarriage’, when a concept of family was detached from the necessity to conclude an official marriage. Persons, mostly women, became financially independent and felt free to build unions beyond marriage.\textsuperscript{48}

2.2.2.2 Scotland

As a consequence of the differences in the law of Scotland and role of the separate established Church of Scotland, historically, the law of marriage has developed differently in Scotland to other jurisdictions in the United Kingdom. Scotland had stood virtually alone in the formal legal sense in the midst of Western European countries which cherished the simple exchange of consent as acceptable basis for marriage. However, the same social disgrace was affixed to informal or irregular unions that we see elsewhere. Thus in practice Scotland was like other countries in which simple exchange of consent was regarded as acceptable forms of contracting marriage. The validity of marriage in Scotland continued to rest primarily on mutual consent with some reservations. These reservations were that there must be no legal bar and the proof of consent could be established when required.\textsuperscript{49}

\textsuperscript{46} Ibid.
\textsuperscript{47} Ibid.
\textsuperscript{48} Supra note 37
Historians have long argued that cohabitation and marriage breakdowns are not recent phenomena. In this respect, the emphasis on the exchange of consent meant that Scotland’s marriage laws retained significant elements of continuity from the medieval period through to the modern period. Testing the reality of irregular marriages Eleanor Gordon Quotes, “Bernard Capp, Joanna Bailey, John Gillis, E.P. Thompson, Leah Leneman and Rosalind Mitchison for Scotland have all drawn attention to the variety of partnership arrangements which characterized unions of ordinary people in the early modern period, whilst Clarke, Gillies, Ross, Rose and Smout have provided convincing evidence that informal marriage arrangements, self-divorce and self-marrying were not infrequent occurrences in the nineteenth and early twentieth centuries”.

There seems to be no consensus among historians with regard to the chronology of the pattern of irregular unions, the reason for the pattern or the incidence and popularity of these irregular unions. It has been implied that the disintegration of traditional agrarian society and the deterioration of close and tightly regulated rural communities with their well-defined hierarchies of authority resulted in a loosening of moral codes and a revolt against the traditional morality of church and community with a consequent increase in co-habitation, bigamy and desertion in the industrial period. However, others see these phenomena as the triumph of pre-industrial customs and practices over attempts to increase regulation and control of sexual life and popular morality. Even among those who argue that cohabitation and irregular unions were associated with urbanization and industrialization, there is a divergence of opinion over its chronology. Gordon further quotes, “Clarke, Gillies, Rose and Ross who have characterized the first half of the nineteenth century as an age of marital non-conformity with the latter half of the century denoting more conformity and control, whilst Frost sees the pattern in the nineteenth century as non-
linear with the early and late nineteenth century bookending a period of conformity in the middle of the century”.

There is a contest of counter thoughts on the meanings that contemporaries gave to irregular unions and what persuaded people to marry irregularly. Such unions may also be interpreted as evidence of popular social rebellion against existing views, as a product of the rise of individualism, as practical solutions to the economic, social and legal constraints to regular marriage, as a mark of religious dissent, as a consequence of secularization and the decline in the influence of community. However there has emerged a degree of consensus amongst those who have written about the pattern of irregular unions in Scotland. The prevailing view is that such unions in the seventeenth century were relatively rare, became more popular in the course of the eighteenth century and declined in popularity in the first half of the nineteenth century. The three forms of irregular marriage recognized as legally valid in Scotland were, marriage constituted *per verba de praesenti* which required ‘some present interchange of consent to be thenceforth man and wife, privately or informally given, marriage *per verba de futuro subsequente copula* which was constituted by a promise of future marriage without any present interchange of consent to be husband and wife, followed at a subsequent time by carnal intercourse and *marriage by cohabitation with habit and repute*. The latter form of marriage was often popularly defined as ‘living together’.

It is certainly a different form, marriage by cohabitation with habit and repute. In pre-tridentine canon law, if a couple lived together and presented themselves as married for an extended period of time, there was a presumption that they had exchanged consent. Irregular unions were initially an antiquity of non-conformity but as the decades progressed these unions became an expression of couples, ‘doing their own thing’, in other words an expression of the triumph of popular practices over religious and legal regulation. Gordon finds that James Stark categorically

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51 Ibid.
52 Ibid.
53 Brian Dempsey, “Marriage by Cohabitation with Habit and Repute is Finally to be Consigned to the History Books” The Journal of the Law Society of Scotland, Dec. 12, 2005 available at: www.journalonline.co.uk/Magazine/50-12/1002528.aspx (Last visited on June 05, 2016)
associated the popularity of irregular marriages in eighteenth century Scotland to religious non-conformity although he acknowledges that the increasing vogue for irregular marriage might have contained an element of genuine social revolt.\textsuperscript{54}

2.2.3 Philippines

The Philippines is unique because cohabitation is not an entirely new phenomenon and both its measurement and comparison with marriage patterns are possible. For example, while the absolute number of registered marriages in the Philippines has declined considerably in the last decade and by nearly 25\% between 2004 and 2013 (CITE Philippines Statistics Authority), it is possible that this decline has been offset by increases in cohabitation.\textsuperscript{55}

Historically before Spanish colonization non-marital cohabitation was practiced in the Philippines often among lower income people to avoid ceremony or celebration costs and legal fees. As Western influences and religion took hold, traditional cohabitation persisted in geographic areas far removed from urban centers and capital cities. Today, alongside more contemporary forms of cohabitation there exist cohabitation as an older and indigenous practice representing both longer term commitment and trial marriage. Cohabiting women may even opt to self-report as being married or practicing kasalukuyang may kinakasama, a traditional form of lifelong commitment, over identifying as a cohabitor. For others, cohabitation serves as a prelude to marriage, shown by the substantial proportion of married people reporting pre-marital cohabitation with their spouse.\textsuperscript{56}

Cohabitation in the Philippines has often been linked to traits associated with disadvantage or instability, absent parents, lack of engagement in work or education, migration, urban residence, while marriage is widely viewed as ideal, especially for women, financial reasons such as the economic burden of hosting a wedding reception and the costs of filing the necessary paperwork and pregnancy are often

\textsuperscript{54} Supra note 49


\textsuperscript{56} Ibid.
cited as motivations behind cohabiting. Witnessing parents’ marital difficulties is another reason for wariness toward marriage and preference for cohabitation, especially because divorce is illegal in the Philippines. Interestingly, while there are distinct correlates of cohabitation overall, cohabiters who eventually marry are similar in socio-demographic profile from people who marry directly. Thus, individualism and secularism among the educated elite do not appear to be behind the growth of cohabitation among youth. There are also inconsistencies in sexual mores between classes, giving further credence to the idea that cohabitation may be the recourse of lower income classes under financial duress and not the practice of wealthy, educated, elite forerunners of idea change. Nonetheless, there is needed to explore whether the meaning of cohabitation and its role in family formation is changing and how it develops over the life course.\textsuperscript{57}

2.2.4 India

A revolution is evident in Indian society from arranged marriages to love marriages and now to ‘live-in relationships’. These relationships are visible in metropolitan cities and men and women working in the Business Process Outsourcing industry are prostrate to enter into such relations. India is a country, which is welcoming western ideas and lifestyles and in present scenario one of the most crucial episodes amongst these lifestyles is the concept of non-marital live-in together i.e. live-in relationships.

2.2.4.1 Vedic Period

According to Manu, in the Vedic period and afterwards premarital relationships existed but were of rare occurrence.\textsuperscript{58} Thus the concept of live-in together before marriage is not new in India; live-in relationship was always present in the society. Though the marriage was a general norm in ancient India the Hindu scriptures illustrate and concede the existence of premarital relationships as well.\textsuperscript{59} The term ‘Live-in relationship’ might be new but the concept is ancient. In the Vedas,

\textsuperscript{57} Ibid.
\textsuperscript{59} \textit{Supra} note 44 at 59
we find acknowledgement of eight types of marriages i.e. Brahma Marriage, Daiva Marriage, Arsha Marriage, Prajapaty Marriage, Asura Marriage, Gandharva Marriage, Rakshasa Marriage, and Paisacha Marriage. Gandharva marriage, one of the eight forms of Hindu marriages, has incidents which are quite similar to that found in a live-in relationship.60

“From the Vedic age, the Gandharvas were well-known for their amorous disposition, and a marriage which was consummated before the due performance of the sacred rituals, naturally came to be known after them. Authorities are not agreed as to whether love unions should be included within the category of approved marriages. The Baudhayana Dharma Sutra refers with approval to the view of some thinkers that love unions ought to be commended, as they presuppose reciprocal attachment. The Kamasutra regards them as ideally good; so also did an earlier thinker named Angiras, quoted by Bhavabhuti in the Malati-Madhava. The Mahabharta in one place included the Gandharva union within the group of approved marriages. Manu seems to be indecisive in the matter. The same is the case with Narada. He declines to place Gandharva Marriage either among the approved or among the blameworthy forms and calls it Sadharana or ordinary. Later writers disapprove both the Gandharva marriage and the self-choice by the bride (suyamvara).” 61

In Gandharva form of marriage a man and a woman mutually decides to live together. This neither involves the family of the couple nor a particular ritual to solemnise the marriage. It is just a verbal commitment. But it still comes under the purview of marriage. Although a couple was united by means of a Gandharva vivaaha, the commitment and responsibility was identical to any of the other types of marriages ordained in the traditional texts.62 The Gandharva form of marriage described in Vedas is similar to concept of cohabitation in western world where a man and woman mutually agrees to live together in sexually intimate relationship without going for the solemnization of marriage as per rituals.

60 Ibid.
61 Dr. A.S. Altekar, The Position of Women in Hindu Civilization 42 (Motilal Banarasidass, Delhi, 2nd Reprint edn., 1987)
According to *Apastamba Grhyasutra*, an ancient Hindu literature, Gandharva marriage is the method of marriage where the girl selects her own husband. They meet each other of their own accord, consensually agree to live together, and their relationship is consummated in copulation born of passion. This form of marriage did not require consent of parents and anyone else.\(^{63}\) According to Vedic records, this is one of the earliest and common form of marriage in Rig Vedic times. The marriage of Dushyant and Shakuntala is an example from history of this class of marriage. In Mahabharata, one of two major epics of Hindus, Rishi Kanva- the foster father of Shakuntala recommends Gandharva marriage with the statement that the marriage of a desiring woman with a desiring man, without religious ceremonies is the best marriage.\(^{64}\)

Dr. A.S. Altekar points out, “A passage in the Mahabharata in later times no doubt represents Sakuntala as calling a priest for the performance of the religious rites before proceeding to consummate her marriage. This version of story is inconsistent with the one given by Kalidasa in his *Sakuntala*; it further contradicts the definition of Gandharva marriage as given in the epic itself. When Kanva proceeds to express his approval to his daughter of her love marriage, he incidentally defines the Gandharva Marriage as a love union brought about without any recitation of mantras.”\(^{65}\)

In course of times, as the hold of religion increased, Gandharva ceased to be one of the ideal forms of marriage; it was included in the list of unapproved forms of marriage. But as long as post-puberty marriages were in vogue, Gandharva marriage could not be altogether stopped.

### 2.2.4.2 Medieval India

In ancient times usually when wife was unable to bear child, concubines have served to give birth to significant offspring. However in Medieval times, concubinage also enjoyed legal tolerance between two unmarried people similar to the status of

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\(^{64}\) Ibid.

\(^{65}\) Supra note 62
common-law-marriage. Though the practice of concubinage had been common in various cultures throughout history but the social and legal status of concubines has varied ranging from sexual slavery to common-law-marriage. These differences have continued to contemporary times.\(^6^6\) It was the time of the advent of Muslims in India. In medieval Muslim society sex slavery and concubinage became almost interchangeable terms\(^6^7\) and concubinage of unmarried people or their cohabitation lost the valuation akin to common-law-marriage.

### 2.2.4.3 Modern India

In modern India with the advent of social reformers and British Indian Laws the movement for elimination of evil practices were stared which resulted in decrease in the relations of concubinage and other evil practices in Indian society, however, it cannot be said that such practices vanished. The practice of keeping concubines was in existence even after the independence of India.\(^6^8\)

Gujarat for a long time had a friendship contract entered into voluntarily between a man and a woman, which provides that the woman would exercise no claim on the man during or after the relationship beyond friendship. Formally they were known as ‘maitray karaars’ in which people of two opposite sex would enter into a written agreement to be friends, live together and look after each other.\(^6^9\) These relationships are called and stigmatized as socially ambiguous and sexually exploitative relationships. The man in such relationships was always married and the woman was a single woman who was also responsible for the sustenance of her parental family. Since she presumes that she could never marry her family willingly consents to such a contract because this was the only way she could enjoy a physical relationship with a man and no questions asked. When the story of maitray karaar blew up in the media many years ago, it was declared illegal and the contract became not even worth the stamp paper it was typed on.\(^7^0\)

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\(^{6^8}\) *Supra* note 1 at 260-261

\(^{6^9}\) *Ibid.*

\(^{7^0}\) *Ibid.*
All though the subject live-in relations may be new to the world but ancient Vedic astrology is adequately empowered to deal with the topic in which two people decide to live together on a long term or permanent basis in an emotionally and/or sexually intimate relationship without marrying each other.71

2.3 NON-MARITAL COHABITATION AND RELIGION: AN OVERVIEW

The rampant phenomenon of non-marital cohabitation is quite recent. It has become a dominant social paradox in the last few decades. Its upsurge spans both sides of the Atlantic Ocean, and even most parts of the western industrialized world. Churches seem astonished if not crippled in their response to the non-marital relationships. Pastoral ministers are still learning how to address the issue in marriage preparation. Many of them identify cohabitation as the most complicated issue they deal with in marriage preparation programs and pre-marriage counseling.72

Living together without marriage is prohibited by all major religions including Islam, Christianity, Judaism and Hinduism. Dr. Normi finds that in Islam, those who commit illegal sexual intercourse are considered as committing a major sin and are subjected to severe punishment from Allah. She quotes the lines from Quran that states: “The woman and the man guilty of illegal sexual intercourse flog each of them with a hundred stripes. Let no pity withhold you in their case, in a punishment prescribed by Allah, if you believe in Allah and the last day. And let a party of the believers witness their punishment”.73

Dr. Normi further says that according to the Bible, marriage should be honored by all, and the marriage bed kept pure, for God will judge the adulterer and all the sexuality immoral. Similarly the ‘old testament’ provides “a man who seduced

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a virgin and had sexual relations with her before marriage was required to pay the
father of the girl and was required to marry her if the father permitted. Sexual
relations with a virgin betrothed to another can be resulted in death by stoning of both
parties”. Thus, almost all religions condemn the act of cohabitation. Turning away
from religion, therefore, can be one of the vital factors why people are involved with
the act of non-marital relationships.

Non-marital cohabitation is denounced in all the official documents of the
Christian Churches and by many Christian theologians. The documentary teaching is
that people should not indulge in sexual relationship without marrying. This teaching,
however, is neglected and disobeyed by church members and, as discussed earlier,
almost universally disobeyed. In spite of this discrepancy between traditional church
teaching and the faith and practices of its members, official church teaching cannot
bring itself to sanction cohabitation before marriage. The unanimous teaching of the
churches remains that sexual intercourse must be confined to marriage. The Roman
Catholic Church censure cohabitation. Such a relationship is seen as a false sign,
contradicting the meaning of sexual relationship. It violates the Church’s teaching
about sexual love and marriage. It is censured under the regulation of free union and
is considered a grave offense against the dignity of marriage. However, there is
acknowledgement of the pastoral difficulty in dealing with this issue i.e. -

a) Immediately confronting the couple and condemning their behavior, or
b) Ignoring the cohabitation aspect of their relationship.75

A middle road is suggested as the wisest strategy: integrate general correction with
understanding and companion; use it as a teachable moment in such a way as to
smooth the path for them to regularize their situation. The assumption is that they are
in a disordered state of sexuality, a state of sin. The Orthodox churches also strongly
disapprove cohabitation. Officially they are reluctant to raise the question of sexual
activity outside of marriage.76 This traditional position is based on a threefold
argument:

74 Ibid.
75 Supra note 72 at 119
76 Ibid.
a) It situates sexual intercourse within the context of the bond of marriage. Any non-marital sexual intercourse then is wrong. Cohabitation, in this situation, is sign of lack of discipline and giving in to spirit of the times.

b) Cohabitation is a threat to marriage and family. Marriage, as Christians understand it, is a communal event undertaken with the intention of unlimited commitment. Cohabitation on the other hand, tends to be private, lacking communal sanction and unlimited commitment.

c) Thirdly, cohabitants tend to create less stable relationships when converted into marriage.

For an effective analysis of cohabitation, the concerns expressed in this traditional argument need to be heard, given additional consideration and at the same time counter-balanced by most persuasive argument.\(^{77}\)

Hinduism is a convoluted religion and its beliefs and practices evolved over a long time, hence, the rules governing the conduct of individuals in Hinduism are also manifold and at times ambiguous. It is difficult to derive social and religious practices of Hinduism, or any historical truths pertaining to them, what holds true for one group may not hold true for all.\(^{78}\) One such complicated issue about which there can be divergent opinions and multiple realities in Hinduism is its stand with regard to non-marital relationships and premarital sex.

In Hinduism, sex is not a taboo. Hinduism, unlike some other faiths, does not regard sexual desire as evil or impure. Still it is a puritanical faith, because it puts heavy emphasis upon virtuous living and the importance of purity and austerity. Sexual desire is personified in Hinduism as a deity (Kamadeva) who instills the passion of love in those whom he chooses to torment. According to its beliefs, sexual desire is the basis of virility, spirituality, austerity, creation, procreation, rebirth and continuation of existence.\(^{79}\) However, as in all other matters in Hinduism, intention is important to determine the sexual conduct of a person is lawful (dharma) or unlawful (Adharma) and whether the sexual desire is pursued for the right ends. If a person

\(^{77}\) Id. at 120


\(^{79}\) Ibid.
pursues it purely for pleasure and selfish enjoyment, it is considered evil and unlawful. Thus, sex is not evil in Hinduism as long as it is pursued as the means to righteous ends, and not considered an end in itself.\textsuperscript{80}

Thus it is well understood that ultimate end of non-marital relationships of the modern world is self realization which could not be termed a righteous end in Hinduism. “Pre-marital sex is immoral and against the tenets of every religion”, a Delhi court has observed.\textsuperscript{81} In spite of condemnation of non-marital cohabitation by all major religions of the world this institution is increasing rapidly. Thus it is well understood that young generation is not looking on interpersonal relations from a religious view.

2.4 RISE IN NON-MARITAL RELATIONSHIPS: A DEMOGRAPHIC TRANSITION

In the 1970s developed countries began to experience changes in family behavior, such as increase in non-marital relations, non-marital fertility, age at first marriage, and divorce. Some scholars viewed such family changes as inaugurating a new stage of demographic development, which they called the Second Demographic Transition (SDT).\textsuperscript{82}

Non-marital cohabitation is considered one of the signature elements of the Second Demographic Transition. Some postulate a philosophical basis, theorizing that the increase in individualism and secularism and corollary decline in religious compliance have added toward tolerance and adoption of non-marital cohabitation as a form of union formation. A second explanation considers that economic development, industrialization and modernization have improved women’s social status, leading to greater gender equality, more sexual freedom, and especially a reduction in the stigma connected to unmarried sexual relations, all of which have

\begin{flushleft}
\textsuperscript{80} Ibid. \\
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increased the likelihood of non-marital cohabitation. A third explanation accentuates the collective buttress of concurrent social changes during the Second Demographic Transition. For instance, educational spread has drive to competition between post-secondary school enrollments which has increased the age at first marriage. This context and the increasing notoriety of premarital sex mean that union formation is increasingly likely to begin with non-marital cohabitation rather than marriage.\textsuperscript{83} Since the increase in non-marital relationships has been seen as a demographic development it becomes necessary to study demographic transition and how the demographic development process has made its impact on the relationship formations.

2.4.1 Demographic Transition Explained

Demography is a science short on theory, but rich in quantification produced one of the best-documented generalizations in the social sciences: the demographic transition. Demographic transition refers to the shift from high birth and death rates to lower birth and death rates as a country or region develops from a pre-industrial to an industrialized economic system. The theory was proposed in 1929 by the American demographer Warren Thompson, who observed transitions or changes in birth and death rates in industrialized societies over the previous 200 years. Thompson himself did not initially think of his formulation as a theory.\textsuperscript{84}

Most developed countries have completed the demographic transition and have low birth rates; most developing countries are in the process of this transition. The demographic transition theory was formulated by the Office in Princeton as a culmination of or abstraction from previous work on ‘The Future Population of Europe and the Soviet Union’, which was published in 1944 on behalf of the League of Nations. However, it was not the first to state the essentials of the theory of the demographic transition.\textsuperscript{85} The demographic transition involves four stages, or possibly five. These are:

- As per the theory of demographic transition, a country is subjected to both high birth and death rates at the first stage of an agrarian economy. The birth rates are very high due to universal and early marriages, widespread

\textsuperscript{83} Id. at 608


\textsuperscript{85} Ibid.
prevalence of illiteracy, traditional social beliefs and customs, absence of knowledge about family planning techniques, attitudes towards children for supplementing family income etc. Thus at this stage, birth rates are high out of economic necessity. At this stage, the death rates are also high due to insufficient diets and absence of adequate medical and sanitation facilities. In this economy, the rate of growth of population is not high as high birth rate is compensated by high death rate.  

- In stage two, that of a developing country the death rates drop quickly due to improvements in food supply and sanitation, which increase life expectancies and reduce disease. The improvements specific to food supply typically include selective breeding and crop rotation and farming techniques. Other improvements generally include access to ovens, baking, and television. For example, numerous improvements in public health reduce mortality, especially childhood mortality. Prior to the mid-20th century, these improvements in public health were primarily in the areas of food handling, water supply, sewage, and personal hygiene. One of the variables often cited is the increase in female literacy combined with public health education programs which emerged in the late 19th and early 20th centuries. In Europe, the death rate decline started in the late 18th century in northwestern Europe and spread to the south and east over approximately the next 100 years. Without a corresponding fall in birth rates this produces an imbalance, and the countries in this stage experience a large increase in population.  

- In stage three, birth rates fall due to various fertility factors such as access to contraception, increases in wages, urbanization, a reduction in subsistence agriculture, an increase in the status and education of women, a reduction in the value of children's work, an increase in parental investment in the education of children and other social changes. Population growth begins to

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level off.\textsuperscript{88} The birth rate decline in developed countries started in the late 19th century in northern Europe. While improvements in contraception do play a role in birth rate decline, it should be noted that contraceptives were neither generally available nor widely used in the 19th century and as a result likely did not play a significant role in the decline then. It is important to note that birth rate decline is caused also by a transition in values; not just because of the availability of contraceptives.\textsuperscript{89}

- During stage four there are both low birth rates and low death rates. Birth rates may drop to well below replacement level as has happened in countries like Germany, Italy, and Japan, leading to a shrinking population, a threat to many industries that rely on population growth. As the large group born during stage two ages, it creates an economic burden on the shrinking working population. Death rates may remain consistently low or increase slightly due to increases in lifestyle diseases due to low exercise levels and high obesity and an aging population in developed countries. By the late 20\textsuperscript{th} century, birth rates and death rates in developed countries leveled off at lower rates.\textsuperscript{90}

\textbf{2.4.2 Second Demographic Transition Theory}

There have been notable changes in the pattern of union-formation and in the extent of having children outside marriage in many western European nations, over the last four decades. After the proliferation of low fertility, there are hardly any other changes in family formation which were as sensational as the rapid rise in unmarried cohabitation and non-marital births. The correlated changes may also be noticed such as declined first marriage rates, increase in the average age at marriage and more existing marriages ending often in divorces. The traditional course of a family formation pattern that has been portrayed by early and wide-spread marriage and subsequent childbearing for about half a century has become weaker. Unmarried cohabitation is not a new phenomenon in Europe.\textsuperscript{91}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{88} \textit{Ibid.}
\item \textsuperscript{89} \textit{Ibid.}
\item \textsuperscript{90} \textit{Supra} note 87
\item \textsuperscript{91} Katja Koppen, \textit{Marriage and Cohabitation in western Germany and France} 1(2010) (Ph.D. Thesis, University of Rostock) available at:
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The second demographic transition refers to a theoretical framework first advanced in 1986 by Ron Lesthaeghe and Dirk van de Kaa which addresses the changes in the sexual behavior and in the patterns of reproduction which occurred in North America and Western Europe in the period from about 1963, when the birth control pill and other cheap effective contraceptive methods such as the IUD(Intrauterine device) were adopted by the general population, to the present. The combination of the sexual revolution and the increased role of women in society and the workforce have profoundly affected the demography of industrialized countries resulting in a sub-replacement fertility level. The changes, increased numbers of women choosing to not marry or not to have children, increased cohabitation outside marriage, increased childbearing by single mothers, increased participation by women in higher education and professional careers, and other changes are associated with increased individualism and autonomy, particularly of women. Impetus has changed from traditional and economic ones to those of self-realization.92

The term Second Demographic Transition was introduced by Ron Lesthaeghe and Dirk van de Kaa.93 The proponents of the Second Demographic Transition contend that emerging behaviors are the expression of new lifestyle choices related to ideational and cultural shift along with the ‘contraceptive revolution’. While traditional social norms and values decreased; and the values that lead to individual autonomy, participation, secularization, rejection of authority, self-fulfillment and quality of life gained priority. This change is believed to be the driving force underlying the changes in family behavior that have been observed over the last decades.94

The Second Demographic Transition suggested that liberalism and freedom from traditional forces of authority particularly religion and growth of personal preferences have significant influence in determining social and economic behaviour. On the basis of significant changes happened in the field of fertility and family formation, Ron Lesthaeghe and Van De Kee developed the term Second Transition.

http://www.demogr.mpg.de/publications%5Cfiles%5C4277_1318519041_1_Full%20Text.pdf (Last visited on March 31, 2017)

92 Supra note 86
93 Supra note 91 at 34
94 Ibid.
The focus of the theory was on the changes like decline in marriage formation, an increase in non-martial cohabitation, a general downfall in fertility but an increase in non-martial child bearing, an increase in union dissolution and a delay in marriage and child bearing. The theory argues that modern prosperity, education have replaced traditional societal norms and demographic change is firmly linked to ideational changes towards more post modern, individualistic and post-materialistic value adaptations and as a consequence, family forms and fertility behaviour are becoming more and more diverse. The gender revolution and evolution and the accompanying increase in female work participation rate has resulted a rise in mean age at first parenthood, high divorce rate leading to a contraction in childbearing and an increase in the share of childless women.

The start of the second demographic transition is often be set at 1965. According to Van de Kaa “changes in family formation have been accompanied by four shifts:

a) **From the golden age of marriage to the dawn of cohabitation**

Marriage rates dropped rapidly, the proportion ever married in each generation declined, remarriages became less likely and divorce rates showed a substantial rise since the mid 1960s. Other forms of living, such as consensual unions, gained importance.

b) **From the era of the king-child with parents to that of the king-pair with a child**

This second shift refers to the decreasing meaning of having children within a partnership. The couple itself becomes more and more important, their relationship, their problems and their well-being.

c) **From preventive contraception to self-fulfilling contraception**

According to Van de Kaa, effective birth control methods not only helped to prevent births but enabled individuals to achieve greater self-fulfillment by permitting greater freedom in sexual relations.

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96 Id. at 46
d) From uniform to pluralistic families and households

This fourth shift refers to household patterns. The once uniform pattern of the nuclear family household (a married couple and their children) has been replaced by a new diversity of living arrangements - a growth in one-person households, more single-parent family households, and a strong increase in the proportion of young people living together without marriage certificate”.

One of the prerequisite for these behavioral shifts has been technological advancement. The availability of efficient contraceptives after the mid 1960s and wider access to legal abortion declined the likelihood of forced marriages to a great extent. Since a marriage has been viewed as moral obligation after a pregnancy, by introduction of reliable contraception many women could avoid unwanted births and therefore also unwanted marriages. Besides, modern contraception, especially the pill, permitted greater freedom in sexual relations and enabled couples to postpone the birth of their first child. Sexual relations were not primarily aimed at procreation anymore. This had also an impact on the norms regarding sexual and reproductive behavior which also lead to a wider acceptance of cohabiting relationships and non-marital births.

Following the idea of the importance of female education on union formation, one could say that education can be used as an intermediary for the value shifts associated within the Second Demographic Transition approach. Lesthaeghe stressed the importance of education for the spread of post-materialist values. People with higher education have values and preferences different from individuals with lower education, not necessarily due to effects of education itself but selection in higher education also plays a role in value orientation. Individuals with higher education are less susceptible to social pressure and cherish values such as autonomy, independence, and self-realization. Individuals with higher education are more committed to individualism and gender equality and less supportive of authority. Highly educated individuals have been the forerunners in the values and behavior associated with the transition. With the expansion of education and the increasing share of better educated women, new lifestyles including extended periods of single

97 Supra note 91 at 35
98 Ibid.
living, cohabitation spread from the higher educated to all other social groups through the process of diffusion. It then became integrated into the process of family formation in varying degrees in most of the European countries. The concept of the Second Demographic Transition has attracted a lot of attention as well as critical doubts. For many critics, the concept of the Second Demographic Transition is merely a description than an explanation of recent demographic developments. Some doubt that the changes were gravely enough to speak from a second demographic transition.  

2.5 GLOBAL ACCEPTABILITY OF NON-MARITAL COHABITATION IN MODERN TIMES

After the World War II, non-marital cohabitation moderately became an approved form of union formation in the United States and other Western countries. According to Second Demographic Transition theory, societies progresses through various stages in accepting and adopting non-marital cohabitation. In the first stage, non-marital cohabitation develops as a variant behaviour that few people accept. Later in the diffusion process, non-marital cohabitation is adopted by more people and functions as a prelude to marriage. Non-marital cohabitation then changes into an alternative for family formation and childbearing. And ultimately, non-marital cohabitation and marriage become equivalent. Different countries are at different stages of acceptance, adoption, and interpretation of non-marital cohabitation.  

According to Ernestina Coast, “Non-marital cohabitation may now be considered normative in the United Kingdom, evidenced by survey and opinion poll data. Such attitudinal data can contribute to the body of evidence about prevailing social norms, stigma and associated behaviour. Attitudinal data about non-marital cohabitation provide one strand of evidence about the acceptability of non-marital cohabitation as a social institution, and contribute to the substantive demographic evidence about the role of non-marital cohabitation in contemporary societies. Responses to questions about attitudes to non-marital cohabitation reveal the extent to

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99 Id. at 36
100 Supra note 82 at 609
which individuals have internalized norms about appropriate and ‘normal’ behaviour with respect to union formation”. 101

‘Cohabitation’ is the term used for live-in relationships in various countries. It is treated synonymous to non-marital cohabitation. Non-marital cohabitation is an arrangement where two people who are not married, live together in an intimate relationship, particularly an emotionally and/or sexually intimate one, on a long-term or permanent basis. Earlier, the law at one time prohibited unmarried cohabitation. The so called ‘concubinage’ was part of Penal Codes in various countries. Many of its proponents emphasized the need to protect women and children and so unmarried cohabitation was treated as undesirable and illegal also. 102 Live-in relationship in various regions of the world or in different countries is either recognized as it exists or it is seeking recognition via implied provisions of different statutes that protect property rights and housing rights. Cohabitation contracts have been provided in many countries in which partners can determine their legal rights. However, when it comes to the rights of women and children born under such relationship lack of uniform and specific law in various countries excludes protecting their rights, thereby, discouraging attempts of non-marital live-in relationships. The meaning of cohabitation and its role in family systems differ considerably from country to country and subgroups within countries. Non-marital cohabitation has become more prevalent globally in recent decades. In Western countries it has come to resemble marriage. 103

In sociological terms the distinction is best made between two forms of cohabitation i.e. provisional cohabitation and long-term cohabitation. “Provisional cohabitation (cohabitation au présent) is a way of life associated with a new tolerance for sexual and affective relationship but without a long-term project of common life and/or family. Provisional cohabitation is widespread among young adults, but also among adults after a divorce or separation, or even after widowhood. Socially, this kind of cohabitation is not associated with a long term project, separation is not a very

102 Supra note 61 at 51
103 Supra note 82 at 607
dramatic issue, and property is not considered common.”¹⁰⁴ ‘Long-term cohabitation’ is a way of living together with or without children and is a long-term relationship. In this type of cohabitation, the behaviour and values are no different from those in contemporary marriage. The live-in partner is considered as an informal spouse and cohabitation as a sort of ‘marriage without papers’ (mariage sans papiers).¹⁰⁵ The similarity between cohabitation and marriage is particularly evident as far as parenting is concerned; the rights and duties of parents and children are considered to be exactly the same in cohabitation and marriage. The modern distinction is no longer between ‘legitimate’ and ‘illegitimate’ children, but between children with two parents and the six percent of children born to a real ‘lone mother’.¹⁰⁶ Of course, in spite of the fact that these different social significations are important, it is extremely difficult to make a distinction between ‘provisional cohabitation’ and ‘long-term cohabitation’ in quantitative data except when there are children born out of such relationship. In fact, many of the long-term unions begin as ‘provisional cohabitation’. Sociologists point out that this new aspect is the tendency towards very soft and informal change in the life cycle. Another problem is that it is difficult to know whether people in long-term cohabitation consider that marriage is definitely excluded for the future or not.¹⁰⁷

The prevalence of non-marital cohabitation varies substantially across countries and also varies across subgroups in countries. Studies have found higher non-marital cohabitation rates among people with less education, fewer financial resources, and limited or no migration experience and among couples who are less religious and more supportive of equitable gender roles. The upbringing of child also influences non-marital cohabitation experience, with several studies showing a higher prevalence of non-marital cohabitation among people growing up in divorced families and/or in families of lower socioeconomic status.¹⁰⁸ Jia Yu, Assistant Professor in Chinese Academy of Social Sciences, thinks that her findings consistent with other works shows that couples with low economic prospects are more likely than their

¹⁰⁵ Ibid.
¹⁰⁶ Ibid.
¹⁰⁷ Ibid.
¹⁰⁸ Supra note 82 at 609
more-advantaged counterparts to choose non-marital cohabitation as a transitional step to marriage.\textsuperscript{109}

Non-marital cohabitation is well studied in Western countries but less is known about non-Western contexts, where non-marital cohabitation has been slower to emerge and data are often less comprehensive. Thus, the Western experience has influenced much of the theoretical debate. And while components of the Second Demographic Transition have emerged in Asia, such as decreased fertility, increases in non-marital cohabitation, and postponement of marriage, many of the related ideational changes have been less pronounced, suggesting the importance of examining social, cultural, and economic factors specific to the national context.\textsuperscript{110} Non-marital cohabitation has also begun to emerge in Asian countries such as Japan, India and China, despite the persistence of strong family ties and more rigid gender roles. The background characteristics remain key to understand the role of non-marital cohabitation in family formation as non-marital cohabitation is sometimes a preference among more affluent, educated individuals exposed to Western culture and sometimes the resort of less advantaged populations who lack the resources to marry. Non-marital cohabitation should also be contextualized with marriage in order to understand its wide ranging roles in family formation. For instance, in some Western contexts, increases in non-marital cohabitation have offset postponed or forgone marriage, leading to little change in union formation overall. However, due to limited data on the prevalence of non-marital cohabitation, it is less clear in other Asian contexts whether delayed marriage has been similarly the outcome of increase in non-marital cohabitation.\textsuperscript{111}

In India marriage has always been considered a sacrament and India is still considered as a country where marriage occupies a sacramental position both philosophically and practically. In the eyes of law the husband and wife are considered as one. The legal consequences that follow add to the sanctity of this relationship of marriage. Marriage legally entitles husband and wife to cohabit and the children born out of a legal wedlock are entitled to the status of legitimate children of

\begin{footnotes}
\footnotetext[109]{Ibid.}
\footnotetext[110]{Supra note 55}
\footnotetext[111]{Ibid.}
\end{footnotes}
the couple. A wife is entitled to maintenance during the subsistence of marriage and even after the dissolution of marriage. However these benefits of marriage come with a lot of responsibilities i.e. the marital obligations towards the spouse, towards the family, towards the children and towards the marital house are inseparable parts of the Indian marriage. To enjoy the benefits of cohabiting together without taking the responsibilities of marriage, young couples are attracted by the concept of live-in relation. Live-in relationships provide for a life free from responsibility and commitment which is an essential element of marriage.112

Globally, there is diversity in the meaning of cohabitation and the life circumstances or social and policy environments that compel men and women to enter into such unions. Some couples practice non-marital cohabitation as a trial period before marriage, while others may see it as a substitute to marriage. Countries support non-marital cohabitation to varying degrees through policies; thus the policy environment may either influence couples’ decisions to cohabit or alternately, policies may be put in place in response to existing practices. Non-marital cohabitation and nontraditional family forms may be adopted by the educated and liberal elite as forerunners of social change or they may be coping strategies of the less privileged in response to economic stress or instability. This is evident in the diversity of both practice and policy observed in Europe, United States, Canada, Australia and much of East Asia.113 Here it becomes imperative to study how different political and social ideologies of various countries have given different colors to non-marital relationships in its development process through its direct or indirect legal provisions. The countries with important developments and acceptability of non-marital live-in together relationships have been studied to elaborate the global acceptability of live-in relationships as following:

2.5.1 China

During the Mao era (1949–1976), China was isolated from Western countries. This closed-door policy was transformed by the economic reforms that began in 1978. Since then, Chinese people have gradually become more familiar with Western

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112 Ibid.
113 Ibid.
culture through such channels as magazines, newspapers, radio and television programs, and the internet, as well as directly through travel. Chinese who accept developmental prominence may view the social, economic, cultural shifts and personal desires including elements of family life in the West as ideal objectives for China. A change in the law may also be adding to the acceptance of non-marital cohabitation. The Chinese Marriage Law of 1980 referred to cohabitation as ‘illegal cohabitation,’ while a 2001 amendment to the law substituted the wording to ‘non-marital cohabitation,’ and this decriminalization may have changed the public attitudes toward non-marital cohabitation. In contrast to industrialized societies, non-marital cohabitation in China is more common among people with higher education and those from higher-status families. This suggests that, as an emerging idea or family behavior, non-marital cohabitation is more acceptable and more likely to be adopted by those with greater knowledge of Western societies. Institutional factors such as migration experience affect the likelihood of premarital cohabitation evidence that both socioeconomic conditions and ideological norms matter. Residence in a region characterized by greater economic development has a positive effect on the likelihood of non-marital cohabitation, which also suggests the influence of exposure to Western culture. In China couples also sign a contract for live-in relationship. The child born through such relationships enjoys the same succession and inheritance rights as are enjoyed by children born through marriages.

Non-marital cohabitation as a social presence is not unique to modern society; however people of different generations have their different attitude. In traditional societies non-marital cohabitation not only suffered severe condemnation from the society on the issue of morals, but also may face legal penalties. In china’s marriage law promulgation of 2001, no mention of non-marital cohabitation takes evasive attitude. However, the reality is that china’s non-marital cohabitation is widespread

114 Supra note 82 at 611
115 Id. at 612
116 Id. at 622
and occurs among all levels of society. Not only non-marital cohabitation but the Traditional Wedding Custom Culture is deeply influenced the lack of the concept of the rule of law in rural areas there is a large number of well educated in the city, even well versed in the law of men and women willing to such a choice. Although China’s traditional ethics and cultural background does not provide appropriate social environment, but people still give more and more tolerant of non-marital cohabitation. Non-marital cohabitation has become China’s an unavoidable social reality and hard prohibited. The existence of large number of non-marital cohabitation phenomenon of society brought about many problems caused due to non-marital cohabitation personal relationship more prominent contradictions and property relations dispute.\textsuperscript{118}

2.5.2 Scotland

A common law marriage is legally binding in some common law jurisdiction but has no legal consequence in others. Common law marriage does not exist in Scotland. There was a type of irregular marriage called marriage by cohabitation with habit and repute which could apply to couples who have lived together and were thought to be married. This was rarely used in practice and except for very particular circumstances was abolished by the Family Law (Scotland) Act 2006. Only irregular marriages established before May 04, 2006 will be recognized. Marriage by habit and repute was a form of interpersonal status that was legally recognized in limited jurisdiction as a marriage, even though no legally recognized marriage ceremony was performed or civil marriage contract entered into or the marriage registered in a civil registry.\textsuperscript{119} Family law (Scotland) Act 2006, for the first time identified, and in the process by default legalized, live-in relationship of cohabiting couples in the country.

The Family Law (Scotland) Act 2006 introduced new rights and an obligation concerning cohabiting couples (the live-in-relation). Section 25 (2) of the Act postulates that a court of law can consider a person as a co-habitant of another by checking on three parameters; (a) the length of the period during which they lived together, (b) the nature of the relationship during that period and (c) the nature and extent of any financial arrangements, subsisting or which subsisted during that period.


\textsuperscript{119} Supra note 117 at 2
In case of breakdown of such relationship, under Section 28 of the Act, a cohabitant has the right to apply in court for financial provision on the termination of the cohabitation otherwise by reason of death i.e. separation. If a partner dies intestate, the survivor can move the court for financial support from his estate within six months.121

2.5.3 United States

The American legal history is witness to several consensual sex legislations and common law marriage doctrine, which facilitated the way for living together contracts and the ‘prenuptial agreements’122. In United States of America there exists the concept of ‘cohabitation agreements’123, comprising the specific mention of rights and liabilities under such agreements. In Fenton v. Reeds124 case, court applied the common law marriage doctrine and recognize a long term cohabitation as marriage. Court reasoned that because the parties cohabited together as husband and wife, and under the reputation and understanding that they were such, and the wife, during this time, sustained a good character in society, an actual marriage between them could be inferred.125 ‘California Supreme Court in Marvin v. Marvin126, a case related to the famous film actor Lee Marvin, with whom a lady Michelle lived for many years without marrying him, and was then deserted by him and she claimed palimony. Supreme Court of California held that unmarried couples may enter into written and oral contracts that cover rights often associated with marriage (such as the rights to property acquired during the relationship). Unmarried couples may create ‘implied’

122 NOTE: [A prenuptial agreement is a contract entered into by two people who are about to marry. A prenuptial agreement (often called a ‘prenup’ or ‘prenupt’) is used to specify how property and debts will be divided in the event of a breakup.]
123 NOTE: [cohabitation agreement is a form of legal agreement reached between a couple who have chosen to live-together. Unmarried couples who are living together have the option of creating a number of legal documents often called ‘cohabitation agreements’ that can help protect their rights as a couple, while at the same time safeguarding their individual interests and assets. Since unmarried couples who live together may one day split up, especially outside of the legal bonds and social institution of marriage. The legal requirements for a valid cohabitation contract are much like the requirements for any valid contract.]
124 4 Johns. 52 (N.Y.Sup.Ct. 1809)
125 Supra note 9 at 1886
126 Marvin vs. Marvin, 18 Cal.3d 660 (1976)
non-marital agreements, without ever writing it down or expressly speaking about it. Rather, a court can evaluate the couple’s actions to determine if such an agreement has been implied in their relationship. If no implied agreement is found, a judge can presume that the parties intended to ‘deal fairly with each other’, and grant one party rights and obligations consistent with equity and fairness.\textsuperscript{127}

In United States of America the expression 'palimony' was coined which means grant of maintenance to a woman who has lived for a substantial period of time with a man without marrying him, and is then deserted by him. Palimony is a compound word made by 'pal' and 'alimony'. The first decision on palimony i.e \textit{Marvin v. Marvin}\textsuperscript{128} was the well known decision. ‘Subsequently in many decisions of the Courts in United States of America, the concept of palimony has been considered and developed. The United States Supreme Court has not given any decision on whether there is a legal right to palimony.\textsuperscript{129} Although there is no statutory basis for grant of palimony in United States of America, the Courts have granted it on a contractual basis. Some Courts in United States of America have held that there must be a written or oral agreement between the man and woman that if they separate, the man will give palimony to the woman; while other Courts have held that if a man and woman have lived together for a substantially long period without getting married, there would be deemed to be an implied or constructive contract that palimony will be given on their separation.’\textsuperscript{130}

Thus the purpose of these recognitions in \textit{Fenton v. Reed}\textsuperscript{131} and \textit{Marvin v. Marvin}\textsuperscript{132} actually was to protect the vulnerable section of society. However in \textit{Taylor v. Fields}\textsuperscript{133} where the plaintiff Taylor had a relationship with a married man Leo, after Leo died Taylor sued his widow alleging breach of an implied agreement to take care of Taylor financially and she claimed maintenance from the estate of Leo. The Court of Appeals in California held that the relationship alleged by Taylor was nothing more than that of a married man and his mistress. It was held that the alleged contract rested

\textsuperscript{127} \textit{Available at:} www.casebriefs.com/blog/law/family-law/family-law-keyed-to-weisberg/alternative-families/marvin-v-marvin/2/ (Last visited on Sep.12, 2016)
\textsuperscript{128} 18 Cal.3d 660 (1976)
\textsuperscript{129} \textit{Supra} note 117 at 10-11
\textsuperscript{130} \textit{Supra} note 120 at 35
\textsuperscript{131} 4Johns. 52N.Y.Sup.Ct.1809
\textsuperscript{132} 18Cal.3d 660(1976)
\textsuperscript{133} (1986) 224 Cal. Rpr.186
on meretricious consideration and hence was invalid and unenforceable. The Court of Appeals relied on the fact that Taylor did not live together with Leo but only occasionally spent weekends with him. There was no sign of a stable and significant cohabitation between the two.\textsuperscript{134}

It is clear from the approach of the Courts in USA that cohabitation relationships and rights of the cohabitants have been recognized if the cohabitants have formed cohabitation agreements and if have not formed any such agreement can be covered under the doctrine of common law marriage. However it is worth notice here that common law doctrine is not recognized in all states of United States of America.

\textbf{2.5.4 Australia}

Non-marital cohabitation, an informal marriage, a de facto relationship, living together has been a growing phenomenon for more than two decades not only in Western societies. ‘The movement that began in Australia at the end of the nineteenth century toward early and universal marriage ended up in 1971 with a median age at first marriage for women of 21.1 years. After that marriage rates declined and age at first marriage increased, so that, by 1986, the median age at first marriage for women had reached 25.4 years, however, at the same time, rates of informal cohabitation increased’.\textsuperscript{135} While the acceptance of the union has attracted more demographic attention than the union dissolution, major concerns remain; first, the nature of the role played by women's education is still subject to debate. While one influential school of thought argues that women's increased economic independence emanates in part from improvements in their education and has weakened their enticement to marry. Further, the marriage rates may have fallen simply because longer schooling delays entry into the marriage institution. Second question relates to the implications of informal marital unions, since the effect of the increase in such unions on marriage rates will depend on whether cohabitation is a precursor of legal marriage, or a clear alternative to it.\textsuperscript{136}

\textsuperscript{136} \textit{Ibid.}
Australia tends to trailing marginally to other western industrialized countries in its demographic changes. In Australia, since 1970s the rate of people marrying between the ages of 20 to 29 years has been falling continuously.\textsuperscript{137} The increase in the de-facto relationships justified the part of this decrease and it could be said that the inception of non-marital cohabitation may be a more appropriate marker of union formation than the marriage date. In the past, those living in consensual unions tended to be the poor, those unable to divorce estranged spouses, and were progressive. In recent years, there has been a tendency towards young people leaving home and being independent for a period before marrying. In many instances, this involves being sexually active and setting up house in marriage-like relationships.\textsuperscript{138} This means marriage is less likely to be a young person’s first experience of living with someone else in a committed sexual relationship. Large numbers of young people are postponing marriage in favor of living together until their mid to late twenties. This practice not only has escalated the rate of cohabitation before marriage but has also increased the divorce rate which further results in a high rate of cohabitation after marriage breakdown. Taking note of these demographic trends, cohabitation now appears to be widely accepted and condoned by law and the general population.\textsuperscript{139}

In Australia only when children are involved, de-facto relationships come under the jurisdiction of the Family Law Act, 1975. Although a parliamentary review committee is considering whether the Act should be extended to cover all de-facto relationships, at present it stands that the legal system is inconsistent in the way it deals with these relationships; laws vary between states, between the states and even between government departments.\textsuperscript{140} The property rights to a de-facto relationship when it breaks down are confusing. Unlike a married couple who can take their grievances before an independent adjudicator in the form of the court acting under the auspices of the Family Law Act, de-facto couples has to rely on a tangle of largely unspecific state property laws that vary from state to state.\textsuperscript{141}

\textsuperscript{138} Ibid.
\textsuperscript{139} Ibid.
\textsuperscript{140} Ibid.
But non-marital cohabitation is not a stagnant or homogeneous institution. It has been rightly pointed out that de-facto relationships are part of spectrum of marriage relationships which derive varying degrees of legal consequences ranging from long-term, full-status ceremonial marriages down to other more casual arrangements. Somewhere near the middle of this spectrum appear de facto relationships of from one to five years duration, together with shorter relationships that have produced offspring. The inclusion of these relationships at different points in the spectrum indicates the different legal consequences attaching to them. There are a myriad of state and federal laws to further complicate matters that rely on different definitions applying in different circumstances, causing de-facto relationships to attract more legal recognition in one state or for one purpose than they do in or for others.\textsuperscript{142} Australia has already given recognition to such relationships. Australia recognizes ‘de facto relationship’ under its family law.

The Interpretation Act, 1984 (Australia) has laid down certain indicators to determine the meaning of de facto relationship. “De facto relationship and de facto partner, references to:

(1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between two persons who live together in a marriage-like relationship.

(2) The following factors are indicators of whether or not a de facto relationship exists between two persons, but are not essential:

(a) The length of the relationship between them;
(b) Whether the two persons have resided together;
(c) The nature and extent of common residence;
(d) Whether there is, or has been, a sexual relationship between them;
(e) The degree of financial dependence or interdependence, and any arrangements for financial support, between them;
(f) The ownership, use and acquisition of their property (including property they own individually);

\textsuperscript{142} Ibid.
(g) The degree of mutual commitment by them to a shared life;
(h) Whether they care for and support children;
(i) The reputation, and public aspects of the relationship between them.

2.5.5 Canada

Cohabitation in fact has been in existence for much longer than the institution of marriage but not in law. The only difference was that marriage was a formal event and status, whereas non-marital cohabitation had not nice, fancy status however, it wasn’t always that way. The early common law did recognize a consensual relationship between husband and wife, without any formal ceremony, provided the relationship had been consummated. This relationship was recognized as marriage not less than that, hence, the relationship termed as common-law marriage. A common law couple may be defined as two persons of opposite sex who are not legally married to each other, but live together as husband and wife in the same dwelling. Although historically Canadians disapproved the couples who lived together before marriage,

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143 The Interpretation Act, 1984 (Australia), Section 13(A) [De facto relationship and de facto partner, references to:
(1) A reference in a written law to a de facto relationship shall be construed as a reference to a relationship (other than a legal marriage) between 2 persons who live together in a marriage-like relationship.
(2) The following factors are indicators of whether or not a de facto relationship exists between 2 persons, but are not essential —
(a) the length of the relationship between them;
(b) whether the 2 persons have resided together;
(c) the nature and extent of common residence;
(d) whether there is, or has been, a sexual relationship between them;
(e) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
(f) the ownership, use and acquisition of their property (including property they own individually);
(g) the degree of mutual commitment by them to a shared life;
(h) whether they care for and support children;
(i) the reputation, and public aspects, of the relationship between them.
(3) It does not matter whether —
(a) the persons are different sexes or the same sex; or
(b) either of the persons is legally married to someone else or in another de facto relationship.
(4) A reference in a written law to a de facto partner shall be construed as a reference to a person who lives, or where the context requires, has lived, in a de facto relationship.
(5) The de facto partner of a person (the first person ) is the person who lives, or lived, in the de facto relationship with the first person.

however, in more recent times the stigma attached to non-marital cohabitation has diminished, if not disappeared. Common-law-marriage was the fastest growing family formation category by the end of the millennium. For some Canadians, non-marital cohabitation is an interim state that anticipate a legal marriage, but for others it is a permanent substitute for marriage. Canadian law does not provide much protection for the property rights of partners in common-law relationships than those of legally married partners.\textsuperscript{145}

Live-in relationship/ non-marital relationships are legally recognized in Canada. In Canada these couples are accorded their legal rights if they are living conjugal relationship for a year or so. Section 54 (1) of Family law Act, 1990 (Canada) says that, two persons who are cohabiting or intend to cohabit and who are not married to each other may enter into an agreement in which they agree on their respective rights and obligations during non-marital cohabitation, or on ceasing to cohabit or on death, including;

\begin{itemize}
  \item [i)] Ownership in or division of property;
  \item [ii)] Support obligations;
  \item [iii)] The right to direct the education and moral training of their children, but not the right to custody of or access to their children.
\end{itemize}

And further Sub-Section (2) of Section 53 provides that if the parties to a cohabitation agreement marry each other, the agreement shall be deemed to be a marriage contract.\textsuperscript{146} Law grants common-law partners the same fundamental rights as married couples after two years of cohabitation; it casts a light on how common-law couples are treated. The presence of children can significantly affect the way a common-law relationship is viewed in the eyes of law.\textsuperscript{147}

\subsection*{2.5.6 United Kingdom}

In United Kingdom a man and woman living together in a stable sexual relationship are often referred to as ‘common law spouses’. Although cohabitants do

\begin{flushleft}
\textsuperscript{146} Supra note 121 at 3
\textsuperscript{147} Supra note 120 at 34
\end{flushleft}
have some legal protection in several areas such as property rights, housing, domestic violence, inheritance, social security, pensions, taxation, immigration, birth registration and parental responsibility but cohabitation enshrines no particular legal status to a couple unlike marriage and civil partnership from which various legal rights and responsibilities flow based on particular status of relationship. Many people are not aware of the fact that there is no specific legal status for what is often referred to as a common law marriage. If unmarried couple separates or one cohabitant dies, they have no guaranteed rights to ownership of each other’s property; it does not matter how long the couple has lived together and even if they had children together. ¹⁴⁸ Some cohabitants enter into a cohabitation agreement which can act as encouragement to consider what they would want to happen if the relationship ends. ¹⁴⁹

‘The couples living together without marriage in the United Kingdom does not enjoy the status of married couple. They do not have same legal rights and duties as assured to married couples. Though they are free to maintain each other separately, there exists no duty or obligation on anyone of them to maintain other. Though the partners do not have inheritance right over each other property but one is eligible to be maintained where a partner had specifically mentioned the name of other partner in the will. Thus couple in such a relationship is not plainly free from all legal consequences. The state pensions that are available to the wives and civil partners who have legalized their status are not similarly applicable to partners who live together unmarried. Bereavement allowance that is available to widowed person is also not available to surviving live-in partner if the other dies. However, the law seeks to protect the rights of a child born under such relationships and hence both parents have the responsibility of bringing up their children irrespective of the fact whether they are married or cohabiting’. ¹⁵⁰

2.5.7 France

France like other European countries has observed an increase in non-marital unions during the last thirty years. In France the norm was to start a union with a

¹⁴⁹ Ibid.
¹⁵⁰ Supra note 120 at 34
marriage till the start of seventies. During the eighties France experienced major changes. First union starting with a cohabiting relationship became the most frequent pattern during these years. The norm of marriage changed and at the beginning of the nineties the first union entered by vast majority was non-marital cohabitation and marriages represented only one union in nine, however, this high pervasiveness of non-marital cohabitation as the first union entered does not necessarily mean that cohabitation had replaced marriage or that it constituted an alternative to it. Non-marital births increased strongly in France during the eighties, the proportion of non-marital births among all births reached 30% and 40% at the beginning and the end of the nineties respectively. The accompanying increase in cohabiting unions and non-marital births suggests that a lot of non-marital births were births to women living in a cohabiting union. Jean-Marie Le Goff in his research on cohabiting unions highlights, “In France the increase in non-marital first births corresponds to a decrease in women who marry between the conception and the birth of a child. It corresponds also to a decline in the proportion of women who get married before the conception of the first child. On the other hand, the increase in the proportion of non-marital births outside of a union is only modest.”

At the outset of the twentieth century the cohabiting unions were, at best, considered outside law and ignored by authorities or, at worst, prohibited and prosecuted. Most of the countries had adopted devices of family regulation based on the model of conjugal family and legitimate births and until the end of the 1960s these family regulations remained unchanged. In the current context, cohabiting unions and out-of-wedlock births raise crucial juridical questions. Firstly, the relationship between the two partners has to be clarified. Secondly, the relationship between the unmarried father and the child has to be specified, i.e. the parental authority and the procedure to recognition of the child by the unmarried father have to be clarified. New measures and regulations depend on legal and cultural traditions and family ideologies specific to each country. In France, the family is recognized by the state as

151 Jean Marie Le Goff, “Cohabiting unions in France and West Germany: Transitions to First Birth and First Marriage”, available at: http://www.demographic-research.org/volumes/vol7/18/7-18.pdf at page 596 (Last visited on July 02, 2016)
152 Id. at 597
153 Id. at 598
154 Id. at 599
an institution which plays a role for social cohesion. The country, however, display different general and cultural political contexts in the regulation of family forms. There are traditional connections between family and policies in the case of France.  

France has introduced equal treatment of married and unmarried couples in its legislation; however the historical panorama about the progression of legislation and laws on cohabiting unions and filiations provides a more opaque picture. After the World War II, family policies in France were based on the norm of the conjugal family. The increase in cohabiting unions during the nineties did not prompt authorities to extend social legislation from married to unmarried couples. Rules of taxation did not allow unmarried couples to jointly declare their income. There were no rights of mutual inheritance in case of death of one’s non-married cohabiting partner. However, cohabiting persons were also treated differently than singles, e.g. they were not entitled to claim special allowances, like allowance for family support to lone mothers or allowance for widowhood. The creation of the ‘Pacte Civil de Solidarité’ (PACS) changed considerably this situation, but did not give the equal rights to cohabiting and married couples. Although the cohabiting unions were increasing, the French legislation gave its preference to marriage.

On October 13, 1999 the French National Assembly passed the Bill amending French Civil Code by inserting provisions for Civil Solidarity Pacts. Live-in relationship is governed by civil solidarity pact in France known as ‘pacte civil de solidarité’ which permits a couple to enter into a union by signing a contract before a court clerk. The contract binds ‘two adults of different sexes or of the same sex, in order to organize their common life’ and permits them to enjoy the rights given to married couples in the sphere of income tax, housing and social welfare. This contract can be cancelled by one partner or both after giving the partner, three months’ notice in writing.

2.5.8 The Philippines

The Philippines is unique because non-marital cohabitation is not an entirely new phenomenon. The absolute number of registered marriages in the Philippines has

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155 *Id.* at 599-600
156 *Id.* at 601
157 *Supra* note 120 at 4 [see also: Sonali Abhang, “Judicial Approach to ‘Live- In-Relationship’ In India- Its Impact on Other Related Statutes”, 19(12) *IOSR-JHSS* 34 (2014)]
declined considerably in the last decade – by nearly 25% between 2004 and 2013- (CITE Philippines Statistics Authority), it is possible that this decline has been offset by increases in non-marital cohabitation. 158 Today, cohabitation as an older, indigenous practice coexists alongside more contemporary forms of non-marital cohabitation, representing both longer term commitment and trial marriage. The increase in non-marital cohabitation has taken place beside other allied major demographic changes including growing rates of separation, delay in entry into first marriage and childbearing and increase in the numbers of births taking place outside marriage.159

In Philippines, live in relationship is recognized, and it governs the property relations by the rules on equal co-ownership, under chapter of ‘Conjugal Partnership of Gains’, Article 147 of Family Code Philippines provides that where a man and a woman who are capacitated to marry each other, live exclusively with each other just like a husband and wife, but without the benefit of marriage or when the marriage is void. In such a situation, property acquired by both the spouses through their work, their wages and salaries shall be owned by them in equal shares which shall be governed by equal co-ownership rule.160

2.6 SUM UP

Indian society has been in a state of revolution from the morals to the practical world, revamping the old customs and traditions in light of the cultural shifts and the repercussion of the west. The marriage as sacrament is still deeply guarded by the society but that is not to say that people don’t adopt alternative forms of living arrangements. Alternative forms of such living arrangements were available in primitive times as well. As we probe into the history of various cultures and countries we find that non-marital living arrangements were in existence in earlier times with different names but had lower social status with no legal rights.

Alternative living arrangements of ancient times in Europe are called concubinage by Bradley. He termed non-marital cohabitation as the continuance of concubinage institution of ancient Rome of napoleon era. In early America such non-marital cohabitation was known as informal marriage for poor people who could not

158 Supra note 55
159 Ibid.
160 Supra note 120 at 34
afford the expenses of marriage ceremonies and rituals. In France the alternative form of living arrangement of extra-marital cohabitation was prevalent. In Scotland an irregular union of marriage by habit and repute had similarities with the present union of non-marital cohabitation. In Philippines living arrangement of kasalukuyang may kinakasama, a traditional form of cohabitation based on commitment without marriage, was prevalent. In Vedic India non-marital cohabitation was termed as Gandharva Marriage. In later times cohabitation without marriage and extra-marital cohabitation were known as concubinage and especially in Gujarat such concubinage was contracted as maitray karaar.

While various forms of long-term sexual relationships and cohabitation short of marriage have become increasingly common especially in the Western World, these are generally not described as concubinage. The terms concubinage and concubine are used today primarily when referring to non-marital partnerships of earlier eras. In modern usage a non-marital domestic relationship is commonly referred to as co-habitation or other similar terms and the woman in such a relationship is generally referred to as a girlfriend, lover or partner. It proves that the ancient tradition of cohabitation is returning. It is assumed that the phenomenon of a post-industrialized society is instrumental in causing the societal change into this renewed social institution of cohabitation. Thus through this historical exploration of the concept researcher could sum up that live in relationship is a new term but an old concept. This institution was known by different names in history as discussed above. The concept had lower social status and in western world it was an institution for poor people and in India also mostly the women of lower social status were found in such relations. Women of high social status and well to do families were unlikely to be found in such practices. However, men of good financial status were most likely in the practice of keeping concubines. Hence researcher could say that in primitive times the institution which was of lower status is presently termed as a new concept of freedom to live together without marriage and has become the choice of modern-urban and elite class.