

Secular marriage: a BONANZA or HARDNUT ?

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“ Speak words worthy and
Speaketh not others.”- Kural 200

Introduction

How far the statement of Sir. Henry Mein regarding the movement of societies have hither to been from status to contract can be applied to marriage and divorce in the present day world prompted this attempt. Much praised Sangam era Thirukkural adorns the virtue of the household and duties (41-50), 'The marriage state is virtuous, others if not reproached (49), praises chastity of women (57) and denounces lust for other's wife(141-150)but doesn't say about divorce. Prof.K.A.Nilakanta Sastri emphatically spells in his "Advanced History of India" that divorce was never practiced during 5,000 B.C as Rig Veda has not referred it. Prof.Daube of Oxford University interprets Paulin's privilege on the lines of the teachings of Jesus that divorce is like 'breaking of one flesh¹. When Prof.Duncan Derret remarked that the judges should not merit theological views (Justice V.R.K on Muslim law), he was rebuked as a distant academic interfering in the aspirations of a nation .But he could reconcile by suggesting that Muslims can put up their house in order without the involvement of the legislature². In Roman law marriage is a social fact and not a legal relationship³. When

¹ J.Duncan Derret -Essays in Classical and Modern Hindu Law

² J.Duncan Derret -Essays in Classical Modern Hindu Law Vol - IV p 58

³ Max Kaser -Roman Private Law

families, groups and societies have to observe norms in their interpersonal relationship, what is the roll of religion, custom or culture? Whether uniformity and acculturation is possible like common civil law as envisaged in the Constitution? When globalization is the trend, how far religious freedom can be reconciled with right to marry?

RELIGIOUS AND SECULAR MARRIAGES:

As religious norms are based on morality, the question of faith and the hold of religion are inseparable. Who is a Hindu and what is Hinduism are difficult questions to answer. Plurality of castes, sects and sub-sects lead to different practices, lacking uniformity. Even the law defines a Hindu in generic terms like one whose parents are Hindus. The law recognizes a Hindu marriage only when the conditions prescribed are fulfilled, besides the observance of procedures⁴.

Custom:

Rituals and ceremonies of marriage differs from region to region and groups. 1991-census mentions 77 groups, besides unclassified ones among S.C.'s alone (Tamil Nadu). There are about 12 social -territories in Coimbatore, Salem and Erode revenue districts⁵. Even though there are many common basic ceremonies, others vary to a great extent. Only a few dowry deaths are reported and abandoning of female infants is a common occurrence. The government implements cradle scheme, and there are also cases of retrieval of babies by mothers⁶. When a custom crystallizes into law? It was answered by the common law courts as those customs, which have been

⁴ Desai Hindu Law

⁵ XXXVII Economic and Political Weekly 16-2-2002 p 653

⁶ Life and Death in Salem – Front line 1-3-2002

practiced from the year 1613⁷. Duncan Derret suggests that a marriage custom may be approved if it was in practice for 40 years⁸. Section 4 of Special Marriages Act 1954 gives approval to marriages even though the parties are within prohibited degrees but their custom permits. The rider is the custom should have been notified as one of the tribe/community or family. Medhithi's study of Manusmriti reveals that a subject who observes customs need not fear the king. As he belonged to a unit family, clan, tribe, cast, or village which would defend him independent of merit of his case⁹.

Consent:

When Zimmerman says "meeting of minds bring isolated individuals together in community but mismatch occurs due to mistake" or Earnest Weinrib says "society is not presupposed but emerges out of totality of individual exchanges"¹⁰ about unification, they are applicable to families also. The importance of the consent of "would be partners for life" can be appreciated. Whether there is a valid consent in real sense of the term is present in minor's marriages? The courts are always anxious to keep these marriages intact and never hold them void on this ground. Sections 11 and 12 of Hindu Marriage Act do not guide explicitly to the effect of violation of minimum requirements¹¹. The same approach seems to be adopted by courts when they deal with cases where the parties get married under Panchayat or police compulsion¹².

From 1969, self respected marriages (seerthirutha / suyamariathai) have been statutorily recognized in Tamil Nadu by way of amending Hindu Marriage Act 1955.
No ceremony need be

⁷ Fitzlerland—Salmond's Jurisprudence

⁸ D. Derret-Introduction to Modern Hindu Law p 15

⁹ Deret-Classical Essays

¹⁰ Mark Von Hoeck and Francis Ost – Harmonization of European Private Law

¹¹ (1993) 1 MLJ 622

observed if the parties are capable under Hindu Marriage Act, and same privilege is not available to people of other faith. As Special Marriage Act 1956 prescribes certain formalities like notice, registration etc for inter-religious marriages self respect format stand questioned¹³. In a few Tamil Nadu cases the courts have to decide whether a Hindu spouse consented for divorce was in accordance with the custom prevalent in their community¹⁴. Petitioners could prove neither the procedure nor substantive part of the custom¹⁵

Registration:

Tamil Nadu Hindu Marriages (Registration) Rules, 1967 provide for registration of marriages as permitted under Sec 8 of Hindu Marriage Act 1955¹⁶. Which facilitates proof of marriage but validity depends upon customary rites and ceremonies¹⁷. Only a few marriages are registered. In other faiths their institutions maintain registers and law recognizes them. When majority of the population lack awareness and many don't register even births under Registration of Birth and Death Act 1969. If mandatory provisions are not observed how optionals will be enforced ?

Faultless and consent divorces are suggested for hard core cases by many jurists and available under different Enactments. United Kingdom Matrimonial Causes Act 1973 sec 1(d) permits divorce after two year separation¹⁸. Duncan Derret cautions us not to hurry up as the quoted provision invited a lot of criticism in UK. It is also to

¹² M. Veleiyudham V Karmagi (1991) 2 MLJ 36

¹³ A.G. Packiaraj V P. Subbammal @ Susila Bai (1991) 1 MLJ 271

¹⁴ Pattayee Ammal V Manicka Gounder AIR 1967 Mds

¹⁵ Chandralekha V Subramani & Others (2002) 1 MLJ 320

¹⁶ R. Anita Manijinic V R. Anadurai (1992) 2 MLJ 11

¹⁷ Mousi Chakroborty V Subtara Guha Roy 1991 Cal

¹⁸ Milka Oldham – Blackstone's Statutes on Family Law

be remembered that they have civil as well as religious marriages. And no clergy of Church of England be compelled to solemnize a divorcee's marriage when the former spouse is still living.

Josephine Harderson comments on English Law, which doesn't recognize marriage without civil formalities under the Marriage Act 1994. People who practice minority religion have two ceremonies, civil and religious, but not Anglicans. Anglican Church maintain registers and observe other formalities. Churches don't permit divorce, but civil authorities¹⁹. Even though the difficulty of reconciling Art 12 and 9 of Human rights Act 1998 is pointed out, John Ekelaar is optimistic in reconciling them²⁰. Even Ireland amended its constitution to provide for divorces and enacted Family Law (Divorce) Act 1996²¹.

¹⁹ Christopher Baker – Human Rights Act 1998

²⁰ (2001) LQR 696

²¹ 50 ICLQ (2001) 150.

