Hindus and Civil Marriage: An Unresolved Dilemma*

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THE CREATION of matrimonial status in any society involves the observance of certain formalities prescribed by that society, a mere cohabitation[1] of the parties being insufficient to effectuate such a status. The solemnization of marriage by observing either the religious ceremonies or certain secular forms prescribed by law is a symbolic expression of the fact that the parties are accepting each other as spouses or where they are of nonage, their parents or guardians deem them to have become spouses.[2] The formalities of marriage prescribed by various communities in India are, in fact, varied and complex, their nature differing according to whether a particular community considers marriage as a religious or secular union. Indian society presents a broad spectrum of formalities ranging from the simple draping of the bride by the bridegroom with a sheet of cloth[3] or the bride carrying a pitcher of water into the residence of the bridegroom[4] to the most elaborate ceremonies spreading over a few days. The marriage formalities in many communities are, indeed, a bundle of ceremonies involving religious, economic, legal and aesthetic motives thereby rendering the separation of legal requirements from their other adjuncts difficult.

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*The *Fifty-ninth Report* of the Law Commission has suggested an amendment to be inserted as s. 21A of the Special Marriage Act, 1954 for solving the problems highlighted in this paper. However, the alternative solution suggested in this paper has the advantage of avoiding the unfortunate implications of s. 21A.

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1. An exception is to be found among the Jats with respect to the remarriage of a widow especially with her brother-in-law. See *Charan Singh* v. *Gurdial Singh*, A.I.R. 1961 Pun. 301 (F.B.).

2. The recent decision of the Andhra Pradesh High Court in *Panchireadi* v. *Gadela Ganapatlu*, A.I.R. 1975 A.P. 103, declaring that a contravention of the provision in s. 5 (*iii*) of the Hindu Marriage Act, 1955 namely, relating to age limits would render the marriage *ab initio* void, does not represent the correct law. See also for the comments of the Law Commission its *Fifty-ninth Report* 50-51.

3. A form of customary marriage existing in Punjab.

4. See for instance in *Kanwal Ram* v. *Himachal Administration*, A.I.R. 1966 S.C. 614-15.

Marriage among Hindus is solemnized either by observing the customary rites of the community to which the parties belong or by performing the *dharmashastric* ceremonies. The customary rites relating to marriage are so varied in the Indian subcontinent that it is not possible to state with any degree of certainty what formalities are required to be observed for the creation of the status. It is indeed a question of fact to be ascertained from the social practices of the community to which the parties belong, *dharmashastras* have, however, specified elaborate and complex ceremonies for establishing the matrimonial nexus. Beginning with a set of simple Vedic ceremonies, the Hindu society has formulated by a gradual process of addition and elaboration a plethora of ceremonies. The baffling number of ceremonies have come into existence due to the practice of Hindu sacredotalism which has ceremonialised each and every activity relating to marriage. For instance, the arrival of the bridegroom at the residence of the bride has been made *varapuja*, throwing a party in his honour has become *madhuparka*, giving new clothes to the bridegroom for wearing on the occasion *vastra paridhanam*, gifting of the bride by the father or guardian *kanyadana*, hand clasping *panigrahana* and so on. Even though there exist some differences regarding the observance of certain ceremonies and their order, there is wide agreement among the leading works with regard to the performance of certain necessary ceremonies such as *kanyadana*, *panigrahana*, *saptapadi* and *lajahoma*. It is indeed very difficult to say with any degree of certainty which of these ceremonies occassions the creation of matrimonial status. However, from the legal standpoint it is the ceremony of '*saptapadi*' which effectuates the matrimonial status, for, this ceremonoy alone according to judicial *dicta* puts the stamp of finality on the transaction.

II

The Hindu Marriage Act, 1955 has merely reiterated in section 7 the provisions of the traditional Hindu law relating to solemnization. Section 7 lays down :

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the *Saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

The only slight modification made by this section is that where the parties to a marriage belong to two different communities with differing custo-

mary rites, the parties have a choice to opt for either of them. Such a provision has become necessary in view of the wide connotation of the term 'Hindu' under the modern Hindu law enactments.[5] It may be significant to notice in this connection that even under the post-1955 era the Hindus turn to their traditional rites for the purpose of getting their marriage solemnized although there is a radical departure in other areas of matrimonial law.

So long as the parties to a marriage have no objection to go through the traditional process for effectuating the marital status, the existing provisions do not pose any difficulties. However, there may be a significant number of Hindus who are agnostics or who do not subscribe to Hindu ritualism and who may, for conscientious reasons, be unwilling to marry under the traditional system. Certain sects[6] and organizations[7] which do not believe in Hindu ritualism have alternate provisions to avail of for the purpose of solemnization. However, a large number of people who are outside these sects or organizations have yet to be taken care of. For a number of these people the *dharmashastric* ceremonies may be mere mumbo-jumbo, the customary rites may appear to be too crude or primitive. Or they may not be willing to squander away a large sum of money which is necessarily involved in a typical Hindu marriage or for personal reasons, they may like to have the marriage as a quiet affair. Now, what is the alternative available for such people to get their marriages solemnized ? At present these people who are desirous of avoiding traditional ceremonies have no choice but to get their marriage solemnized under the provisions of the Special Marriage Act, 1954 and such a marriage which is non-religious is designated as civil marriage. A civil marriage (which is often termed as 'court marriage' inaptly) is, therefore a marriage solemnized in a secular or more accurately a non-religious form in the presence of an authority meant for that purpose under the provisions of the law.[8] The procedure to be followed and the formalities

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5. See s. 2 of the Hindu Marriage Act the Hindu Succession Act, 1956, the Hindu Adoptions and Maintenance Act, 1956 and s. 3 of the Hindu Minority and Guardianship Act, 1956.

6. For instance, the Arya Samajis may adhere to the procedure laid down by their Samaj. See the Arya Marriage Validating Act, 1937 ; also see the Anand Marriage Act, 1909.

7. See the Hindu Marriage (Madras Amendments) Act of 1967 sequel to the decision in *Deivanai Achi* v. *Chidambaram Chettiar*, A.I.R. 1954 Mad. 657, relating to the marriages of the members of the self respectors association.

8. See ss. 3 and 12 of the Special Marriage Act. Cl. 2 of s. 12 enables the parties to choose any form of marriage they like. However, the proviso makes it abundantly clear that it is the presence of the marriage officer and the three witnesses which effectuates the status.

to be observed for a civil marriage have been prescribed under chapter II of the Special Marriage Act, 1954.

The Special Marriage Act, while providing for the solemnization of marriage between any two persons has, however, enacted in chapter IV certain far-reaching consequences especially under sections 19 and 21. Section 19 which is applicable to Hindus exclusively lays down :

> The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family.

Section 21 which is applicable to all the persons marrying under the Act whether they are Hindus or otherwise states :

> Notwithstanding any restrictions contained in the Indian Succession Act, 1925 (XXXIX of 1925) with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act and to the property of the issue of such marriage shall be regulated by the provisions of the said Act and for the purposes of this section that Act shall have effect as if chapter III of part V (Special Rules for Parsi Intestates) had been omitted therefrom.

It is exceedingly important to examine the implications of these two sections with particular reference to the Hindus. While section 19 effectuates an involuntary severance from the joint family of the person marrying under this Act thereby depriving him from the membership of the family and its appurtenant advantages, section 21 makes the Indian Succession Act applicable to him and his issues thereby putting them out of the purview of the Hindu Succession Act, 1956.

There can be no two opinions that the aforesaid consequences are serious enough to cause concern to any Hindu who intends to marry in a simple non-religious form and is at the same time desirous of being governed by the Hindu law enactments. An examination of the rationale[9] of section 19 reveals that it intends to avoid complications in a joint Hindu family especially when one of its members marries a person belonging to a different religion or even a different caste. Undoubtedly, it will not be to the liking of the family when a coparcener attempts to bring someone who cannot fit

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9. The members of the select committee had the idea of deterrence foremost in their minds is reflected in the remarks of H. S. Gour, the Law Commission, *Fifty-ninth Report* 93.

into the religio-cultural life of the family. The law is indeed overzealously protecting the family by declaring that the person who marries under the Special Marriage Act is separated from the family automatically. Two interesting questions may be raised in this connection. Could the law not have allowed the parties, namely, the person marrying under the Act on the one hand and the members of the joint family on the other, to sort out their affairs. Why should such an involuntary separation be imposed on a coparcener especially when he marries a person of his and family's choice and both are getting on well after the marriage ?

If the family does not approve of the marriage of a coparcener, it may ask that coparcener who has flouted the family tradition to leave its fold. Of course, if we go to the theoretical extreme, a family cannot throw out a recalcitrant coparcener against his wishes. However, it is only an exceptional situation where a coparcener marries someone outside the religion or caste despite the dissent of the family and at the same time is desirous of remaining in its fold. It is indeed more in consonance with human nature that a coparcener who flouts the family tradition will be eager to depart from the family. Therefore, it is very interesting to notice that the problem which section 19 intends to solve is a mere remote possibility. On the other hand section 19 creates a problem where a member of the family enters into a marriage with a person of his caste and to the satisfaction of his family In such a case the law is imposing a partition even though both he and the members of the family are eager to live together. The members of the family have to resort to the obscure provision of reunion if they have to restore the *status quo ante*. It is, therefore, submitted that section 19 has hardly any utility so far as the joint family is concerned. Consequently, the section could as well be repealed instead of retaining it in the present form and making a modification under section 21A as suggested by the Law Commission.

III

Section 21 of the Special Marriage Act is enacted primarily keeping in mind the marriages of persons belonging to different religions governed by different personal laws.[10] The question of succession to the property of the parties governed by two different personal laws bristles with difficult problems which defy satisfactory solution under either of the personal laws. For

10. The Law Commission also refers to the views of Gour and the joint committee that s. 21 accomplishes the object of protecting the interests of the widow and the daughter of the intestate who has married under the provisions of the Special Marriage Act. If that is the main basis of the section, its *raison 'd etre* disappears after the enactment of the Hindu Women's Rights to Property Act, 1937 and the Hindu Succession Act, 1956,

instance, if a Muslim male marries a Hindu female and then dies leaving behind property, in the absence of section 21 of the Special Marriage Act, we have to witness the intolerable situation of the Hindu wife being excluded from succession on account of her. being a non-Muslim.[11] In such a case section 21 surmounts the difficulty by applying the provisions of the Indian Succession Act, which enables the widow to succeed to the property of her husband. However, the applicablility of section 21 to the issue of such marriage and its implications with respect to the interests of third parties are far from satisfactory. For instance, the children of mixed marriages may be brought up under the religion of either of the parties, and in the above illustration, say the issues have been brought up as Hindus. Why should such children be governed by the provisions of the Indian Succession Act even though they have been brought up as Hindus ? Is such a predetermination of the legal status of the parties in conformity with the desire of the actual parties ? Regarding the implications relating to the third parties we may take an example of a Hindu dying intestate leaving behind his widow, mother, a son, a daughter and a son's widow. Had the deceased married under the traditional rites, each one of the above heirs would have taken a share in the property of the deceased.[12] However, if the deceased had married under the provisions of the Special Marriage Act, section 21 would displace the provisions of the Hindu Succession Act in favour of the Indian Succession Act. With the result both the mother[13] and the son's widow[14] would be totally excluded from inheritance and the remaining three heirs would take the property of the deceased. Should these hapless women, namely, the mother and the son's widow, be visited with such serious penalty merely because the deceased had made the choice to marry in a simple non-religious form ?

The aforesaid consequences will ensue even where the parties to a marriage belong to the same sect or caste, or are marrying with the consent of the members of their families or even where all of them are living in a most cordial way after the marriage. However, one may suggest that if the parties to a marriage decide to marry under the provsion of the Special Marriage Act, they have to face the consequences ensuing their decision and there is nothing inequitable in such a situation for they have opted for it. The tenability of such a justification can be questioned on the ground

11. See for instance, *Chan Irasekharappa* v. *Govt. of Mysore*, A.I.R. 1955 Mysore 26, where the Hindu brother is disqualified from inheriting his Muslim sister's estate.

12. See s. 8 and cl. I of the schedule to the Hindu Succession Act.

13. Under the Indian Succession Act, mother comes in as an heir only in the absence of the lineal descendants and the father, see s. 43 of the Act.

14. Son's widow is no heir at all for she is not a kindred. See the definition of kindred under s. 24 of the Indian Succession Act.

that, as already noticed, a Hindu who is an agnostic or who does not believe in Hindu ritualism[15] has no option but to get his marriage solemnized under the provisions of the Special Marriage Act. The choice for him is indeed between the devil and the deep sea; on the one hand it is revolting for him to go through a set of ceremonies which he does not believe in and on the other a marriage under the Special Marriage Act effectuates legal consequences not to his liking.

Now, what is the wayout of the aforesaid awkward situation ? The Law Commission in its *Fifty-ninth Report* while rightly noticing the problems created by sections 19-21, has suggested the insertion of a new section[16] which would exclude the operation of sections 19 and 21 in the case of those parties where both of them are Hindus. However, the amendment bristles with numerous difficulties with respect to other communities even-though it solves the problems relating to the Hindus. Sivaramayya while questioning the propriety of the section on the ground that it decodifies the general law relating to succession in the case of Hindus, has doubted the constitutionality of the provision. With great deference to the members of the Law Commission it is doubtful whether section 21A could stand judicial scrutiny in its present form. If two Hindus could marry under the Special Marriage Act, and yet retain the Hindu law of succession, why should two Muslims who marry under the Special Marriage Act be deprived of the Shariat law relating to succession ? If Muslims, Parsis and Jews should also be exempted from the application of section 21, as suggested by Tahir Mahmood,[17] the process of decodification would be complete. Undoubtedly the above picture would harm the movement towards a uniform civil code.

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15. There is another category of persons who come under the mischief of ss. 19 and 21 of the Special Marriage Act. The Act provides in chapter III for the registration of marriages which have been solemnized under other forms. A fairly good number of persons who are going abroad with their wives may have to produce satisfactory evidence of their marriage. Such people avail of the provisions of the aforesaid chapter and get their marriage registered. A registration intended for achieving such a limited objective will be accompanied by serious legal consequences noticed above.

16. S. 21A reads : "Where the marriage is solemnized under this Act of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion, sections 19 and 21 shall not apply and so much of section 20 as creates a disability shall also not apply." The Law Commission, *Fifty-ninth Report* 98.

17. He has suggested the amendment in the following form : "Where a marriage under the Act is solemnized between two persons both of whom profess the same religion section 21 shall not apply."

IV

There is, however, a more plausible alternative which while solving the problems of the Hindu community would not come in the way of realizing the constitutional objective of a uniform civil code. It should be noticed that the difficulties highlighted above have arisen only because of the absence of provision relating to civil marriage under the Hindu Marriage Act. Two considerations might have influenced the decision of the framers for not including the provision relating to civil marriage under the Hindu Marriage Act : either they must have presumed that the Special Marriage Act with its general application is a precursor to a uniform civil code and that the Act would be followed by a comprehensive legislation giving effect to the objective laid down in article 44 of the Constitution, or that the traditional Hindu society which has always looked down upon the civil marriage may consider such a provision to be an affront to its religious outlook and values and, therefore, might have resisted the entire legislation. If the first consideration has weighed over their mind for not including such a chapter, it is submitted that it is high time a chapter on civil marriage is included in the Hindu Marriage Act.

The reason for such a conclusion is that the policy makers are chary about giving effect to article 44 of the Constitution. If the thinking among the Muslim academics is any indication[18] the possibility of having a uniform civil code in the near future is not very bright. On the other hand, the supporters of a uniform civil code may entertain a suspicion that the suggested inclusion of a chapter on civil marriage under the Hindu Marriage Act may amount to a retrograde step in the direction of achieving the objective under article 44. It is, however, submitted that the inclusion of such a chapter will not run counter to the idea of a uniform civil code for there is no conflict between the provisions of the Special Marriage Act and the provision for civil marriage under the Hindu Marriage Act. It merely eliminates the drawbacks of the existing statutory provisions by taking into account the immediate needs of the Hindu society. The suggested measure would give a Hindu the choice to opt for a non-religious from of marriage and at the same time continue to be governed by the Hindu law.

The fact that the traditional Hindu community dislikes the civil marriage might have influenced the framers of the Hindu Marriage Act. The contempt of the Hindu society for the 'court marriage' or for that matter 'love marriage' is evident and does not require an elaborate thesis to establish it. The askance with which the Hindu society looks at civil marriage

18. See for instance, Tahir Mahmood, *Islamic Law in Modern India* (I.L.I., 1972).

is understandable. Civil marriage in fact, while making a dent on the Hindu ritualism, cuts at the very root of the practice of arranged marriage. Even the mere suspicion that the Hindu society may not tolerate the minimal regulation by the secular authority as contemplated under section 8 of the Hindu Marriage Act has haunted the state legislatures to ignore the implementation of a very laudable provision.[19]

Even if the aforesaid factors had influenced the legislature in 1955 for not including a chapter on civil marriage in the Hindu Marriage Act, the past two decades have witnessed changes in the values and attitudes of the Hindu society. Hindus have come to live with more radical ideas embodied in the Hindu Marriage Act. More people are availing of the matrimonial reliefs provided under the Act which undoubtedly run counter to the traditional values. If Parliament could enact the Medical Termination of Pregnancy Act, 1971, a landmark in family law legislation, there is nothing to inhibit it in adding a chapter on civil marriage to the Hindu Marriage Act in the prevailing social climate of the country. Obscurantists have always clamoured against any progressive measure and the country cannot heed to their undue concerns. Such a slight modification in the Hindu marriage law would, while preventing the subordination of the general law to the personal law, pave way for enacting a uniform civil code.

19. S. 8 of the Hindu Marriage Act merely makes a provision for the registration of marriages without, in any way interfering with the traditional modes of solemnization. See for further comments on this provision, B. N. Sampath, 'Marriageable Age, Consent and Soundness of Mind in Indian Matrimonial Law: A plea for Rationalization', 5 *Banāras Law Journal* 28, 51 (1969).