

HINDU MARRIAGE AND ITS POSITION IN THE MALAYSIAN MARRIAGE LAW

Ramalingam Rajamickam,¹ Vanaja Paramasivam² & Kirubini Subramaniam³

¹ PhD Student, Faculty of Law, The National University of Malaysia,
43600 Bangi, Selangor Darul Ehsan, Malaysia

mr_ramg@yahoo.com

² Master Student, Faculty of Education The National University of Malaysia
43600 Bangi, Selangor Darul Ehsan, Malaysia

vanaja.ukm@gmail.com

³ Undergraduate Student, Faculty of Law, The National University of Malaysia
43600 Bangi, Selangor Darul Ehsan, Malaysia

kiru_90@yahoo.com

Abstract

Marriage among Hindus was considered a sacramental union primarily meant for the performance of religious and spiritual duties. It is regarded as a promise of commitment for life before God and the community. That is why the Hindu Marriages are considered solemnized when parties married in accordance with the customary rites and ceremonies. However with changes in the society, marriage among the Hindus which was essentially a sacrament partook the nature of a contract. Thus, this paper discusses the marriage in Hinduism and its solemnization. This writing further explains the position of Hindu Marriage in the Malaysian Marriage Law which is governed by the Law Reform (Marriage and Divorce) Act 1976 (LRA). It is clear that the Hindu Marriages according to custom is not a prerequisite condition according to Malaysian law. The only requirement to solemnise a Hindu marriage in Malaysia is registration. This is the conflict between the Natural Law and the Positivism Law.

Keywords: Contract, Hindu Marriage, Registration, Sacramental Union, Solemnisation,

1.0 Introduction

Marriage is a lovely relationship in human being's life which given by God. Marriage is a union between a man and a woman who make a good commitment for future life for example, the couples bearing and rearing children together. Marriage is a formal union of a man and a woman, typically as recognized by law, by which they become husband and wife (<http://oxforddictionaries.com/definition/english/marriage>). Besides that, marriage also defined as social institution under which a man and woman establish their decision to live as husband and wife by legal commitments, religious ceremonies ant etc. On the other hand, marriage is by nature a multidimensional institution. Marriage as the emotional and legal commitment of two people to share emotional and physical intimacy, various tasks, and economic resources (Olson, Defrain and Skogrand, 2008).

According to Gallagher, marriage is an essentially private, intimate, emotional relationship created by two people for their own personal reasons to enhance their own personal well-being. Marriage is created by the couple, for the couple (Gallagher, 2001). Meanwhile, The Witherspoon Institute described marriage as a legally sanctioned union of one man and one woman and it plays a vital role in preserving the common good and promoting the welfare of children. In virtually every known human society, the institution of

marriage provides order and meaning to adult sexual relationships and, more fundamentally, furnishes the ideal context for the bearing and rearing of the young (The Witherspoon Institute, 2008).

In addition, South Dakota statutes define marriage as a personal relation, between a man and a woman, arising out of a civil contract. Marriage requires consent of the parties followed by a ceremony. According to the case of *Hyde v. Hyde* (1866) LR 1 P&D 130, “marriage is usually means a voluntary union for life of one man with one woman to the exclusion of others.” Meanwhile, in the case of *Shaw v. Gould* (1868) L.R. 3 H.L. 55, at 82, Lord Westbury was of the view that:

“Marriage is the very foundation of civil society, and no part of law and institutions of a country can be of more vital importance to its subjects than those which regulate the manner and the conditions of forming, and if necessary of dissolving, the marriage contract.”

Marriage among the Hindus was considered a sacramental union and it continued to be so throughout the entire Hindu period. Hindus conceived of marriage as a union primarily meant for the performance of religious and spiritual duties. It could not take place without the performance of sacred rites and ceremonies and it was a permanent and eternal union.

2.0 History of Hindu Marriage

Historically, all Hindu marriages were premised upon similarity of social standing, which often included the caste, class, religion, and education of the prospective couple. Despite forces of modernization, urbanization, and liberalization, the number of arranged marriages in India far outnumbers ‘love’ or ‘self-arranged’ marriages (Chawla, 2004). Arranged marriages among Hindus were marriages generally organized by parents and elderly kin (Sur, 1973). In earlier times, intermediaries called *sambhalas*, or traditional matchmakers, were employed to keep the genealogical history of each family, and ensure that the bride and groom were not related from five to seven generations (Sur, 1973). In more recent times, these criteria have stretched. For example, Mullatti outlines seven criteria that are currently followed by matchmakers: kin; parents and relatives; caste; social structure; moral value compatibility; academic compatibility; occupational compatibility; the family’s moral history; and horoscope compatibility (though not necessarily in this order) (Mullatti, 1995). In the past two decades, parents have begun seeking matches for their children through matrimonial columns in newspapers, magazines, and now even via internet (India Today, 2004).

Hindu marriage is said to be derived from laws interpreted in the *Dharmashastras* which in turn have their roots in the 3000-year-old hymns called *Vedas* and *Smritis*. The *Vedas* and the *Smritis* are considered the oldest surviving documents from the Vedic and Epic age (what are considered the first recorded periods of Indian civilization from 4000 B.C.–1200 A.D. (Kapadia, 1958). These texts tell us that Hindu marriage dates as far back as 4000 B.C., written by holy men of the time period, these scriptures (as are scriptures across most religions) are a collection of rules and conducts for society at the time (Zysk, 1989).

According to the tenets of Hinduism, marriage is a sacred relationship, a sacrament, and a divine covenant meant for procreation and the continuation of family lineage. In the traditional Hindu system of marriage, there is no role for the state as marriage remained a private affair within the social real. Within this traditional framework reference, marriage is undoubtedly the most important transitional point in a Hindu’s life and the most important of all the Hindu *samskaras*, or life-cycle rituals.

3.0 Perspective of Marriage in Hinduism

In Hinduism, marriage (*vivaha*) known as sacred relationship between two persons that is not limited to this life alone. It extends across seven or more lives, during which the couple help each other progress spiritually. The adage that marriages are made in heaven is very much true in case of Hinduism. Two souls

come together and marry because their karmas are intertwined and they have to resolve many things together upon earth in order to ensure their mutual salvation.

The relationship between couples is essentially a relationship of the souls. It is not necessary that their gender roles are fixed for ever. Sometimes they may switch roles and the husband may become the wife and the wife the husband. Sometimes they may also temporarily part their ways and come together again after one or two lives in a grand reunion.

Marriage in Hinduism is a sacred relationship. It is both an obligatory duty (dharma) and a samskara (sacrament). Unless a person renounces life and accepts the life of a renouncer (sanyasi), he is expected to marry and lead a householder's life. It is an essential aspect of the four ashramas (brahmacharya, grihastha, vanaprastha and sanyasa) and the four aims (purusharthas) of human life, namely, dharma, artha (wealth), kama (sensuous pleasures) and moksha (salvation). For a Hindu woman marriage marks the end of her life as a maiden. She has to leave her parent's home to begin life anew in her husband's house, amidst new people and new surroundings. After marriage her relationship with her parents remains formal and minimal. Marriages therefore become a matter of anxiety and stress for many women, till they become familiar with their new surroundings and the new people in their lives. The early stages of marriage is a make or break situation in case of many. It is also the period, during which the bride either becomes popular in her new home or unpopular, depending upon her behaviour and her relationships with each member of her husband's family.

Hindu marriage tradition recognizes seven different types of marriage, ranging from the popularly known arranged marriages to the extremely rare and forced marriages through abduction. Generally most of the marriages are arranged with the consent of the bride and the bridegroom and the blessings of the elders. Caste, natal charts, gotra (kinship or family lineage), family background, financial status of the groom, appearance and character of the bride and the bridegroom, the willingness of the parents are some important considerations in arranged marriages. In some parts of southern India, marriages between cousins (children of brother and sister) are considered normal. In ancient India, if a woman's husband died, she had the permission to marry her deceased husband's brother, strictly for the purpose of progeny. Polygamy was an acceptable norm in ancient Hindu society. But presently Hindus are expected to be strictly monogamous.

4.0 Solemnization of Hindu Marriage

The word solemnized means to celebrate marriage with proper ceremonies and in due form. According to Hindu religious texts marriage is an act to fulfill Dharma (righteous duty), Arth (acquiring material wealth to fulfill household duties), Kama (satisfying righteous desires) and Moksha (achieving liberation or salvation). Both husband and wife are equal partners who have the responsibility to uphold the values and pass it on to the next generation before commencing on to the final journey.

Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party. Such rites and rituals include the Saptapadi, 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 expression 'customary rites and rituals' naturally mean such Shastric ceremonies which the caste or communities to which the party belongs is customarily following.

The most common type of Hindu Marriage is through tying a sacred thread, *thaali*. The word *thaali* literally means "an auspicious thread". It is usually a gold pendant strung from a yellow thread prepared with turmeric, a string of black beads or simply a gold chain. It is comparable to the wedding ring of the West. A married woman is expected to wear the *thaali* until her husband's death. It is tied around the neck of the bride on the day of marriage symbolizing the union. According to Hindu cultural ethos, *thaali* symbolizes the inseparable bond between a husband and a wife. During the wedding ceremony, the bridegroom ties the

thaali to the neck of the bride. Married women are entitled to wear *thaali* throughout their life as it is believed that the practice enhances the well-being of her husband and family and cannot be shown in public. It is also considered that the *thaali* protects the marriage from any evil. A Hindu marriage is incomplete without the *thaali*. Three knots symbolize three different aspects of a married woman i.e. the first knot represents her obedience to her husband, the second to her parents and the third represents her respect for God.

5.0 Hindu Marriage Law in Malaysia

The relevant law to Hindu Marriages in Malaysia is the Law Reform (Marriage and Divorce) Act 1976 (LRA) (Act 164). This law was gazetted in 1976 but it was only enforced throughout Malaysia from 1 March 1982. The LRA provides for monogamous marriages, solemnization of marriages, registration of marriages, divorce, matters that are incidental to matrimonial proceedings as well as for protection of children (Malayan Law Journal, 2001). According to Section 3, this Act shall apply to all persons in Malaysia and to all persons domiciled in Malaysia but are resident outside Malaysia. Marriage solemnized prior to 1 March 1982 included marriages solemnized in accordance with the provision of statutes, such as the Christian Marriage Ordinance 1956 and the Civil Marriage Ordinance 1952, Chinese customary marriages, Hindu Marriages, Muslim Marriages and common law marriages (Mimi Kamariah Majid, 1999). A marriage solemnized under any law, religion, custom or usage prior to 1 March 1982, unless it is void under that law, religion, custom or usage, shall continue until it is dissolved:

- a) by the death of one of the parties;
- b) by order of a court of competent jurisdiction; or
- c) by a decree of nullity made by a court of competent jurisdiction.

6.0 The Position of Hindu Marriages in Malaysia Prior to 1 March 1982

Hindu marriages according to custom are recognized in Malaysia prior to 1 March 1982 (Ahmad Ibrahim, 1984). The view regarding customary marriages was recognized in *Reg v Willans* (1858) 3 Ky 16 and is applicable to Hindus. Sir Peter Benson in that case said:

“But where the law of the place is inapplicable to the parties by reason of religious opinions and usages, then from a sort of moral necessity the validity of the marriage depends upon whether it was performed according to the rites of their religion.”

In *Chua Mui Nee v Palaniappan* [1967] 1 MLJ 270, it was alleged that the appellant a Chinese Buddhist had married the deceased a Hindu, according to the Hindu rites in Malacca and that after the marriage they had lived as husband and wife in Malacca and had three children. The respondent who claimed to be the son of the deceased by his wife disputed the validity of the first marriage. At the trial it was held that the appellant was not the lawful widow and her children not the lawful children of the deceased as some of the essential items of the Hindu marriage ceremony had not been complied with when the appellant married the deceased. On appeal, it was held that as the deceased was a Hindu and the appellant a Chinese Buddhist the law which governed the marriage between them was not Hindu law but the law of Malacca in 1943. There was a marriage according to Hindu custom and although there was an imperfect marriage ceremony, Barakbah LP was of the view that, it did not affect the validity of the marriage as it was performed during the Japanese Occupation when movements of an individual as well as a community were stringently restricted. It was also held that the consent of the first wife even if it was essential for the validity of such marriage could be inferred from the circumstances of the case. This case shows the recognition of Hindu Marriages according to Hindu custom as well as its importance in ensuring the items of the Hindu Marriage ceremony are complied with.

In the case of *Rex v Govindasamy* [1933] MLJ 97, details of the rites performed were not given and no priest was called to prove that rites were essential to constitute a valid Hindu marriage. Referring to the earlier case of *R v Ratnam* (1930) SSLR 218, Morrison CJ observed that the evidence given by priest's was not clear on whether all the ceremonies described were essential and the witnesses did not testify by any means to all the rites mentioned by the Brahmin priest, therefore there was doubt as to the ceremonies included the essentials of a valid marriage. It was concluded by Whitley J that evidence as to the ceremony in *Rex v Govindasamy* is insufficient with reference to what was laid down as necessary in *Ratnam*. In *Ramasamy v PP* [1938] MLJ 137, Cussen J was satisfied on the aspect of validity of marriage after determining the sufficiency of evidence pertaining to the actual ceremony and whether it constituted a valid marriage. According to cases illustrated above, it is obvious that sufficiency of evidence relating to Hindu Marriage ceremony is pertinent in ensuring its validity.

In *Paramesuari v Ayadurai* [1959] MLJ 195 (also in the case of *Maniam v Rajoo* [1958] MLJ 144), the court accepted the evidence of the priest who performed the marriage ceremony between the petitioner and the respondent and also expert evidence on the traditional features of a marriage between Ceylon Tamil Hindus. The marriage in that case was solemnized according to Ceylon Tamil Hindu Custom and according to the expert witness and the priest who performed the marriage, such marriages are monogamous. The court found as a fact that the parties were parties to a binding marriage contract which was monogamous in its nature. As there was proof of the respondent's subsequent marriage to another woman it was held that the petitioner was entitled to a decree of dissolution of her marriage. In *Nagapushani v Nesaratnam & Anor* [1970] 2 MLJ 8, the plaintiff produced a 'thali' (a golden chain) which she claimed that the first defendant had tied around her neck during the marriage ceremony as a symbol of marriage. It was concluded by Raja Azlan Shah J, that the plaintiff and the first defendant had gone through a ceremony of marriage in 1942 according to Hindu rites; they had cohabited for a number of years as well as enjoyed the reputation of husband and wife. His Lordship observed that:

"Marriage by Hindu rites is common and binding on both parties. It will be startling to hold otherwise in view of the prevalent practice. Such a marriage was recognised in the case of *Paramesuari v Ayadurai* where the marriage of the parties was conducted according to Hindu Custom."

Both cases above uphold the importance of Hindu Marriage ceremony according to the custom. This indicates that the performance of Hindu Marriage according to rites and custom is crucial in binding parties to the marriage.

However, in Malaysia, a Hindu marriage is solemnized when the marriage has been registered by a Registrar (Section 2 (1) of Law Reform (Marriage and Divorce) Act 1976). There is no legal requirement for Hindus to undergo customary rites and ceremonies before they may register their marriage.

7.0 Registration of Hindu Marriages

Aspects on registration of marriages are laid under Part IV of the LRA. According to Section 27 of Law Reform (Marriage and Divorce) Act 1976, the marriage of every person whether resident in Malaysia or resident abroad who is a citizen of or domiciled in Malaysia after 1 March 1982 shall be registered pursuant to the LRA. This clearly indicates that marriage of Hindu's shall be registered pursuant to the LRA and that shows that even if the Hindu customary marriages did not take place, it can be construed as a valid marriage. A marriage register and such books prescribed by LRA or rules shall be kept by every Registrar and every marriage solemnized in Malaysia by the Registrar shall immediately after the solemnization thereof be registered by the Registrar in his marriage register (Section 29 of Law Reform (Marriage and Divorce) Act 1976).

Registration of marriages solemnized prior to 1 March 1982 under any law, religion, custom or usage is also provided under Section 33 (1) of Law Reform (Marriage and Divorce) Act 1976 if the marriage has

not been registered. The Registrar may require the parties to the marriage to appear before him and to produce such evidence of the marriage, either oral or documentary, as he may require and to furnish such other particulars as may be required by him upon an application. The marriage is registered and particulars shall be entered in the marriage register if the Registrar is satisfied of the truth of the statements contained in the application. It is also provided that the Registrar shall not register a marriage if he is satisfied that the marriage is void under LRA. In addition, it is also clearly stated that nothing in the LRA or rules made thereunder shall be construed to render valid or invalid any marriage which otherwise is invalid or valid merely by reason of its having been or not having been registered (Section 34 of Law Reform (Marriage and Divorce) Act 1976).

Therefore, it's evident before us that Hindu Marriages according to custom is not a prerequisite condition according to Malaysian law. However, the only requirement in marriages in Malaysia is registration which is significant. It can be concluded that even though Hindu Customary Marriage did not take place, registration is sufficient for a marriage to be solemnized.

8.0 Conclusion

Marriage is considered as one of the vital societal institutions to carry forth the society. Marriage is a universal human institution which has formed the foundation of the family throughout history. All over the civilized world and in every legal system of the world, marriage is a very important social institution (Rajat Dosi, 2010). However with changes in the society, marriage among the Hindus which was essentially a sacrament partook the nature of a contract. The Malaysian Law on Hindu Marriages i.e. the LRA also recognizes a marriage as a contract but does not have any provisions pertaining to the Hindu customary rites and ceremonies as prerequisite for solemnization of a Hindu marriage. Thus, many Hindus only register their marriage under LRA but do not perform any customary rites and ceremonies according to their practices. This makes their marriage is invalid according to their customs and traditions. However, this issue is not taken seriously by the Hindus as the Malaysian law only required the parties to register their marriage for the purpose of recognition and solemnization.

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