

Marriage & Divorce under tribal and customary law -a perspective

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The laws governing marriage in India are complex and vary depending on the religion and community of the people involved. The principal law governing marriage in India is the Hindu Marriage Act, 1955 and The Special Marriage Act, 1954. The Hindu Marriage Act applies to all Hindus, including Sikhs, Buddhists and Jains but not to persons of tribal community. This is because the Act was designed to apply to Hindus, and tribals are not considered to be Hindus under the Act. For tribal communities, the laws are even more complex, as they are often based on traditional customs and practices that may not be in line with the laws of the land and till date remain uncodified. The tribes have their own traditional laws governing marriage, which are based on their own customs and practices. The Special Marriage Act, 1954, provides a secular alternative to Hindu marriage, and can be used by any Indian citizen, regardless of religion.

In recent years, there has been some debate about the role of customary law in tribal marriage. Arguments have been put forth that customary law is outdated and discriminatory, and that it should be replaced by statutory law. Others argue that customary law is an important part of tribal culture, and that it should be respected. No doubt,

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customary law is an important part of tribal culture, but it is also said that customary law must be consistent with the Constitution and other laws of the land.

Tribal marriage laws on one hand are a complex and varied topic. In India, there are over 500 tribal groups, each with its own unique set of customs and traditions. As a result, there is no single set of laws that govern all tribal marriages. The traditional laws of tribal communities vary widely. In some communities, marriages are arranged by the parents of the bride and groom. In other communities, young people are free to choose their own partners. In some communities, polygamy is allowed, while in others it is not. This has led to conflict and confusion, as people are not sure which law applies to them. The enforcement of tribal marriage laws is often challenging. Many tribal communities are located in remote areas, and their customary law is often difficult to understand and implement. In addition, there is a lack of awareness of the law among many tribal people.

One of the most important aspects of tribal marriage law is the minimum age of marriage. The Prohibition of Child Marriage Act, 2006 sets the minimum age of marriage for girls at 18 years and for boys at 21 years. However, many tribal communities still practice child marriage, and the law is often difficult to enforce in remote areas. Another important aspect of tribal marriage law is the requirement for consent. Parties to a tribal marriage must freely consent to the marriage, and the consent of parents or guardians is not required. However,

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in some cases, the consent of the community may be required. Tribal marriage laws also typically prohibit certain types of marriages, such as marriages between close relatives and marriages between members of different tribes. In addition, some tribes have specific rules regarding the exchange of gifts and the payment of dowry.

Another important principle of tribal marriage is that it is a social contract between two families, rather than a contract between two individuals. This means that the families of the bride and groom play a significant role in the marriage process, and that the marriage is not considered to be valid unless it is approved by both the families. Another important principle of tribal marriage is that it is a lifelong commitment. Divorce is very rare in tribal societies, and it is usually permitted only in cases of extreme hardship, such as adultery or desertion. Finally, tribal marriage is often seen as a way of strengthening the bonds between two communities and when two people from different tribes marry, they bring their families and communities together promoting understanding and cooperation between the two groups.

On the other hand divorce under tribal law is a complex and diverse topic, as the laws vary from tribe to tribe. However, there are some general principles that apply to most tribal divorces. One of the most important principles is that divorce is typically seen as a last resort. Tribal communities value marriage and family highly and they

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prefer to see couples work through their problems before resorting to divorce. However, if a marriage is truly beyond repair, divorce is an option that is available to both the husband and wife. Another important principle is that divorce must be conducted in a public forum. This is because tribal divorces are seen as a matter of public interest, and not just a private matter between two individuals. The divorce must be announced to the community, and the reasons for the divorce must be made public. In other cases, the divorce may be granted by a religious leader.

It is important to note that the Hindu Marriage Act, 1955 does not apply to members of Scheduled Tribes. This means that a member of a Scheduled Tribe, cannot obtain a divorce under the Hindu Marriage Act. However, a divorce under the customary laws of the tribe can be obtained. Section 2(2) of the Hindu Marriage Act, 1955 prohibits application of the Act to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution of India unless the Central Government, by notification in the Official Gazette, otherwise directs. This means that the provisions of the Hindu Marriage Act, 1955, which govern marriage, divorce, and other matters relating to marriage, do not apply to members of Scheduled Tribes. Instead, the customary laws of the tribe in question will apply. The reason for this is that the government wanted to respect the traditional customs and practices of Scheduled Tribes. The government also wanted to ensure that Scheduled Tribes

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were not disadvantaged by the application of the Hindu Marriage Act, 1955, which was designed as per Hindu rituals and customs. Thus couples from scheduled tribes cannot use this Act to obtain a divorce.

In some tribes, divorce can also be granted if the couple simply agrees that they want to end their marriage. The process of getting a divorce under tribal law also varies from tribe to tribe. In some tribes, the couple must go before a tribal council or court to have their divorce granted. In other tribes, the couple can simply file for divorce with the tribal government. Once a divorce is granted, it is typically final. However, in some tribes, there is a period of time during which the couple can reconcile. If the couple does reconcile, the divorce can be annulled. It is important to remember that tribal communities value marriage and family highly, and they prefer to see couples work through their problem before resorting to divorce. In addition to these grounds, some tribes may also allow for divorce on other grounds, such as incompatibility, irreconcilable differences or irretrievable breakdown of the marriage. To obtain a divorce under tribal laws, the couple must typically file a petition with the tribal council or court. The council or court will then hold a hearing to determine whether the grounds for divorce have been met. If the grounds have been met, the council or court will grant the divorce. It is important to note that divorce under tribal laws is not always easy or straightforward. The tribal council or court may require the couple to go through mediation or

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counseling before granting a divorce. The council or court may also require the couple to pay a fee in order to obtain a divorce.

Once the divorce has been finalized, the couple is no longer considered to be married. Parties thereupon are entitled to seek declaration to that effect from Family Courts which are conferred with jurisdiction for such adjudication u/s 7(1) Family Courts Act. The husband is no longer responsible for the support of his wife, and the wife is no longer under the authority of her husband. The couple is free to remarry, but they must first obtain the consent of their respective families.

On similar consideration marriage already solemnised between members of tribal community cannot be said to be governed by Special Marriage Act. Therefore a petition for restitution of conjugal rights u/s 22 Special Marriage Act or judicial separation u/s 23, or for any relief u/s 24,25,27 or 28 of the Act at the instance of parties is not maintainable if the marriage has been solemnized under the customary law. Therefore in simple words it means that the law which has tied the nuptial knot only can untie or restore it. All the personal laws regarding marriage are customary laws and over a period of time some of the customary laws have been codified while some still remain un-codified. Be that as it may, still Courts by virtue of Section 7 Family Courts Act 1984 are conferred with the jurisdiction to adjudicate on almost all circumstances, complications and issues arising out of a marital tie. The section grants jurisdiction to intervene in

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such issues but a party to a marriage must bring its case under the provisions of any of the substantive customary law codified or uncodified in order to invoke such jurisdiction.

The Family Courts pan India, have been conferred under Section 7(1)(a) Family Courts Act,1984 competency to exercise jurisdiction under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation to the section. This leads to the inference that a suit for grant of relief under customary law too is maintainable before it. This proposition of law has been affirmed by the judgment of the Hon'ble Jharkhand High Court in First Appeal 124 of 2018 Baga Tirkey Versus Pinki Linda and Niraj Karmali.

Thus as held by the Hon'ble Court and from the bare perusal of the provision it transpires that the aforesaid section confers jurisdiction upon Family Court whereupon parties are required to establish their right, title and entitlement in accordance with their substantive or customary law, codified or un-codified, for grant of divorce or any other relief by way of suits and proceedings as referred to in the explanation to the said section. The provisions of a codified personal law, accordingly, cannot be extrapolated to an un-codified personal or customary law at the discretion of the parties or simply to enable exercise of the jurisdiction. Furthermore, though there are catena of judgments wherein tribals sufficiently Hinduised have been brought under the ambit of succession or inheritance but the proposition laid

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down in such cases have been applied in a very narrow compass and have rarely been applied to matrimonial suits. Therefore even if a member of tribal community sufficiently Hinduised but not converted, solemnises marriage as per Hindu custom and rituals would not be entitled to matrimonial relief under the Hindu marriage Act,1955. The relief would also be not available under the Special marriage Act, 1954 if the marriage was not registered under the Act.

A party to the suit has to describe the circumstance under which matrimonial reliefs as prescribed in Hindu Marriage Act or Special Marriage Act or Indian Divorce Act or for that matter any other law would be applicable to customary law and vice versa and has to state the custom prevalent within his tribe whereby such matrimonial reliefs can be granted. A petitioner, therefore claiming a matrimonial relief, must show acts in accordance with custom prevalent within his community which permits grant of such relief. Such petitioner thereafter can enforce resumption or severance of nuptial cord in accordance with the prevalent custom by seeking a declaration to that effect by a competent Court conferred with jurisdiction u/s 7(1)(a) Family Courts Act, 1984.

Conclusion

Marriage and divorce under customary laws are complex issues. The rules and regulations vary from community to community, and they can be discriminatory against women. However, customary laws continue to play an

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important role in regulating marriage and divorce in India as they provide a framework for couples to build their lives together, and also offer a way for couples to resolve their differences if their marriage fails.

Thus tribal rights on marriage in Indian customary law are an integral part of the culture of tribal communities. Customary laws and tribal laws are both systems of law that govern specific communities or societies. Once it is found that the parties are governed by the Customary Law, the parties are required to plead and prove the customs, by which, they are governed in matters concerning, marriage and divorce.

The Indian parliament legislated the Panchayat (Extension to Schedule Tribe Areas) Act, 1996. PESA mandated India to devolve certain political, administration and radial powers to local Government elected by the tribal community in their jurisdiction, and to preserve their tradition and entrusting them with the authority to manage their community resources. A law on similar lines is required today to preserve the various customary laws of the tribal community on marriage, more so, when the clamour for a uniform civil code is intensified day by day.