

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

© 2020 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at editor.ijlmh@gmail.com.

Essential Ceremonies in Hindu Marriage: A Sanskara or a Tool in the Hands of Judiciary to Thwart Gender Equality

SHAILJA RAWAL¹

ABSTRACT

Marriages under Hindu law are still considered to be a sacramental union between two identities. They are thus, performed in accordance to various traditions and 'essential' ceremonies. Due to diverse customs present in Hinduism, every community has its own way of concluding a valid marriage by conducting its own 'essential' ceremonies. But the question which arises is what are these essential ceremonies and who labels them as being 'essential'. Amidst this uncertainty, judiciary often takes this task onto itself and determines the validity of marriage or often times the fate of the women. Shaped by the patriarchal notions of the society and gender biased provisions of the law, judiciary, by laying down its own whimsical and ever changing standards raises the level of ambiguity in the already existing chaotic situation. The paper analyses the effects of such lax attitude which can range from bigamy to even concubinage and in the end analyses that how a woman's status gets tampered even further due to lack of certainty and manipulative approach of men who in turn negate the entire marriage by claiming non performance of essential ceremonies. In the end, the paper lays down certain suggestions in this regard, which if implemented will be a good start in making a move from the current gender blind to a gender neutral approach.

I. INTRODUCTION

All communities in India prescribe different rites and ceremonies for marriage, which have been elaborated under *Grihiya Sutras*.² According to Hindu Marriage Act 1955 a valid marriage is solemnized in accordance with the customary rites and ceremonies of either parties.³ Some of these ceremonies include *Kanyadan*, *vivaha-homam* and *saptapadi*. Of these *saptapadi* is generally considered as being necessary to be performed. In other words, Marriage is said to be solemnized under the Hindu marriage law only when bride and groom together take the

¹ Author is a student of National Law School of India University, Bangalore, India.

² Dr. Paras Diwan, *Family law - Hindus, Muslims, Christians, Parsis and Jews* (9th edn., 2009) 50.

³ Hindu Marriage Act 1955, s 7(1).

seventh step.⁴

But before delving into the entire discussion of essential ceremonies under the Hindu Marriage, it is important to discuss the need of these ceremonies in Hindu Marriages and see if they are uniform for all the communities who might be included in the ‘catch-all’ phrase of being a Hindu? Marriage usually consists of several rituals and ceremonies. When the question of solemnization of Marriage is brought into question courts usually consider these ceremonies as “proof” of a valid conclusion of such marriages⁵. However, these ceremonies are not uniform across various communities. Rather they are varying and heterogeneous in nature. What one community might perform rigorously may not be known to the other community. Sometimes, even the pundits are not able to reach to a consensus,⁶ regarding the ceremonies performed.

Although *Saptapadi* is considered as an essential practice in Hindu Marriage, if the bride and groom do not take the steps, it might not be an invalid marriage.⁷ This explains the broad interpretation which has been given to S.7 of the Hindu Marriage Act, 1955. It specifies that solemnization of marriage could be done by either *saptapadi* or *kanyadaan* (which are often construed as being essential ceremonies under Hindu law) or other customary rites and ceremonies⁸ according to the religious practices of other communities which are often included under the ‘all-pervasive’ definition of Hindu law. This research paper identifies the various rites and ceremonies as performed in Hindu marriages and looks at the possibility of uniformity of the entire procedure thereby concluding by possible suggestions. Certain methods have been suggested which can be incorporated legally as well as ritually so that it can constitute as a ‘proof’ of a valid marriage at a later point in time. This paper also argues the discretionary powers granted to the courts while interpreting the word “essential” ceremonies that often times gives a broad room for such customary practices and it is then the judge who ends up deciding the entire case. In fact, in all cases it is the woman whose interests are endangered and the children also face the fear of being termed as ‘illegitimate’. By the help of critiquing case laws and precedents, researcher puts forward the argument that by giving such high regard to these ceremonies judges put women in a vulnerable position.

⁴ Diwan (n 1) 51.

⁵ *Bhaurao Shankar Lokhande v State of Maharashtra* AIR 1965 SC 1564.

⁶ M.P. Chandrika, ‘Ceremony and Valid Marriage among the Hindus-A Dichotomy’ 2(3) IJLLJS <http://ijlljs.in/wp-content/uploads/2015/04/Ceremony_and_Valid_Marriage_among_the_Hindus-A_Dichotomy.pdf> accessed 20 November 2019.

⁷ Swapna Raghu Sanand, ‘Hindu Marriage Act: Married without taking ‘saath pheras? Find out if your marriage is legally valid!’ *Financial express* (India, 16 May 2019) 1.

⁸ *Chandrabhagbai Ganpati v S.N. Kanwar* 2008 MLR 21 (Bom.).

II. CUSTOMARY RITES AND CEREMONIES

Religious rites and customary rituals have to be performed in order to constitute a valid marriage according to Hindu Marriage Act, 1955. Invoking the fire and performing *saptapadi* are considered to be two of the basic requirements for a traditional marriage.⁹ There can be marriages which law accepts as valid as they had been solemnized by customs and not necessarily following the essential ceremonies.¹⁰

Section 7 of Hindu Marriage Act, 1955 has been given a broad interpretation by specifying that a marriage can be solemnized either by performing the essential ceremony of *saptapadi* or customary rites and ceremonies of either parties. Before the codification it was a rule that marriages have to be performed according to *shastric* and customary rites.¹¹ If it was done in any other manner, it wasn't even considered as a validly concluded marriage.¹² Some of the customary ceremonies include *Katar* or sword marriages in which the bride is married to bridegroom's sword instead of him and this is usually performed amongst the *kshatriya* community¹³. On the other hand the Reddy community in Telengana does not consider *saptapadi* as being an essential marriage ceremony rather their customary practices usually consists of tying *mangal sutra*, putting toe ring and throwing rice on each other's head and these when fulfilled constitute a valid marriage¹⁴. Other essential ceremonies include exchanging the widow for a rupee as *isar* which is performed in Gwalior¹⁵ and tying of *thali* among the Naickaras community.¹⁶

Along with this the *Ituat* form of marriage is valid among the *santals* where the groom sneers vermilion on the forehead of bride. It also varies according to the geographical locations for example in Assam, a marriage ceremony by the name of *Saklong* is prevalent. In this form of marriage exchange of knives and rings in a big heap of rice takes place.¹⁷ This ceremony if performed is then considered to be essential while recognizing the proof of conclusion of marriage. Different communities along with having different rituals also have different stages of rituals which demarcate the solemnization of marriage. For example, usually *saptapadi* is considered as the final step towards consummation of marriage however amongst the *Rajput*

⁹ *Lingari Obulamma vs L. Venkata Reddy & Ors* 1979 AIR 848.

¹⁰ *Sumitra Devi v Bhikan Choudhary* (1985) 1 SCC 637.

¹¹ *Chandrika* (n 5) 5.

¹² *Dr. A N Mukherji v. State* AIR 1969 All 489.

¹³ *Maharaja of Kolhapur v. Sundaram Aiyar* AIR 1925 Mad. 497.

¹⁴ *In Re Dalgonti Raghava Reddi* AIR 1968 A.P. 117.

¹⁵ *Mahadeo Sheoram v. Chandrabhaga Bai* AIR 1946 Nag. 232.

¹⁶ *Tirumali Naickar v. Ethiraj Ammal* AIR 1946 Mad. 466.

¹⁷ *Balaram Baruati v Surya Baruati* AIR 1969 Assam 90.

community all ceremonies performed uptill the custom of putting *sinduram* is valid and once it is performed, marriage is considered as being completed.¹⁸ In case of Nattukottai Chettis, the marriage is valid when the sacred fire is lit and *thali* is tied around the neck of bride unlike the usual norm of couple taking seven steps.¹⁹

There is variation not only in the kind of ceremonies performed but also in the way a particular ceremony is concluded. For example *saptapadi* which is often considered as being mandatory under the Hindu Marriage Act, 1955 does not always involve the bride and groom taking seven steps rather in the gujrati community only four steps are taken while performing *saptapadi*.²⁰ There has also been innovation in these ceremonies with respect to the Anti Purohit association or self respector's cult which did not have any specific ceremonies attributed to that group. Court held all marriage to be void due to absence of such ceremonies²¹ however later it got amended by Madras Legislature whereby a new section by the name of 7A was included.

These ceremonies and customs attributed to certain identifiable groups are also given the due weightage as compared to performance of any other "essential" ceremony. This is evident from the fact that although *kanyadaan* and *vivah homa* are considered to be essential ceremonies under the Hindu Marriage Act, 1955 but still non performance of the same cannot invalidate the marriage.²²

III. 'ESSENTIAL CEREMONIES' – A MYTH

There have been several case laws which consider *saptapadi* and *vivah homa* as essential practices under the Hindu Marriage Act.²³ However, this is not just a settled position rather there exists a constant tussle; on one hand *Grihyasutras* mention *panigrahanam* as an essential ceremony whereas on the other hand *manusmriti* considers *saptapadi* as a mandatory practice. Further, this has undergone several heterogeneous changes among the communities. For instance, *saptapadi* essentially means seven steps. However, it has now gained the meaning of taking seven pheras around the holy fire. Sometimes even the priests rig the mantras to suit the ceremonial requirements of both the sides.²⁴ Nowadays some men have started using the defence of non-performance of 'essential ceremonies' to invalidate the entire marriage.²⁵ It then becomes the onus of the court to prove the valid conclusion of marriage either through

¹⁸ D.H. Chaudhari, *The Hindu Marriage Act, 1955* (3rd edn., 1966) 92.

¹⁹ *ibid.*

²⁰ Chandrika (n 5) 7.

²¹ *Deivayani v. Chidambara* AIR 1954 Mad 657.

²² *Ramlal Agarwal v Anupam* (2004) 3 SCC 199, *Rampiayar v. Deva Roma* AIR 1923 Rang 202.

²³ *Appibai v Khimji* AIR 1936 Bom 138; *Vishnu Prakash v Sheela Devi* (2001) 4 SCC 729.

²⁴ WF Menski, *Modern Indian Family Law* (1st edn, Curzon Press 2001) 29.

²⁵ *Rajdei v Lautan* AIR 1980 All 109.

customary rites or bearing the risk of converting women into unfortunate victims. In the case of *Baby v Jayant Mahadeo Jagtap*,²⁶ the court upheld the validity of Neo-Buddhist practises and said that there was no need to prove *Homa* or *saptapadi*, but such cases are rare. In *Appibai v Khimji*²⁷ it was held that *saptapadi* and *homa* are essential to be performed in Hindu marriage, however surprisingly it also mentioned that lack of it cannot dissolve the sacramental tie or render it void.²⁸ These judgements show the irregularity and deviating nature of the courts which as of now hasn't adopted a standard approach while dealing with law. Such whimsical nature adopted by the judges puts a big question mark not only upon the women's future whose marriage is put at stake but also her children, from the said marriages who are rendered 'illegitimate'.

IV. INAPPROPRIATE USAGE OF ESSENTIAL CEREMONIES: FROM 'WIFE' TO 'COCUBINE'

The concept of 'Essential Ceremonies' is favourable to men who can escape the economic liability of maintaining his wife on the plea that the marriage suffered from legal defects or lacked the requisite legal sanctity.²⁹ This works in the advantage of men and ends up putting women in the vulnerable position and threatens their status from being a 'wife' to a 'concubine' or 'mistress'. This assertion has been proved due to the voluminous cases present. Basically the objective behind this is to keep the woman as a mere 'mistress' or a 'keep' and not attribute her the rights, benefits and status of being a 'wife'. In the case of *B. S. Lokhande v State of Maharashtra*,³⁰ the accused committed bigamy and later took the defence of a valid marriage by alleging that the first marriage was not valid as it lacked the performance of essential ceremonies of *homa* and *saptapadi*. This decision was responsible for setting free the man who technically should have been convicted under section 494, Indian Penal Code, 1860 and also proved to be disastrous for the wife whose rights and benefits were snatched away due to illegal marriage. This was not the only instance, another case law of similar nature was observed in the case of *Shanti Dev Berma v Kanchan Prawa Devi*,³¹ where although the spouses were living together in cohabitation and had the proof of validly exchanged letters as written in the capacity of being a husband/wife, however still Supreme Court discarded such evidences and merely relied upon the absence of *saptapadi* and *homa*. The accused was acquitted of bigamy and

²⁶ *Baby v Jayant Mahadeo Jagtap* AIR 1981 Bom 283.

²⁷ *Appibai v Khimji* AIR 1936 Bom 138.

²⁸ *ibid*.

²⁹ Flavia Agnes, *Marriage, divorce, and matrimonial litigation* (first published 2011, OUP 2011) 142.

³⁰ *BS Lokhande v State of Maharashtra* AIR 1965 SC 1564.

³¹ *Shanti Dev Berma v Kanchan Prawa Devi* AIR 1991 SC 816.

again as the norm might have it, the woman was the one whose status was challenged. Although the due benefit of doubt might be extended in the above mentioned cases however, the gravity of error committed cannot be excused in the case where man himself admitted that he had committed bigamy, then also judges invalidated one of the marriages saying that one of them was not valid, thereby as usual saving the accused from the charge of bigamy.³² In all these cases the woman, who was a part of this invalid relationship suffered, thus leading to extinguishment of all her marital rights and benefits. This practice of considering essential ceremonies as proof of solemnization of marriage also defeats the provision of bigamy as it leads to creation of loopholes by which an offender can circumvent the law. Sometimes, just to follow the precedent judges tend to decide in an absurd manner. For example in the case of *MBK Ramaraju v Bodi Thirupathamma*³³ Justice Reddy merely followed the case of *Lokhande*³⁴ and said that he felt constrained to invalidate the second manner in order to follow the judicial precedents.³⁵

V. STATUS QUO AND THE WAY AHEAD

Often times, the *shastric* ceremonies and rituals performed serve as a proof for the conclusion of valid marriage, but what if you don't have the clippings of these rituals which were performed that too some 20-25 years ago. Can their absence still serve as grounds for breakdown of marriage? The answer to this is a shocking 'yes'. Recently, it has been concluded that unless the marriage is celebrated or performed with the due rituals and ceremonies, it will be deemed to not have been solemnized³⁶. In the midst of the entire discussions between the rituals and ceremonies performed the only relief provided to helpless women is by the Indian Evidence Act, 1872 whose s. 114 states that even if independent evidence is not available for solemnization of a valid marriage, it's conclusion is still presumed due to continuous cohabitation³⁷ of both the spouses and reasonable inference by a third party who consider them as married. Certain of the suggestions in this respect can be to:

1. Compulsorily register marriages and get a marriage certificate just like people do in the case of birth or death. Legal sanctity should be provided to such marriages only after the registration of such marriages. This will reduce the ambiguity involved regarding

³² *Sujit Kaur v Garja Singh* (1994) 1 SCC 407; *P Satyanarayana v P Mallaiiah* (1966) 6 SCC 122; *Joyita Saha v Rajesh Kumar Pandey* AIR 2000 Cal 109.

³³ *MBK Ramaraju v Bodi Thirupathamma* 1975 Cri LJ 208.

³⁴ *Lokhande* (n 26).

³⁵ *Ramaraju* (n 29).

³⁶ 'Hindu marriage invalid without rituals, rules High Court', *The Times of India* (India, 7 Feb. 2019) 1.

³⁷ *Badri Prasad v Deputy Director of Consolidation* AIR 1978 SC 1557; *Parameshwaribai v Muthojirao Scindia* AIR 1981 Kar 40.

the determination of valid marriages. Courts often delve into the question of intention or conduct of both the spouses which involves certain judicial discretion and this can be eliminated by the introduction of a valid marriage certificate, which can serve as a proof for the conclusion of a valid marriage in the eyes of law.

2. Although, it is still there according to section 8 of Hindu Marriage Act, 1955 but it is not compulsory and has been included in the mere form of being a suggestion, making it mandatory can serve a dual purpose. First, it can serve as a proof for the marriage which was concluded and second, it gets the potential of saving women from bigamous cases just because of their inability of producing proofs of marriage before the court.
3. Registration process as in status quo is a long and cumbersome process which prevents the couple from getting their marriage registered and along with this there is neither any added incentive for doing it nor any grave detrimental impact for its failure. Therefore, efforts should be made to hasten the process and negative impacts can be associated to it so that there is enough incentive for the newly wedded couple to actually go and get the marriage registered³⁸ rather than merely considering it as *sanskara* and thereby avoiding the paper work.
4. Till now marriages are considered as being sacramental,³⁹ however it's time that apart from merely considering it as being a social tie it should also be recognized as a contract which involves rights, duties and obligations towards the opposite party. If such duties are not performed then it can also be revoked unlike the nature of a *sanskara* which once performed cannot be undone.
5. In case some inconsequential flaws are discovered in the ceremonies performed and it is found out that men have been nit picking regarding the rituals in order to intentionally make it void to serve their ulterior motives of either performing bigamy or taking away his wife's right. In such cases, some provision should be made in law which protects the women's interest just like child's interests are protected under s.16 of Hindu Marriage Act, 1955. For example women can be given economic rights over the property and appropriate power should be rendered to her so that she can exercise her marital rights.
6. According to the current position of the law, although 'cohabitation' is given

³⁸ 'Registration of marriage should be made compulsory' *Hindustan Times* (India, 4 July 2017) 1.

³⁹ B.N. Sampath, 'hindu marriage as a samskara: a resolvable conundrum' (1991) 33(3) JILI <https://www.jstor.org/stable/43951370?seq=1#metadata_info_tab_contents> accessed 24 November 2019.

importance however still it merely creates a presumption⁴⁰ which can easily be rebutted. It is required to look at prolonged habitation as a concrete proof of marriage and assign it a higher status as compared to the current plight of it merely being responsible for raising a rebuttable presumption. In such cases intention of the parties can be looked upon. The very fact they have been living together from such a long time and any third party also considers them as being married should not be completely discarded.

Marriages are still not registered due to the lengthy and cumbersome process, which spouses usually tend to avoid and also there are no repercussions for not getting it registered.

VI. CONCLUSION

Through the scope of this research paper, section 7 of Hindu Marriage Act, 1955 has been discussed and various rites and rituals of different communities have been explained to show the heterogeneity of such customs. Further, it has been shown that the very interpretation of the word 'essential ceremonies' is not applied consistently and rather there have been contradictory judgements in order to support the same. This puts women in a disadvantageous position as usually they are the ones whose destiny is put at stake as it entails the possibility of them no longer benefitting from the rights and benefits of being a wife. In status quo, it is only limited to provisions of evidence act which might act in her favour however, till date there is no conclusive solution to the same and this ambiguity perpetuates and even in some cases aggravate. Therefore, this research paper attempts to put some solutions in the end which if adopted can be of certain help to the women, who according to the current paradigm are at the mercy of judicial discretion and heterogeneous customs which have largely been manipulated by men.

Customary rites are given a great importance and this is due to the sacramental nature of marriage. The validity of marriage depends upon custom, which if performed with irregularity has the potential of turning the entire marriage as void. The idea of marriage being a *sanskara* is probably one of the reasons that many people still do not get it registered. Therefore, a shift in perception from a sacramental to a contractual institution can go a long way in reducing the dependency of customs as being 'proof' of marriage.

It is high time that rendering the marriage as void or valid should not be the sole consideration of the courts rather the pertinent question should be what follows once the marriage has been rendered void and what can its possible impact be upon the woman or often times the 'victim'⁴¹.

⁴⁰ *Priya Bala Ghosh v Suresh Chandra Ghosh* (1971) 1 SCC 864.

⁴¹ Riju Mehta, 'Inheritance rights of women: How to protect them and how succession laws vary' *Economics*

The laws as enshrined under the Hindu Marriage Act, 1955 and the judicial precedents lend a helping hand to the husbands to validate their manipulations and take advantage of their own wrongdoings.⁴² The often perceived gender neutral laws are rather gender blind and the patriarchal condition of the society has also moulded the laws in the favour of the dominant instead of the group who is dominated.

Times (India, 29 July 2019) 2.

⁴² *Agnes* (n 25) 140.