The Sri Lankan General Law of Marriage: Dutch, Victorian, or Indigenous ?

Sharya Scharenguivel
Faculty of Law University of Colombo.

Background

The Sri Lankan General Law of marriage has been considerably influenced by the Roman Dutch law and the English law. To a large extent the law remains unreformed and is in many ways not compatible with modern notions relating to marriage and the termination of marriage. The General law is accessed not only by the low country Sinhala people who as a result of our colonial history do not have a legally recognized customary law but also by Tamils (whether they are governed by the Thesawalamai or not) and by Kandyan who have a choice of marrying under the Kandyan law or the General law. In relation to the Tamils governed by the Thesawalamai by and large the Thesawalamai impacts only on property and succession rights of married persons. The requirements relating to capacity to marry, guardianship and custody is governed by the General Law.

Methodology

Aspects of the Sri Lankan law of marriage will be examined with a view to ascertaining whether the General Law of marriage is Dutch, Victorian or indigenous. We will also consider whether the lack of agitation for reform can be attributed to the fact that the law accords with our current sense of values and is therefore indigenous.

Marriage will be looked at from the point of view of contracting a marriage, the incidents arising out of marriage and terminating a marriage. In each of these spheres it will be noted that the marriage laws are largely Dutch or Victorian. The Roman Dutch Law relating to marriage was largely a seventeenth or eighteenth century law. Some of its inherent features must be understood in the context of that period and its relevance today

must be questioned. This system saw the woman as the subordinate partner in the marriage and vested both decisions in relation to the

marriage and children in the male spouse. A corollary was that of seeing the husband as the primary financial supporter of the marriage. This was reinforced by the early British colonial legislation which imposed criminal liability on a husband who failed to support the wife.The received English law of the eighteenth century and the nineteenth century was concerned with the emancipation of the married woman. It sought to give the married woman control over her separate property and a distinct legal personality. Yet the issue that confronts the Sri legal system today is whether the married woman has achieved substantial equality and in some instances whether she has been denied both formal and substantial equality. Does she for example have the same opportunities to engage in economic activities which will generate the same type of income as is generated by her husband? Or does her role as care giver of the children deprive her of those opportunities. Is the separate property regime which was a response to protecting the earnings of a select group of women in 18th century England an appropriate model for Sri Lanka today? Should Sri Lanka be looking at some indigenous concepts in formulating her laws relating to matrimonial property? These are some of the issues which will be looked at in this paper.

Divorce in the General Law is based on the ideal that marriage is a life long commitment which can only be dissolved exceptionally on the proof of a serious matrimonial fault. Suspension of the marriage is a recognized form of relief and the viability of the marriage is not a consideration. The Procedural laws are adversarial and the process is essentially acrimonious where success will depend on whether one party has succeeded in proving that the other party has committed a serious matrimonial fault. The uncontested divorce is a response to this fault based system where one party agrees not to contest the action which then results in the court holding that the alleged matrimonial fault has been committed. In essence this is a divorce by mutual consent where the property and custodial consequences have been determined out of court and the courts role is a formal one. Once again the question that has to be asked is whether the indigenous systems which deemphasize fault and stress on conciliatory or mediatory measures are better options.

Outcome

The expected out come of this research is that of demonstrating that the law relating to marriage and divorce in the General Law is based on antiquated notions of marriage and does not accord with current notions of marriage as a relationship between equals. Nor does it accord with the well accepted view that a non functional marriage marriage must be set aside with minimum distress to the parties.

Legislation and case law will be the principal sources that will be examined Commissioned reports and other reports will be examined and commented on whenever appropriate.

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