

# OFFICIAL POLICIES FOR (UN)OFFICIAL CUSTOMS: THE HEGEMONIC TREATMENT OF HINDU DIVORCE CUSTOMS BY DOMINANT LEGAL DISCOURSES

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The Hindu Marriage Act of 1955, besides providing for the first time in India statutory divorce as a matrimonial remedy for all Hindus (section 13), officially recognised customary divorce as well (section 29(2)), consequently offering both possibilities to those couples willing to end their matrimonial tie. Interestingly enough, the directions of development of these two institutions have been until now almost opposite. The statutory divorce policy, which until the mid-1980s tended to facilitate dissolution of marriages, has since the 1990s been replaced by careful consideration of the possible financial disadvantages of divorce, especially for women. An inverse trend has characterised the official treatment of customary divorce, which was at first strongly discouraged in the post-Independence period, and later from the 1990s onwards, gradually encouraged especially in view of the multiple advantages of relying on the traditional family.

This paper is developed around Rajkumari's narrative, an individual account of customary divorce collected during extensive fieldwork in the Shivpuri district of Madhya Pradesh. By comparing Rajkumari's narrative with similar divorce stories in official case-law and thus reflecting on its possible outcome in a law-court in the light of legal precedents, this paper pinpoints the specific elements of praxis on which has been developed the legal reasoning of law courts. Furthermore it highlights the ideological reasons linked to the choices of the judiciary in the

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treatment of customary divorce in India. Rajkumari's story is offered as an example of the specific kind of praxis which is the source of legitimacy and accountability for people's actions in the enactment process of everyday life. Thus the probabilities of success of Rajkumari's narrative in a law court are estimated with a view to making explicit the influence of dominant discourse in legal policies. As such this paper supplies a reflection linking the local praxis of divorce stories in Central India with the macro-enactments of official law courts at a national level. It does not aim, however, to suggest a representative explanation beyond the context of such reflection. Its scope is instead to show the many possible manipulations of praxis by legal policies informed by dominant discourses, and to point out the potential of divorce customs as a local form of resistance to patriarchal instances of Hinduism. The challenge has been to reconstruct the polyphony of voices informing the choices of everyday life, in which it is not always possible to isolate a single voice in relation to a particular story because one speaker can have more voices in the multifaceted layers of praxis.

### Children and daughters-in-law .... That's marriage.

It was the end of the winter season 1999/2000 and for once the crop was good. It was the best opportunity for the unskilled workers to make some money and most of the lower caste women were ready to work as day labourers for about 30 rupees a day. Rajkumari impressed me with her interest in my research. She expressed from the outset an eager willingness to explain her choices in her matrimonial life, whereas other women appeared more uncertain and confused about my interest in a custom considered immoral by the higher castes. In accord with this first impression, Rajkumari appeared very sure of herself right from our first meeting. She promised to explain everything to me at her employer's house where we could easily chat in the backyard room. The only problem was to fit our meetings into her daily schedule of home-helper and day-labourer. It was agreed that Rajkumari would have her day-pay as labourer refunded by me whenever we would meet to discuss her experience of divorce and remarriage. Most of the time she arranged for both going to work and meeting me, doubling her income in that way.

The very day of our first meeting, Rajkumari spoke about divorce and remarriage customs, giving an unexpected richness of detail about rituals and procedures. A few days later she was ready for a filming session with the sole condition that I would come alone. Except for her employer's wife nobody was in the house at the

time of the appointment and Rajkumari seemed to be not particularly concerned by the camera and the recording equipment. Her only worry was that the neighbours might hear our conversation. Consequently she would have preferred to close the back door which was the only source of light. We eventually agreed to leave the door ajar. Rajkumari seemed to consider superfluous my usual explanations of the technicalities and use of the recordings, and began to speak even before everything was ready. After a few communication difficulties due to my poor understanding of her dialect, she became so involved in her account that I did not interrupt her and she kept speaking and explaining for about one hour with very little intervention on my part.

I arrived here [Piparsod] at the time of my second marriage. My husband paid 15,000 rupees for me. It was my second marriage indeed. Here I have got children and daughters in-law. None from my first husband. He wasn't a good one. He didn't give me any children... We did everything right for my first marriage, the turns around the fire, the banquet... Here I came for my second marriage. Men arranged everything. I gave back my jewellery to my first husband. Nothing was left to me. After I ran away, the elders met and wrote on a piece of paper the amount owed to my first husband. My first husband got 15,000 rupees ... for the dispute. The reason of the divorce was that he was too young... physically immature... he was impotent. Nothing to do with him. How long could I go on in this way? For this reason one night I ran away and came here... I didn't realize it [my husband's condition] before. I met him only after the marriage... People here are married by their parents ... when they are still children. The girl and the boy don't meet each other before the marriage. The parents arrange their children's marriage. Much later at puberty, the girl is taken to her in-laws. Only at that time does she meet her husband. If the spouses aren't too young [at the time of marriage] they also exchange garlands. We didn't do even that. But we did the rite around the fire. Then I have been taken there [to the in-laws' house]. Only at that moment did I meet him... And I realised that he was too young ... he was not for me. After some time I thought: Enough! I told around about that... People said I was right and I decided to run away... I met

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another man and I ran away with him. So, here I arrived. I am happy now. I don't have any problem.

How did I find him? I told some people of my village about my wishing to remarry. The news was spread out from one to other. A man heard of me. I met him. Then we ran away together by motorcycle and I came here...The dispute? The *panchayat* met.<sup>1</sup> We wrote down that we were leaving each other. The elders read the paper. The elders decided. My first husband got 15,000 rupees. The first husband get 15,000/20,000 rupees. It is on the basis of the jewellery of the woman. If she has not much jewellery it will be around 15,000 rupees. If she has a lot of jewellery it can be 20-25,000 rupees. So when she has really nothing the amount is around 15-16,000 rupees.

When I married for the second time we didn't do anything ... the only thing we did the second time was to pick up the jar full of water before entering the [in-laws' house] ... just for good luck. All the neighbours were invited ... some good food was prepared. We had a good time together, we ate and we had fun. The new daughter-in-law was given jewellery and after wearing them the jar was picked up ... sweets were shared ... we sang and sang, on such occasions we sing a lot. The more a family can do, the more is done ... if one can't, nothing can be done... Now I am very happy, sons, daughters-in-law...four daughters-

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<sup>1</sup> From 1920 until 1947 the British implemented village assemblies, *panchayats*, with competence in minor penal and civil matters. The Constitution of India (art. 50) provided village councils with separate bodies for judiciary, *nya-ya panchayat*, and administrative competencies, *gra-m panchayat*. However, both the British and the post-Independence attempts to restore traditional justice in India were far from the indigenous legal values by which they should have been inspired (Galanter 1972). Nowadays in many villages of India, justice is almost independently administered by two councils: the statutory *panchayat*, based in principle on permanent elected members, and the traditional *panchayat*, usually but not exclusively linked to the caste and whose composition relies on the features of the case and on the people involved. The latter is also designated the elders' council. See also: Cohn (1994), Dumont (1957), Ghosh and Kumar (2003), Hayden (1999), Holden (1996 and 2003), Moore (1985), Srinivas (1987), Tinker (1954).

in-law, now. No problem. I am happy. My first husband was good at nothing.

Some people go to the advocate ... if they cannot agree they have to go to the advocate. He can settle everything. He writes everything on a paper in two copies: one for himself and one for us ... so that we have a proof. Because often it happens that later one doesn't want to give the money any more. But if there is a written copy one cannot go back on the agreement. Eventually we did go to the advocate because my first husband wasn't happy any more ... he got 15,000 rupees. One has to set a date and go all together ... if no agreement has been possible. If later something happens, and somebody says that he didn't get enough, then we have our papers. 15,000 rupees is nothing at all. If a woman has a lot of jewellery the amount can reach 20/25,000. But I didn't have anything.

A lot of lower caste women do as I did. They aren't happy with their man and meet another man secretly. Then when their husband is asleep during the night they run away. If the woman agrees then the man takes her away with him, during the night. But when there are children it is much more difficult. Some women are suffering because of their children. If the other man doesn't want her children it is difficult. And even if he wanted them, he would never consider them as if they were his own children. With children everything is more difficult. When they are grown up they can tell you that their father is not their real father. Someone is even ready to give his name to children that are not his children... so that they can have the land ... But then there are the brothers, the real ones, and there are a lot of problems. Women without children can remarry ... even ten times. If they are not happy with one, they can go to another and another and another and so on. Without any problem. Children can cause a lot of suffering to women. Even yesterday it happened that a woman came here [with her second husband] and took her children with her ... but these things never have a happy end ... Children and daughters-in-law .... That's marriage.

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Rajkumari's divorce appeared to have been a remarkably successful experience that brought respectability and prosperity to her life. I wondered if it was a particularly lucky case, and so misleading as to the reality of women's life in the village. Notwithstanding her broken speech, I was impressed by Rajkumari's explicit talking, and later struck by her structured argumentation. First she described the features of the traditional Hindu marriage. She expatiated on the points that indicate the probability of the failure of a conjugal tie, which is nothing but an arrangement between the parents of the spouses. Then she pointed out that on the day of the marriage herself and her first husband were so young that they were not even able to perform some of the marriage rituals. This alone could have opened the path to every sort of legal disquisition on the validity of the first marriage. Finally she explicitly presented the facts: Her husband's incapacity to have sexual intercourse. Her account constructing by stages the inevitability of the divorce, she seemed to have carefully prepared her interlocutor to grasp the necessity of her divorce. In this perspective it was even likely to appear as part of the duties of a Hindu woman because, according to the reported facts, her marriage failed to meet the social expectation of a proper marriage. The last sentence of Rajkumari's account interestingly summarised her position: "Children and daughters-in-law ... that's marriage."

My first impression was that Rajkumari's account could have been a source of inspiration for the rare lawyer willing to plead in an Indian law court in favour of customary divorce at the woman's initiative. Her argumentation legitimised divorce with the help of its most antagonistic notion: the indissoluble and sacramental Hindu marriage, whose traditional aims are progeny, sexual enjoyment and performance of sacred rituals. Her first marriage, she said, because it lacked the necessary requirements, was not a proper marriage, and consequently remarriage was the only possible step. Rajkumari did not directly fight the ideology according to which the traditional Hindu woman's expectations should be confined within the family's boundaries. On the contrary she confirmed it in aiming at children and daughters-in-law, using the dominant discourse of Hindu ideology for legitimating divorce - which is viewed as absolute anathema in the traditional milieu. Thus she even described how her escape was not a sudden whim but a perfectly legitimate step not only in her eyes but in the eyes of her community as well. Eventually she married another man meeting her matrimonial expectations of fertility and sexual enjoyment.

Rajkumari's tactic succeeded and she declared herself to have a happy life. But what if her story were to face official law? What if, following the death of her

second husband, her brother in-law claimed that her marriage had been unlawful and so she and her children could not claim inheritance rights? What if Rajkumari's second husband had had a first spouse alive at the moment of his remarriage with Rajkumari? And what if he had had children from his first spouse? Would Rajkumari's story be strong enough to resist the claims of her adversaries? Would her story meet the requirements of the maintenance regulation? Through the analysis of similar divorce stories brought before official law courts from the beginning of the 20th century, we can imagine the possible transformation of Rajkumari's story in an official setting, where, under the magnifier lens of official justice, precise details can acquire the status of conclusive evidence, irrespective of the original context of the facts, and consequently can re-create truth.

### The Perfection of Non-Registered Arranged Marriages Between Underage Spouses

In 1915 a Bombay law court produced what should be considered as a masterpiece of a decision by the opponents to customary divorce on the woman's initiative. *Keshav Hargovan v. Bai Gandhi*, 1915 ILR 538, where husband and wife contended in two cross suits respectively for restitution of conjugal rights and dissolution of marriage, made clear not only that divorce is contrary to the spirit of Hindu law, but that, in particular, the custom authorising a woman to divorce her husband is immoral and opposed to public policy. The judge initially tried to consider on the same level the validity of the husband's and the wife's initiatives respectively in relation to divorce but irretrievably slipped into criticisms of women who divorced their spouses (541-542):

The plea in the wife's written statement is that the marriage is a contract subject to a condition sanctioned by custom, that it may be put an end to at the wish of the wife subject to a payment of money. We cannot accept the position that marriage among Hindus is only a contract, but even if it were so, it could only, be a contract when concluded between adults capable of contracting. That is not the case here, and it is probable that the child wife who is put forward as paying money for the caste and for the repudiated husband is merely a pawn in a game between those who are the real instigators of her suit and the opposite party in the caste who dispute the existence of the alleged custom.

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The moral concern for minors who have been instigated by unscrupulous adults was later overcome by statements concerning the immorality of customary divorce practices. It was said (at 543):

[Customary divorce] is opposed to public policy as it goes far in substituting promiscuity of intercourse for the marriage relation, and is, we think, equally repugnant to Hindu Law, which regards the marriage tie as so sacred that the possibility of divorce on the best of grounds is permitted only as a reluctant concession... We can see no substantial distinction between the recognition of this custom and the declaration that the tie of marriage does not exist among Hindus of the Pakhali caste.

Such argumentation, as we will see, has found supporters among both Hindu traditionalists and progressivists fighting for women's rights, as it appeals to the sensitive questions of child marriage and wife repudiation, which have been, since the British times, among the powerful stereotypes disseminated by both the colonial administrators and missionaries for justifying their 'civilising' mission.<sup>2</sup> A consideration of Rajkumari's story as set out above should allow us to estimate what chance of success it would have had before the Bombay judge.

Rajkumari testifies to four possible formal steps in the accomplishment of customary divorce and remarriage: the escape from the first husband's house, the settlement of her case against him before the *panchayat*, the remarriage ritual, and a possible procedure, in case of disagreement, before the advocate or notary public. We should have therefore evidence of the performance of both the necessary formalities attesting the divorce and the rituals ensuring the validity of the remarriage. However at the same time the insistence on the financial transaction - the payment of 15,000 rupees, although it could have been more if the woman had more jewellery - as the decisive element settling the 'dispute', offers juicy material for speculations catching the Western and Westernised Indian middle-class imaginary of Oriental 'immorality'. The spectre of a trade in women seems to peep out from the Bombay judge's talk of a child-wife as "a pawn in a game between those who are the real instigators", and Rajkumari's story has in the

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<sup>2</sup> Concerning the British "civilising" mission see also Cohn (1997), Dirks (2001: 173-174), Fisher-Tiné and Mann (2003), Guha (1997), Metcalf (1994), Raheja and Gold (1994: 2-13), Rao (2003) and Said (1993).

details concerning the financial transaction all the elements to support an interpretation of this sort. Hence, the chance of survival for the custom dramatically decreases if it encounters the judiciary's manipulation of moral arguments, denying women customary divorce by re-shaping it in stereotypes attracting public criticism.

Rajkumari's story suffers even from the fact that her first marriage cannot take advantage of another commonly shared Oriental stereotype of the child-wife given in marriage to an old man, as her first husband was very young. In fact, as in *Kishental v. Prabhu*, AIR 1963 Raj 95, the reason why Rajkumari's marriage was not consummated was quite possibly the young age of her husband. In the *Kishental* case, Prabhu, a young bride belonging to the caste of Mehra, deserted her husband soon after she had moved into his house, and without consummating the marriage went back to her parents. At her native village, she developed what the law court called 'an illicit intimacy' with a man of her neighborhood. Her husband, after unsuccessful attempts to bring her back, obtained a divorce before the *panchayat*. The *panchayat* meeting was also attended by Prabhu, who alluded to the very unhappy life with her in-laws, and requested the divorce. However some time later she applied for maintenance against her husband under s. 488 CrPC (Criminal Procedure Code), which at that time did not include the divorced woman. Consequently her husband, who in the meanwhile had remarried, resisted his first wife's application by relying on the *panchayat* declaration of divorce. The matter in issue before the Rajasthan Judge was therefore whether the *panchayat* had the necessary authority to sanction the divorce.

The judgment states that the case had been grossly misconducted by the parties as no adequate evidence of the existence of the customs had been brought on behalf of the husband. Curiously enough, the wife had admitted, against her own interests, the existence of a custom of divorce in her caste. The court, focusing on the inability of the traditional jurisdictions to achieve justice, decided not to recognise the authority of the *panchayat* to dissolve a marriage or to give permission to a married woman to remarry. The judgment states (at 95):

... a custom by which a caste *panchayat* can grant a divorce whenever it thinks fit irrespective of the mutual consent of the parties cannot be countenanced by Court of law as valid custom. The principal reason is that a custom by which a marriage tie may fall to be dissolved by a mere fiat of the caste *Panchayat*,

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without more, which is not unoften torn by party factions and internal jealousies is apt to work very oppressively and capriciously, the more so as the affairs of such *Panchayats* are usually carried on with no semblance to rules of procedure or law or even natural justice. A custom, by which the subsistence or dissolution of the marital tie, the consequence of which would indeed be momentous on the parties concerned, is left to depend upon the mere caprice or whim of those assembled at the *Panchayat* meeting, is intrinsically contrary to reason and would be definitely opposed to public policy.

The Rajasthan judge facing the dilemma of recognising customary divorce and denying maintenance to Prabhu chose to declare the *panchayat* decision to be unreasonable and opposed to public policy, and consequently granted maintenance to Prabhu. Different and contradictory forces are detectable as informing the choice of the Rajasthan judge: modernist forces favouring social engineering and supporting the abandonment of South Asian traditions, and traditionalist forces fighting tooth and nail the adoption of foreign models of life which might recognise for women freedom of choice in matrimonial life – both of them however agreeing with the aim of reshaping India in conformity to the international scene. From this perspective the *panchayat's* authority could simply be rebutted by the allusion to factionalism and communalism, which in the immediate post-Independence period were considered to be the very emblems of that part of village life which was opposed to modern administration. Furthermore granting maintenance to a woman was seen as a response to the pressures for protection of women's rights, which were part of the modernist requirements. However, and this is one of the reasons why the argument in favour of and against customary divorce remain complex nowadays, indissolubility of Hindu marriage remained one of the ramparts of Hindu ideology. The Rajasthan judge, by denying the validity of the customary divorce and granting maintenance to Prabhu found the most effective answer in that context. The paradox of the reaffirmation of the validity of the first marriage, celebrated between underage spouses and without any form of consent or statutory formality, was completely silenced by the beneficial outcome of the granting of maintenance to Prabhu. This dispelled at the same time the suspicion that repudiation was unilateral divorce depriving the wife of any financial support – yet another damaging picture for India's international image.

Derrett (1963) pointed out the danger that this judgment constituted for all customary divorces pronounced by *panchayats*. In fact the paradoxical legal reasoning which was favourable to Prabhu seemed to be purposely designed to support future injustices. The denial of recognition to the *panchayat* of authority to declare customary divorce was not without consequences. What would happen if Rajkumari were to become a co-widow claiming inheritance rights from her second husband, and she had to prove the existence in her community of divorce customs or the formalities undergone for performing them? We shall see that in *Laserbai v. Jugribai*, 1978 MPWN 336, Jugribai, a co-widow who was apparently inadequately advised, failed to prove the existence in her community of divorce customs together with the formalities undergone for performing them. Surprisingly enough, the lack of evidence did not concern the proper formal steps leading to divorce but one single affirmation: that her husband Balli was alive at the moment of her second marriage. The court held therefore (at 336), that Jugribai was just a concubine and Laserbai, the appellant daughter born from her father's first marriage, was the only surviving heir of her father on the basis that, lacking proof of divorce, the second marriage of Jugribai was to be considered invalid:

There is not evidence of marriage of Balli with Jugribai and if such a presumption can not be raised under the facts and circumstances of the case, the marriage of Balli with respondent No. 1 would stand disproved. Now Jugribai has admitted that even at the time of giving evidence, her former husband Jugru was alive. In face of such admission, it was necessary that she pleaded and proved that she was divorced by Jugru: that there was a custom in the community that such divorce was permitted and the form of divorce, and lastly whether such formalities of divorce had been actually undergone.

In an even more overt and recent denial of evidence, in *Godawari Bai v. Bisahuram Sahu*, 1992 MPWN 118, a co-wife customarily married with the *cu-<sup>®</sup>* form (otherwise known as *cu-<sup>®</sup> pahna-na-* which is a remarriage variant and it is performed by offering the bride new bangles to wear) was refused her claim for maintenance under s. 125 CrPC, because the court did not recognise her customary marriage, since the first wife of her husband was alive at the moment of the wedding. It was said (at 118):

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As shown above it is an admitted position that first wife of non-applicant Bisahuram Sahu was alive at the time when he married the applicant in the customary form and she is still alive. Though under section 125 Cr. P. C. the term has not been specifically defined as to include the second wife in customary form, the word 'wife' in this connection, refers only to the legally wedded wife and means only a legitimate wife and, therefore, a marriage proved illegal does not give any right to wife to get any maintenance.

As is shown in the cases of Jugribai and Bisahuram, Rajkumari's story does not provide her with appropriate means for claiming her rights as a married wife in a situation of bigamy. In the absence of effective legal advice, Rajkumari would have failed if she had been asked crudely if her first husband, or her second husband's first wife had been alive at the time of her second marriage. Of course they both were! Such reasoning implies that customary divorce does not exist, and perhaps that even a widow needs to divorce before remarrying. Eventually, no matter the rituals or the formalities undergone for divorce and remarriage, Rajkumari's story would not have withstood the complex of snares arising from the Hindu proscription of bigamy and the Indian judiciary's notorious tolerance toward bigamous husbands.

It is a fact that bigamous Hindu men rarely incur serious punishment but, in the above cases, the judges did not hesitate to deny inheritance rights and maintenance to women. Be it the residue of patriarchal forces or the anticipation of post-modern trends of non-intervention in the family sphere of life (Menski 2001: 144-147), Indian law courts in the beginning of the 1990s appeared not to have renounced the sacrality and indissolubility of Hindu marriage, which very often seemed to justify the view that the husband relinquishing his wife was more acceptable than a wife relinquishing her husband. Furthermore the sacramental notion of Hindu marriage was revealed to be particularly fertile in the jurisprudential spin-off concerning the validity of sacred rituals for establishing the existence of remarriage. The jurisprudential interpretation stating the necessity of orthodox ceremonies for the existence of remarriages not only achieved substantial unfairness toward women (Menski 1983, 1985, 1991a, 1995, 2001) but served the purpose of resisting bigamy accusations (see for example *Bhaurao Shankar Lokhande v. State of Maharashtra*, AIR 1965, SC 1564, and *Kanwal Ram v. Himachal Pradesh*, AIR 1966, SC 614).

It seems therefore that the potential for resistance observable at the level of customary legal awareness in Rajkumari's account, if confronted with the official legal discourse, was bound to crumble under the weight of the mainstream Hindu principles. These were occasionally combined with modernist forces. They were upheld by a judiciary which preferred to protect non-registered,<sup>3</sup> arranged marriages with underage or bigamous husbands, rather than admitting the possibility of customary divorce on the woman's demand.

### Free Customary Divorce for Illiterate, Backward, Immoral and Lower Groups of Hindu Society

The strong claims for the indissolubility of Hindu marriage affirmed by a substantial jurisprudential trend prior to the 1990s could have led to doubt even about the very existence of customary divorce practices beyond an extremely localised context. Nevertheless case-law recognising customary divorce dates back to the 19th century, and indicates the precise elements of praxis in an earlier period, which after adequate treatment could have achieved a successful career in the law courts.

*Sankaralingam Chetti v. Subban Chetti*, 1894 ILR Mad 479, an appeal judgment, recognised in a relatively straightforward argument the validity of customary divorce on the woman's initiative by saying (at 480):

[...] that divorce in this form is consistent with the 'original' customs of the potters, and, if this be so, the custom is sufficiently ancient. We do not see that it is immoral, since it does not ignore marriage as a legal institution, but provides a special mode by which it may be dissolved. The fact that there is a money-payment does not make the custom immoral, and among the inferior castes similar customs are known to prevail.

Hence, more than a century ago, before s. 29 (2) of the Hindu Marriage Act, customary divorce on the woman's initiative met the approval of the official

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<sup>3</sup> Registration is not compulsory for Hindu marriages (s. 8 of Hindu Marriage Act, 1955).

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jurisdiction, although with one condition: that such a custom would be clearly confined to 'inferior' castes. Rajkumari's story contains, indeed, a brief but precise reference to the social position of actors in customary divorce cases. The last paragraph of her account begins with the words: "A lot of lower caste women do as I did". The skilful use of this apparently insignificant statement could have by itself led to victory not only before the Madras Judge but also before many other judges in the future.

Until the amendment of s.125 CrPC in 1973, on the basis of which even the ex-husband became liable for maintenance,<sup>4</sup> many legal arguments concerning the validity of customary divorce concealed financial issues. This explains the *Kishenlal* case, in which the finding of invalidity of divorce was a necessary step in a decision granting maintenance to the woman. It is therefore only too clear how the manipulation of the complex relationship between custom and official law can be used in support of ideological stands, irrespective of the contextual interests of the parties in each particular case. *Nallathangal v. Nainan Ambalam*, 1960 AIR 179, for example, pointing out the validity of customary divorce in exceptional situations, denied maintenance on the ground that the marriage had been dissolved. It was said (at 179):

It is not in dispute before me that, though Hindu law does not recognise divorce between husband and wife, marriage being regarded as an indissoluble sacrament, nevertheless, the custom in certain communities may be widely different, permitting a valid divorce by means of a caste *panchayat* or similar tribunal.

The above cases highlight the possible interests and strategies underlying customary divorce litigation and the difficulty of harmonising efficiently the regulation on maintenance with the customary practices regarding matrimonial remedies. The recognition of customary divorce can mean the refusal of maintenance to the woman as in the *Kishenlal* case. Maintenance, however, has been granted also on the basis of remarriage by recognising the validity of customary divorce. Thus, in *Pritam Singh v. Nasib Kaur*, 1956 PLR 424, the

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<sup>4</sup> Until the amendment of 1973 s. 125 of CrPC concerning maintenance excluded the divorced wife. In 1973 the following explanation was added to s. 125: "'wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried".

judge ascertained the existence of customary divorce among the Jats of the Ludhiana District and declared the second husband liable to pay maintenance. It was held (at 425):

According to the customs of the District a woman can remarry if she has been turned out by the husband. In the present case the evidence shows that the mother wrote to the first husband that if he did not take his wife back they would marry her off to somebody else and he went to the house of the mother in law and told her he would not take her back and it was after this that Nasib Kaur, the petitioner (now respondent) married Pritam Singh.

We can conclude that before 1973 the chances of success in maintenance disputes concerning customary divorce depended very much on the choice between claiming maintenance from the first or the second husband, and consequently on proving the invalidity or the validity of a customary divorce. Law courts' reluctance to uphold customary divorce could have been therefore, in certain cases, explained by a protective stance towards women. This same logic ceased to make sense afterwards.

*Pritam Singh v. Nasib Kaur*, however, presents a further factor which needs consideration in our attempt to test the chance of survival of Rajkumari's story in an official setting: the woman is never the active subject of the actions described. Divorce is described in the passive voice. It is said that "she has been turned out by the husband", and remarriage occurs if "they [the woman's relatives] would marry her off". Such a form of argument, similar to the typical scheme of Madhya Pradesh divorce affidavits briefly mentioned by Rajkumari,<sup>5</sup> insisted on the grievances of the husband, whose faults did not leave any possibility other than the wife running away and remarrying. In *Pritam Singh v. Nasib Kaur* the inevitability of events is specifically strengthened by the use of passive voices. At the same time, asserting the validity of the customary divorce meant in this case affirming the validity of the remarriage and hence the right of the wife to obtain maintenance under CrPC s. 488. Thus a gradual specification is observable in the presentation

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<sup>5</sup> Concerning customary divorce procedures before the advocates and notary public in Madhya Pradesh see also: Holden and Holden 2000; Holden 2003, 2004, and 2005. Further in this article see Dhagamwar 1992.

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of customary divorce rules not only as a matter of extremely localised facts, and consequently not affecting the Hindu principle of indissolubility, but also, by offering a specific version of the story which pointed to the need of the wife for protection, could more easily meet social approval. Rajkumari's story, in spite of containing the exact elements on which to re-construct a legal truth satisfying the law courts, would have needed to be reshaped to strengthen all those points contributing to the image of a woman in need of protection. A possible beneficial version of the story set out above could have been re-created by enhancing the following statements:

... My [second] husband paid 15,000 rupees for me.... Men arranged everything. I gave back my jewellery to my first husband. Nothing was left to me.... I met [my first husband] only after the marriage... People here are married by their parents ... when they are still children. The girl and the boy don't meet each other before the marriage. The parents arrange their children's marriage. Much later at puberty, the girl is taken to her in-laws. Only at that time she meets her husband. If the spouses aren't too young [at the time of marriage] they exchange also garlands. We didn't do even that.... Then I have been taken there [to the in-laws' house]. Only at that moment, I met him... And I realised that he was too young ...

The judiciary's perceptions concerning customary divorce seem to have drastically changed at the end of the 1990s. The leading case in this turnaround is *Govindaraju v. Munisami Gounder*, AIR 1997 SC 10. The interest in this case resides in how it deals with a customary divorce granted on the woman's initiative (see also Menski 2001: 39). The High Court had declared the appellant illegitimate because his mother had married his father after having walked away from her previous husband with whom she had lived for a couple of years. The Supreme Court, which counted a woman among its judges, attached high relevance to the caste factor and built its reasoning around an assumed larger freedom of lower caste women in matrimonial relationships. It was held (at 11):

The High Court in illegitimising the appellant, seems to have overlooked the caste factor which would have a great bearing in order to establish the relationship between the parties. They were 'Gounders', necessarily falling in the classification of 'Shudras'... Walking out of Pappammal from the house of her

first husband Koola Gounder was irretrievable and irreversible, for it is in evidence that neither of them took interest in each other thereafter. The divorce was thus complete.

The Supreme Court judges expressed the idea that walking away from the husband's house without being pursued to be brought back was tantamount to a ritualised act signifying the dissolution of the matrimonial tie. This perfectly harmonises with Rajkumari's story, according to which she seems to know perfectly well that divorce in certain circumstances is socially allowed and even expected. The Supreme Court, however, insisting on the caste factor, confirmed the stereotype of divorce customs as a remnant of older traditions in marginal groups. Probably the Supreme Court considered it had already done enough in recognising the right of lower caste women to walk freely away from their husbands. However, such a formalisation of the widespread perception of customary divorce as a custom of lower castes, while possibly not contradicting reality from a statistical point of view, builds an image of customary divorce in too strong colours. I had myself notice of customary divorce by Brahman women during my fieldwork in Madhya Pradesh (see also Holden and Holden 2000). It had already been stated in *Virasangappa v. Rudrappa*, 1885 ILR 8 Mad 444 (at 450), that customary divorce of high caste women was not unheard of. The situation is far from being so clear cut.

*Govindaraju v. Munisami Gounde* did not put an end to the debates concerning the necessity of elaborate Sanskrit rituals to bring into existence a Hindu marriage, nor to the manipulation of divorce custom and official law to pursue particular interests.<sup>6</sup> However the Madras High Court with *P. Mariammal v. Padmanabhan*, AIR 2001 Madras 350, took a step forward regarding not only customary divorce issues but also matrimonial litigation in a broader sense, by offering a straightforward logical ground for avoiding the crude debates on the performance of rituals for establishing a Hindu marriage. The facts are typical: after the death of her husband a remarried woman saw her inheritance rights contested on the basis that her marriage was not valid because she had been still married to her previous husband. The trial Court after examining the parties and analysing the evidence came to the conclusion that the previous marriage had not been dissolved by customary divorce, this being invalid after the Hindu Marriage Act. The case

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<sup>6</sup> Cf. *Lola Padmaja alias Venkateswaramma v. Loya Veera Venkata Govindaraju*, AIR 2000 AP 284.

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had to reach the High Court for a fair decision. There the judge felt the necessity of revision so strongly that he re-examined the facts. It was said (at 351):

Normally, the facts found by the lower appellate Court need not be questioned but if the soundness of the conclusion from them is in a question, then that is a matter of law.

The High Court judge went on, criticising the Trial Court for having misconstrued the evidence and therefore having reached the wrong conclusion of law. It was said (at 352):

[A] deed of divorce has been produced in the Court which contain [sic] the signature of the appellant/defendant herein - Manikatti who was the first husband of the appellant/defendant, was examined as D.W.4 [Defence Witness nr. 4], Manikatti himself had stated that the marriage that subsisted between himself and the appellant herein/defendant was divorced during 1968. D.W.4 is not a rustic or illiterate. He is a retired teacher. His version is corroborated by D.W.2 who has deposed that he was a witness to the divorce. Further when both the marital parties admit that there had been a divorce and they have taken different life partners, the trial Court ought to have accepted their evidence, instead closing its ears to their versions. It is not as if the theory of divorce is put forward for the first time before the trial Court.

Significantly, this law court did not relate customary divorce to lower castes or illiterate communities. Instead it pointed to the fact that the first husband of the appellant had been a retired teacher and was therefore worthy of trust. This element, together with the point of law concerning the validity of customary divorce after the Hindu Marriage Act, could have caused a transformation in the jurisprudence concerning customary divorce, dominated until then by the perception of divorce as a marginal custom used by marginal people. However, the appellate judge qualified his argument by affirming that “it is a fact that divorce was not known to the general Hindu law” (353), thereby supporting the perpetuation of the mainstream image of the indissolubility of Hindu marriage. This judgment overcomes the impasse of the requirement of ceremonies for establishing the existence of a valid Hindu marriage. After stating that there was a strong presumption in favour of the validity of marriage it held (at 354):

Once when the appellant/defendant establishes by clinching evidence that she is recognized as the wife of Rajaiah, then the further question whether the ceremonies necessary to solemnize a marriage should be proved, does not arise.

The High Court strongly criticised the inferior courts for affirming that there could not be customary divorce after the Hindu Marriage Act, and undertook a detailed consideration of the law. It was held (at 353):

It is a fact that divorce was not known to the general Hindu law, but then in certain communities, divorce, was recognized by custom and the courts upheld such custom when it was not opposed to public policy. The scheme and object of the present Act is not to override any such custom which recognized divorce and effect is given to the same by the saving contained in this subsection. It is not necessary for parties in any such case to go to Court to obtain divorce on grounds recognized by custom. The custom must of course, be valid custom. Therefore, the finding of the trial Court that there cannot be a customary divorce after the advent of Hindu Marriage Act, is erroneous finding of law. The lower appellate Court approved the finding of the trial Court without applying its mind.

It is evident that in spite of the finding, mentioned above, concerning the non-existence of divorce in ancient Hindu law,<sup>7</sup> this is an exemplary judgment, which hopefully will be considered as a leading precedent.

#### Conclusion: Praxis v. Official Policies

We have seen not only how easily Rajkumari's narrative could have been manipulated in a law court to deny the validity of her divorce for 'her own sake', but also how similar situations have been handled differently when, as in bigamy

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<sup>7</sup> For an interesting paper concerning the existence of divorce on the woman's initiative in ancient Hindu law see Larivière 1991.

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or maintenance cases, the husband could benefit from the recognition of a customary divorce. Legal policies concerning customary divorce and remarriage have been irretrievably embedded in the dominant system of thought of the Hindu tradition, irrespective of whether they were promoted for traditionalist or for social engineering objectives. The notion of sacramental marriage has been perpetuated as the totality of the concept to the exclusion of evidence of customary practices to the point that the case-law has frequently expressed doubts concerning the very existence of divorce in Hindu law.<sup>8</sup> However, the notions of customary divorce and remarriage had no greater success with the proponents of reformist instances, which immediately after Independence were too involved in social engineering projects aiming to uplift India's image abroad. Consequently, those practices have been officially marginalised, and the groups following them have been silenced, undermining their identity as 'not something': not orthodox, not high caste, not civilised and so on.

The first part of this paper highlighted the legal paradox of supporting, against customary divorce, non-registered arranged marriages between under-age spouses for the sake of both orthodox Hindu tradition and modernist feminist policies protecting human rights. The legal scholarship denying customary divorce on the basis of orthodoxy merely perpetuates a dogmatic opposition. This is between the sacramental ideal of Hindu marriage, on the basis of which divorce is unknown to ancient Hindu law, and the practice of divorce and remarriage, for which, since ancient times, all sorts of theoretical expedients have been used to limit them to the category of exceptional localisms. These customs have been relegated since the times of ancient texts of Hinduism to the periphery of Hindu culture. They have been said to belong to past times or underrepresented groups, or they have been translated into foreign legal categories, such as the nullity of marriage, which is the "dignified" alternative to divorce in canon law (Holden 2002a). In this regard, the indological scholarship pointing out the references in classical texts to the dissolution of marriage on the woman's initiative (Larivière 1991), represents a milestone in the cultural recognition of customary divorce practices, and this all the more as it concerns the woman's initiative.

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<sup>8</sup> For the indological scholarship on this see among others Kane (1930-62, vol. II, I: 620), Purohit (1989: 41), Rocher (1968: 110), Viridi (1972: 20). For the anthropological scholarship see the Dumontian theory of secondary marriages (Dumont 1966a).

An important part of the anthropological scholarship has confirmed the mainstream discourse of Brahmanic culture by accepting the Dumontian theory of secondary marriages (Dumont 1966a). This does nothing but reinforce the supremacy of the sacramental marriage, or primary marriage, and legitimise the patriarchal control of women, by reducing customary remarriage to a sale transaction. However, praxis-focused studies by anthropologists such as Chambard (1961), Parry (2001) and Utthan-Kumar (1997), indicate the existence of a network of knowledge beneath the dominant Brahmanical discourse of the indissolubility of marriage. Within the Dumontian scenario marriage is a crucial stage of the life of the 'holistic man', who essentially is incorporated into social life to the extent of not having individual aims different from those of the society itself (Dumont 1966a: 294-297). In this view the simple fact of recognising the voluntariness of divorce practices appears as a non-sense. This all the more the case since customary divorce is essentially on the woman's initiative, given that in traditional contexts men do not need to divorce in order to remarry. It is consequently evident that in such a situation the dominant discourse about the indissolubility of Hindu marriage serves both the positivist agenda of Hindu orthodoxy aiming for the universalistic diffusion of the Brahmanical culture, and of the reformist parties for whom the same notion of indissolubility justifies the necessity of change.

This dilemma lurks in South Asian legal scholarship, which is aware of the existence and frequency of customary practices of divorce and remarriage, yet has to deal with the implications of its legal recognition for the sensitive issues of maintenance and inheritance rights. Derrett (1963 and 1978) pointed out the failings of judgments which rejected the existence of customary divorce granted by a customary authority on the basis of mutual consent. Yet at the same time he expressed concern for the place of the divorced woman in Hindu society. Menski (1983, 1985, 1995, 2001, 2003) has elaborated the issue of customary divorce and remarriage, drawing attention to the cultural stakes in the rejection of customary divorce and to the financial significance, in terms of welfare policies, of encouraging customary solutions for matrimonial crises. We have seen how the recent possibilities of official acknowledgment of divorce customs are affected by underlying financial reasons. Nevertheless, Rajkumari's narrative would have more chance of success before a law court from the 1990s onwards than earlier. This means that, notwithstanding the ideological limitation and implication of such recent legal policies, society would surely lose if women were excluded from their possible benefits. This contextual gain for women is particularly difficult to acknowledge for the feminist scholarship involved in political action at a national

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and international level. The tactic of such scholarship has been until now to emphasise the possible dreadful consequences for women in the perpetuation of such customs. Thus local male perceptions of customary divorce as a form of sale have been offered to international debates as the only possible view of customary matrimonial remedies and as such to be fought against as a modern form of slavery (Dhagamwar 1992).

In summary, this paper has sought not only to highlight the hegemony of the dominant discourse that since ancient times relegated to non-existence customary divorce at the woman's initiative, but also attempted to point out how Hindu women in the Madhya Pradesh locality where the fieldwork was undertaken, can negotiate the termination of a marriage and then remarry, securing equity for themselves and their children. However to understand the peculiar techniques featuring women's legal awareness, it is necessary to look beyond positive law to a radical perspective of legal pluralism, where non-state-law can inform or even substitute for state law. As the comparison of Rajkumari's narrative with official case-law showed, customary matrimonial praxis has been manipulated both by the Brahmanic ideology and by the progressivist's insistence on modernist reform. The Brahmanic ideology englobes divorce in its own logic, undermining it as a kind of minor or secondary tradition, when the reality is such that its presence 'on the ground' could not have been denied. The leading indological scholarship and the anthropological scholarship inspired by it both assert the non-existence of divorce in Hindu marriage, but occasionally mention its possibility within the old argumentative and reductive scheme of the exception confirming the general rule. This scholarship tends to label customary divorce patterns as lower caste practices, thus allocating them to the margins of Hindu tradition, as is evident from a number of recent cases. On the other hand, the feminist approach, which uses the mainstream interpretations of local praxis to support the global feminist agenda, is liable, in spite of its good motives, to deprive women of their customary powers of action without offering them anything in exchange. Ultimately policies informed by traditionalist discourses as well as those informed by modernists discourse, both fail to see that law is much more than the Parliamentary statutes or the law courts' precedents, and assert a static view of Hinduism which denies customary divorce. Paradoxically enough, state law and law courts, and, much more, customary jurisdiction in rural India (Holden 2002b, 2003, and 2004a) at least recognise the possibility and legitimacy of customary matrimonial practices - being therefore disconcertingly ahead of leading academic thought, which too often appears trapped in perpetual positivist argument far from praxis.

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