

The Law of Marriage And Social Change

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SOCIAL CHANGE implies a necessary shift from the traditional religion-oriented, authoritarian and hierarchical society to an egalitarian, secular society. It means and includes change in social relationships, structure, processes and values of life in society. The factors that may influence social change may be psychological, social and economic. Marriage is an important social institution, and it provides nucleus for the family which is the basic unit of a society. Traditional marriage was shaped by values prevailing in ancient times. The maintenance of male superiority over women was one of such values. The structure of the family, and the process of interaction between the wife and husband, determine the values they cherish in their family life. Today this hierarchical and authoritarian structure of family must yield place to a situation of equality and mutual respect between the two spouses.

One of the essentials of a good government is a good system of law, which is capable of promoting the preferred values without giving rise to disharmony among the people that are governed by it. The purpose of law is to promote justice, keeping pace with the changing social, economic, political and other needs of the people. Reaffirming these ideas, the Preamble of our Constitution speaks of four objectives, *viz.*, justice, equality, liberty and fraternity, and rules out any kind of discrimination on the basis of sex, race and religion.¹ Every branch of law should aim at the realisation of these objectives. Matrimonial law is no exception. In this paper an attempt is made to examine the question how far the law relating to the Hindu Marriage Act, 1955 and the law laid down in the Special Marriage Act, 1954 contribute to bring about the preferred social change in the present context.

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1. See the Preamble and arts. 14 and 15 of the Constitution of India.

II

Society is a complex process. Its full character is revealed by its structure, values, processes and its level of standard of life. The elements that determine the character of a given society are varied, namely, historical, psychological, political and economic. Law is one of the elements that shape society and it does so through its norms. Law has come to be regarded as an instrument of social control and social change. By means of a suitable law of marriage we can influence a change in the structure, values, interactions, and interrelationship within the family. But law, unassisted by other factors, might not bring about the necessary change in the attitude, and outlook of the people towards marriage and other institutions of family.

The institution of marriage is as old as the dawn of civilization. The general concept of marriage requires the subsistence of relationship between man and woman constituting the centre of the social unit of family, which is the foundation of every society.² It is an association of man and woman formed for mutual satisfaction of value demands which may be biological, psychological, social and economic. It is a process by which the legal relationship of wife and husband is established. Traditionally for Hindus, marriage is an essential *samskara* and a sacrament. For Muslims, marriage is a contract, the purpose of which is to legalize the sexual intercourse and to legitimize the progeny. From Christian point of view, marriage is a voluntary union of man and woman to the exclusion of all others. The concept of marriage, thus, differs from community to community.

Indian society is a museum of diverse religions, cultures, races, languages and communities. Despite the heterogeneous nature of the living conditions and social life of Hindus, and the apparent diversity among them living under different geographical conditions of the Indian subcontinent, the Hindu society has developed a remarkable uniformity, homogeneity in its culture, social life and social institutions. This has been manifested in the *dharmashastras*, the religio-legal works of the Hindus, providing the core of the rules, conventions and the religious injunctions regulating the domestic relations of the people living in the ancient society. While the *shastras* laid down the basic principles, custom or *sadachara* guided by the local requirements formulated the details. The Muslim invasions, and the advent of the British rule brought new religions, new cultures and new laws to this country. The people of India were governed, during the Muslim ascendancy by the *shastric* law on the one hand, and the *Shariat* on the other, even regarding their domestic relations. Later, the English legal principles were super-imposed on the law of

2. Endre Nizsalovsky, *Order of the Family* 15 (1968).

the Muslim times. This has given rise to the gradual development of different personal laws in India governing the domestic relations of the people belonging to different communities *viz.*, Hindus, Muslims, Christians and Parsis, *etc.* Each of these has its own matrimonial law, based on its peculiar religious beliefs and social values.

The Hindu law of marriage was very much influenced by the Hindu religious beliefs. The traditional Hindu law of marriage imposed a number of endogamous and exogamous restrictions on the capacity and competence to marry. Intercaste and intersect marriages were not permitted. However, in practice the Hindu society witnessed the intercaste and intersect marriages, called the *anuloma* and *pratiloma* marriages³ for a long time, of which the latter were held to be invalid by the judiciary. A catena of social legislations such as the Hindu Marriage (Disabilities Removal) Act, 1946 and the Hindu Marriage Validation Act, 1949 recognised such marriages as valid. Most of the marriages were early and arranged marriages, and in them the woman was no more than a pawn in the hands of negotiating parties. As it was mainly for religious purposes, the mutual gratification of secular values like matrimonial happiness, and the security of women were not given the primacy they deserve. Though the concept of marriage was idealised by the sages in the Vedas, men seemed to have practised it as a pastime, reducing women to the position of instruments of enjoyment. Divorce or dissolution of marriage was unknown, and no other remedy was available to women to free themselves from the shackles of tyrannical husbands who were very much pathologically concerned with virginity, fertility, and authority to dominate over their wives. In this process, marriage gave rise to certain evil practices like polygamy and the most abominable and abhorrent practice of dowry giving and taking. Polygamy, in course of time, became a matter of social prestige for men. The unequal status of women was manifested in the Hindu laws of marriage and inheritance in which men were declared superior in the matter of matrimonial status and property rights. The precept '*nastri swatantray marhati*', which means, women do not deserve any freedom and equal rights with men, echoed very much in every walk of life. The traditional law of marriage is thus replete with serious shortcomings like inequality and sex discrimination in the matter of property right and matrimonial status.

The advent of independence marked the beginning of an era of social legislation that sought to codify and modify the old laws of marriage giving place to new matrimonial laws. With the growth of industrialization old values gave place to the new ones, posing a challenge to the traditionally entrenched

3. '*Anuloma*' marriage means a marriage between a boy from a high caste and a girl from a low caste. This was legally held valid by courts. '*Pratiloma*' means a marriage between a high caste girl and low caste boy. This was not recognised by courts as valid.

evil practices like early marriages and dowry giving and taking. Long before independence, the process of reform was started by the British in India with the passing of some statutes, such as the Widow Remarriage Act, 1856 by which widow remarriages were permitted and declared legally valid, and the Child Marriage Restraint Act, 1929 under which child marriages, and marriages below the statutorily prescribed age limits, *i.e.*, 18 years for the boy and 15 for the girl, were legally prohibited. Those who procure or undergo child marriage were liable to severe punishment under the relevant provisions of the Act.⁴ Under the impact of democratic and secular ideas, caste barriers to marriage were removed, and marriage as a legal institution was freed from religious moorings, with the enactment of the Hindu Marriage Validation Act, 1949 which validated all marriages between parties belonging to different religions, castes, subcastes or sects. Some provinces also effected such legislative reforms as the Bombay Prevention of Hindu Bigamous Marriage Act, 1946 which rendered void the bigamous marriage of a Hindu, and the Madras Hindu Bigamy Prevention and Divorce Act, 1949. By such legislation, the evil practice of polygamy was done away with, providing a sense of security to women, and the matrimonial relief of divorce was guaranteed to spouses governed by such legislation on proof of certain allegations, stated as grounds in the relevant provisions of the Acts.

These were followed by a spate of social legislation that came into being immediately after the independence. The notable ones amongst them are : the Special Marriage Act, 1954 the Hindu Marriage Act, 1955 the Hindu Succession Act, 1956 the Hindu Minority and Guardianship Act, 1956 and the Hindu Adoption and Maintenance Act, 1956. These Acts made inroads into the old laws of Hindus. The Dowry Prohibition Act, 1961 was passed to put an end to the evil practice of dowry. Under the Act, severe punishment was prescribed to those who violate the provisions of the Act. Thus, a catena of social legislation enacted over the years immediately after the independence has gone a long way towards democratisation and secularisation of the institution of marriage; and its laws, ensuring justice to married women. The process of democratisation has also given a decisive blow to evil practices like the taboo on intercaste marriages, early and arranged marriages, and the practice of giving and taking dowry. As a result of these developments, the Hindus, at least some sections in the urban population, have grown less conscious of the legions of caste and religion in their matrimonial and social relations.⁵

4. Under ss. 3 and 4 of the Act the person who violates this rule, if he is above 18 years but below 21 years, would be punished with imprisonment for 15 days or a fine of Rs. 1000, or both. If he is above 21 years of age, he is liable to three months imprisonment or a fine. A person conducting, or directing such marriage is also punishable in the same manner.

5. A.K. Sur, *Sex and Marriage in India* 158 (1973),

They are at liberty to choose whatever form of marriage they want, free from religious shackles and caste barriers. The trend towards secularism, equality of sexes, legal emancipation of women by elevating their status to that of men, is a unique feature of those laws that constitute the new code regulating the personal and property relations of the Hindus.

III

The present law of Hindu marriage requires the parties to be married to fulfil certain conditions laid down in the relevant sections of the Hindu Marriage Act, 1955 which seeks to secularise and simplify the ceremony of marriage. The concept of Hindu marriage has undergone a tremendous change under the Act, according to which marriage means a lawful consensual union of man and woman to the exclusion of others, accompanied by certain formalities which may be religious, customary and statutory. The *dharmic* institution of marriage, in which marriage was meant to be an indissoluble religious union of man and woman, is sought to be transformed into a union of convenience. It is aptly remarked by S. Venkataraman that the Hindu Marriage Act, in its basic ideology, is the repudiation of the *dharmic* institution of marriage.⁶ The Hindu code consisting of various enactments is a bold social experiment.⁷ Monogamy is now made legally compulsory for all married Hindus putting an end to the evil practice of polygamy. The boy and the girl must have attained the statutorily necessary marriageable age, and they must be mentally sound. This rule seeks to abolish the evil practice of child marriages. The parties to be married must not be *sapindas* to each other, and must not come within the prohibited degrees of relationship. This aims at avoiding the practice of incestuous and immoral alliances between persons closely related by blood, affinity and adoption. The ceremony of a marriage should be free from all invalidating factors like fraud, coercion and undue influence.⁸ A prominent feature of the present law is that it has done away with all traditional rigidity. The disqualification based on religion, caste, *gotra*, *pravara*, have been dispensed with. Intercaste and intersect marriages are made legally valid, though socially they are still unacceptable in major sections of the society. Marriage is made more secular and contractual than it was under the old system. A significant feature of the present law is that it provides for new matrimonial remedies such as, judicial separation, annulment of marriage, and the right to get divorce.⁹ These provide relief and

6. S. Venkataraman, 'Matrimonial Causes Among Hindus', *I.S.C.J.* 1 (1962).

7. *Ibid.*

8. See s. 5, Cls. i, ii, iii, iv and v of the Hindu Marriage Act, 1955.

a sense of security to women who may be driven to seek anyone of these remedies in times of necessity.

The enactment of the Special Marriage Act in 1954 has marked the beginning of an era of significant social reform and change. A unique feature of this Act is that it makes provision for a uniform secular law of marriage and matrimonial reliefs for all citizens of the country irrespective of their race, religion, class, caste and creed. Parties intending to be married under this Act may be a Hindu and a non-Hindu, a Muslim and a non-Muslim, a Christian and a non-Christian, they are required to fulfil certain conditions laid down in section 4, and comply with certain procedural requirements prescribed in sections 5 to 14 of the Act.¹⁰ Apart from providing for choice or consent-marriages in the civil form, it also provides for dissolution of marriage by mutual consent and agreement.¹¹ In addition to the usual remedies of judicial separation and divorce under sections 23 and 27 and the remedies for decrees of nullity and annulment under sections 24 and 25, it provides under section 28 for divorce by mutual consent. As the age requirements for the boy and girl under this Act are 21 and 18 years respectively, there is no scope for early and arranged marriages of minors. The Act, thus encourages only adult marriages which are the result of mutual choice and agreement between the parties to be married. Those who are married in their own religious or customary forms are also given an option to get their marriages registered under section 15 of the Act, which requires the parties to fulfil certain conditions like the rule of monogamy, prohibited degrees of relationship, *etc.*, for getting their marriage registered under the Act. By virtue of such registration, the parties are deemed to be married under this Act.

A valid marriage under any one of the above Acts brings about a very important change in the status of the parties. It gives rise to mutual rights and obligations which can be legally enforced in the courts of law against each other. Unlike the Special Marriage Act, the Hindu Marriage Act recognises mutual right of maintenance for both the spouses. Divorce, though unknown to Hindus in the beginning, is now statutorily recognised under section 13 of the Hindu Marriage Act, and sections 27 and 28 of the Special Marriage Act. The divorce by mutual consent incorporated under section 28 of the Act is said to be a highly progressive, and at the same time, a revolutionary measure. With the introduction of divorce and other matrimonial reliefs the

9. Ss. 9, 10, 11, 12 and 13 of the Act provide for these remedies on proof of any one of the grounds stated in the respective provisions.

10. See ss. 4 and 5 to 14 of the Special Marriage Act, which prescribe conditions and procedures to be complied with for civil form of marriage under the Act.

11. This provision is described as a revolutionary provision which is capable of leading to dangerous consequences.

Hindu society is revolutionised and a new matrimonial jurisprudence is developed.¹²

The present society, under the influence of the process of democratisation, urbanisation and industrialisation, is marked by tremendous change in the values of life which provide the rationale for certain norms or rule of family organization, and conduct of the members living in the family. The type of values cherished by the spouses in a family determine their norms of behaviour and conduct in their mundane activities.¹³ The impact of these values finally determine the character of the society in which we live. Modernization thus has brought about transformation of these values from tradition to modernity, giving place to a new set of values, and the generation of new concepts like liberty, equality, individualism which seriously affect the old institutions of marriage and family. In this process, the traditionally entrenched custom of marriage by arrangement is found to have disappeared giving place to a voluntary mate selection, resulting in "choice marriage" or "love marriage."¹⁴

However, modern social legislation and other developments seem to have had limited impact on the practices, customs and beliefs of the people. Particularly, the Special marriage Act and the Hindu Marriage Act have proved to be mere paper legislation in several aspects. This partly is due to allowing religion, caste and custom to continue to have their sway on the people. The Dowry Prohibition Act, 1961 proscribes the practice of dowry giving and taking, but permits the same in the form of gifts out of love and affection excluding them from the meaning of "dowry" under the Act.¹⁵ Though the Hindu Marriage Act aims at a secular law of marriage for all Hindus, doing away with all religious moorings, it still allows customary marriages and marriages replete with religious ceremonies. It provides saving clauses which seek to perpetuate customary marriages even in derogation of law and public conscience.¹⁶ Despite legal prohibition, early, arranged marriages and the evil practice of dowry are still continuing, and are assuming dangerous proportions in the society. The practice of polygamy and bigamy is allowed to continue on the basis of custom and convenience of the people, although they are prohibited in law. Though divorce is statutorily provided, customary

12. Read s. 13 of the Hindu Marriage Act and ss. 23 and 27 of the Special Marriage Act.

13. Wilbert Moors *Social Change* 89-93 (1965).

14. *Id.* at 102.

15. Explanation 1 to s. 2 declares that presents made at the time of marriage as cash ornaments, or other articles are not dowry. This requires to be suitably amended otherwise dowry can be given and taken by way of presents and gifts.

divorces are still widely prevalent in most of the socially and economically backward communities. All these loopholes in the law of marriage and divorce need to be plugged. They must be either amended or emended suitably to enable the matrimonial law to become an effective instrument of social change.

The question that occurs to every one is, what is the ideal form of marriage that suits the modern conditions? Marriage ceremony in the present society must be a simple one, secular or civil, without any pomp and show, and it should combine all the sanctity and solemnity of the *shastric* marriage and the secular content and modernity of marriage by choice, in which the parties to the marriage actively participate without undue interference from elders, who may be, at the most, consulted before marriage. The values cherished by the participants must not be merely materialistic, but also human in their nature. Marriage is not merely meant for sexual enjoyment but also for a long and happy association of man and woman to constitute an orderly family which contribute to the progress of society. Mutual love, affection and understanding must build the bonds of matrimony and bind them together for a happy, harmonious conjugal life. Further, the process of industrialisation, urbanisation, secularisation, the increasing number of married working women, and the alarming population growth, have brought about significant change in the attitude of the people. New norms of marriage, and new values of life are in the offing. The attitude of educated men and women towards marriage and family has been changed very much. Several demands are made by husbands and wives on each other. They depend on each other for emotional security and peace of mind.¹⁷ In the light of these developments, the laws of marriage are to be revised suitably and new laws formulated. Moreover, in the present dynamic society of ours, which is engaged in the adventurous task of creating a new social order, founded on the value system of equality and socio-economic justice, drastic revision of all the branches of country's laws including the personal laws, is called for to keep pace with the changing and challenging times, notions of fairness and justice, assuming new and wider dimensions of change in the people's customs and beliefs. These in turn demand significant changes in the structure of laws.¹⁸ All this accelerates a continual effort at social reform and social change, and the country's laws are called upon to play the role of the real instruments of social change and control.

16. Read ss. 5 (iv) and (v), 7 and 29 of the Hindu Marriage Act.

17. Protima Kapoor, *Marriage and the Working Women in India* 10 (1970).

18. The Law Commission, *Fifty-ninth Report* 9-10 (1974).

IV

The term value means a thing or an event that is desired by the people concerned. In every social organisation people cherish certain values of life. The notable ones amongst them pursued by men and women in the institutions of marriage and family are love, affection, sex, respect, wealth, equal matrimonial status, economic and social security. In fact, the present trend in law is towards the realisation of certain democratic values such as equality of sex, social and economic security for women and children, and the development of secular outlook. Of all the values equality of sex, and equal opportunities for spouses is the major goal value with which the law of marriage is mostly concerned. The articulation of outlawing sex-based discriminations in the context of present International Women's Year is the major concern of the global community, more so in the case of Indian society. Particularly, every branch of family law should aim at the achievement of this value by doing away with all sorts of deprivations and restrictions imposed on women on the basis of sex, and they must have equal participation in sharing and shaping all the other values concerning marriage and family, like love, affection, and matrimonial equality. It is observed by the United Nations in a recent study :

Differences of sex roles begin at the moment of birth as male or female. From that moment, child is expected to behave in accordance with the role of customarily assigned to his or her sex. By the time she becomes an adult...she learns that being born female sets her apart from men and limits her rights in law and in practice.¹⁹

Therefore, the success or failure of the laws of marriage depends upon the extent to which they help to realise these values. This calls for the critical analysis of the relevant provisions of the Hindu Marriage Act and the Special Marriage Act to ascertain whether, and to what extent, they are capable of promoting these values.

To a great extent the law of marriage laid down in the two enactments tends to establish the principles of equality, equal opportunities and equal protection of laws to both spouses without any sex discrimination. The law confers equal rights, imposes equal obligations, and the parties are allowed to enjoy equal matrimonial status in all respects. For instance, a valid marriage confers certain rights like the right of consortium and maintenance on both the parties to marriage under these enactments. When the right of consortium is infringed by one spouse, the other spouse is entitled to enforce his or her right to have conjugal society of the other by obtaining the remedy called

19. Equal Rights for Women, A Call for U.N. Action, OPI/494, 6 (1973).

restitution of conjugal rights.²⁰ In the same manner, both are under obligation to maintain each other in times of necessity and distress on fulfilment of certain conditions required under the relevant provisions of the law.²¹

For a considerably long time, women have been made victims of certain evil practices, like polygamy, dowry system and unilateral divorces by husbands and equal participation of women in judicial proceedings like legal separation, annulment of marriage and divorce, is denied to them. Widowers, but not widows, were permitted to remarry. Thus in a nutshell, what has been permissible to men has not been made equally permissible to women²² However, this kind of unequal status is sought to be done away with, and is of course, being replaced by the concepts of matrimonial equality and equal participation of both the spouses in all proceedings, through suitable changes in the present law of marriage. In case where the spouses fail to get on well due to psychological incompatibility or matrimonial misconduct of either spouse or due to some other reasons, and find their lives miserable, and are unable to pull on together as wife and husband, they are equally provided with suitable remedies to disrupt or dissolve the marital tie either temporarily or permanently, depending upon the gravity of the situation. The matrimonial courts are equipped with the jurisdiction to grant the necessary remedies to the aggrieved party on proof of any one of the grounds set out in the provisions enumerated under the Hindu Marriage Act and Special Marriage Act. Section 10 of the Hindu Marriage Act, and section 23 of the Special Marriage Act deal with judicial separation which only means suspension of conjugal life for a temporary period of time. If the spouses fail to get reconciled during that period it will lead to permanent breakdown of marital life under section 13 of the Hindu Marriage Act, and section 27 of the Special Marriage Act which deal with the remedy of divorce. In addition to these, marriage can also be avoided by virtue of the decrees of nullity and annulment of marriage, under sections 11 and 12 of the Hindu Marriage Act, and sections 24 and 25 of the Special Marriage Act. Thus the various provisions of the two enactments dealing with matrimonial reliefs loudly speak about the concept of matrimonial equality and equal right of spouses to obtain suitable remedies.

20. See s. 9 of the Hindu Marriage Act, and s. 22 of the Special Marriage Act.

21. Ss. 24 and 25 of the Hindu Marriage Act, 1955 deal with interim and permanent rights of maintenance, and s. 37 of the Special Marriage Act requires the husband to provide maintenance to the wife.

22. Myers S. McDougal, Lasswell and Lung-clu-chen, *Human Rights for Women and Public World Order: Outlawing of Sex-based Discrimination*, 69 *American Journal of International Law*, 497-507 (No. 3, 1975).

In certain legal systems, the idea that woman has no legal existence separate from her husband, who is the head of the family and the interest and unity of the family is paramount, has been well practised. This made women suffer various kinds of deprivations. Discrimination against women is very much pronounced in sharing the matrimonial wealth, thereby endangering their economic security. The laws, institutions and practices simply relegate them to a position of inferiority, and subordination with regard to their "rights to acquire, administer, enjoy, dispose of and inherit property including the property acquired during marriage."²³ This is very much true of the Hindu joint family system and the Hindu law of inheritance prior to the passing of the Hindu Succession Act. But the position in India under the new laws has changed. By virtue of their legal relationship as wife and husband, son and daughter, men and women are equally entitled to succeed to the property of the other. Though the traditional law of inheritance among Hindus discriminates on the basis of sex in the matter of property rights, the present law of succession laid down in the Hindu Succession Act, and the Indian Succession Act, 1925, sought to remove such sex-based discriminations. The wife and husband, daughter and son, all are equally entitled to succeed to the property left by a Hindu male or female.²⁴ Further, under the Indian Succession Act, both males and females are equipped with equal testamentary powers to will away their properties to whomsoever they like.

However, certain provisions under the Hindu Succession Act, like sections 6 and 30 are still unequal and discriminatory, denying Hindu women equal right to succeed to the coparcenary property left by a male member of a Mitakshara joint family. For instance, section 6, which deals with the devolution of coparcenary interest left by the deceased Hindu male, discriminates between a son, who is a coparcener having right by birth over the father's coparcenary interest, and a daughter who is not a coparcener. The son, by virtue of being a coparcener, is entitled to have double share, one as a coparcener with father and the other as class I heir, whereas the daughter is given only one share in the separated share of the deceased father. Even this she may not be entitled to, if the Hindu coparcener exercises his testamentary power under section 30 of the Hindu Succession Act, which confers a right upon a Hindu coparcener, belonging to a Mitakshara joint family, to will away his interest therein to whomsoever he likes. A Hindu female is thus disentitled to every iota of share to which she is entitled under section 6 of the Act. Further, a Hindu wife or daughter may be completely deprived of everything under Hindu Succession Act, because of the unrestricted testa-

23. *Supra* note 22, at 501-504.

24. See, ss. 8, 9, 10, 11, 12, 13, 14, and 15 of the Hindu Succession Act, and ss. 33 to 36 of the Indian Succession Act.

mentary power of a Hindu male who is authorised to will away everything, including his coparcenary interest, under the present law of succession, thereby, seriously affecting the principle of equality. This calls for a drastic revision of the relevant provisions of the Hindu Succession Act and Indian Succession Act by putting certain limitations upon the testamentary power of a Hindu male, so as to strike a balance between men and women in the matter of succession rights.

For the purposes of ensuring economic security for Hindu women and children, it is also desirable that specific provisions be incorporated in the Hindu Marriage Act, and the Special Marriage Act, guaranteeing equal right to share the matrimonial wealth, and the other family property at the time of judicial separation or divorce, or even after granting the decrees for nullity and annulment. Both the enactments are lacking such provisions, and the economic and social security of the spouses and their children, is jeopardised.²⁵

Despite the shortcomings stated above, the Hindu Succession Act and the Indian Succession Act, do bring about considerable change in the legal status of women, by conferring equal heritable capacity, and removing certain disabilities in the matter of property rights suffered by them under the old system.²⁶ But the measures provided therein are not adequate enough to provide full measure of economic security and social justice to Hindu women. The major stumbling block for this is the retention of the concept of Mitakshara coparcenary system, and the right by birth for a son under the present law, which must be abolished altogether so as to bring about full measure of equality between men and women and socio-economic justice in the society. Then and only then the objectives enshrined in article 38 of the Directive Principles of State Policy under the Indian Constitution which enjoins the state "to promote social order in which justice, social, economic...shall inform all the institutions of national life",²⁷ will be realized.

The Indian Succession Act, which applies to the devolution of the property of those married under the Special Marriage Act, and to the property of their issues, is more progressive and secular in this regard when compared with the Hindu Succession Act. Therefore, the legal position of women

25. Such measures have been suggested by Rajkumari Agarwala in "*Matrimonial Remedies Under Hindu Law* (1974). She also voiced her concern on the same subject at the time of the seminar on Hindu Marriage Act and Special Marriage Act, organised by the Indian Law Institute, New Delhi, in 1975.

26. S. 14 of the Hindu Succession Act seeks to remove such disabilities.

27. Read art. 38 of the Constitution dealing with Directive Principles of State Policy.

married under the Special Marriage Act is said to be more secure and safe than that of the women governed by the Hindu Succession Act. For instance, the legal position of a widow or widower, under section 3 of the Indian Succession Act is elevated in the sense that she or he gets $\frac{1}{3}$ in the presence of children, and $\frac{1}{2}$ in their absence, of the property left by the deceased spouse. Moreover, there is nothing like Mitakshara coparcenery and right by birth for a son under the Indian Succession Act. From this it is clear that the position of the spouses under the Special Marriage Act, is definitely better than that of persons married under the Hindu Marriage Act.

So far as the development of secular outlook is concerned, both the laws tend to promote high secular values. Particularly, the Special Marriage Act is said to be more secular in content than the Hindu Marriage Act. Both the laws are secular in the sense that they permit inter-caste, inter-caste and inter-religious marriages. But, some of the provisions under the Hindu Marriage Act are tainted with religious influence. For instance, section 7 of the Act speaks about the observance of ceremonies like *saptapadi* and other customary rites. The Act also permits the solemnization of *shastric* marriages with all religious paraphernalia and provides saving clauses for customary marriages and divorces.²⁸ Provisions of these types are hindrances to the realisation of secular values in full measure.

The author is of the opinion that the retention and recognition of *shastric* marriages under the present law of marriage is a retrograde step or a step backwards, for the development of secular outlook sought to be cherished by the modern law of marriage among Hindus. It should be either amended suitably so as to break the religious shell of the marriage or be removed completely from the statute book.

Some of the provisions of the Special Marriage Act, are of doubtful value for the purpose of giving secular character to the law. For example, section 12 of the Act, if interpreted literally, is likely to lead to piquant situation. Sub-section 2 of section 12 reads: "The marriage may be solemnized in any form which the parties may choose to adopt". This raises an important question as to what was the intention of Parliament in giving such an option to the parties intending to marry under this Act. For this, no clear answer can be obtained. Does this mean that the parties are allowed to get married in the *shastric* or customary style? If that is correct, the very purpose of having secular law, with its progressive nature may be defeated. Similar option has been accorded to the parties with regard to the place of marriage also

28. S. 5, cls. iv and v of the Hindu Marriage Act, provide saving clauses validating marriage even in violation of prohibited degrees and *sapinda* relationship, and s. 29 saves customary divorces.

under the same section.²⁹ In such a case, will the marriage officer allow the parties to choose a Hindu temple or a mosque or church to be the place of marriage? If this interpretation is correct, section 12 runs counter to the very spirit of the Special Marriage Act and the policy behind it. However, the Special Marriage Act can definitely be regarded as a more secular and progressive piece of legislation than the Hindu Marriage Act. Further, the civil form of marriage suggested under this Act seems to be quite agreeable to the modern youth, although it has not yet made much impact on the people of the country in general. In this context it is interesting to note that in the State of West Bengal 70 per cent of the marriages performed in a particular year were under the Special Marriage Act, 1954.³⁰ This makes it clear that it is making headway gradually. In fact, the form of marriage, and the pattern of the law regarding matrimonial reliefs incorporated under the Special Marriage Act, with a few modifications, can be a good model for a uniform law of marriage and matrimonial reliefs for all the people in the country.

Thus, law of marriage laid down in these two enactments make a serious attempt to achieve the preferred values set out in the Constitution of India, and it would go a long way in that direction to cherish the values of equality, economic security and the spirit of secularism, though they need some changes as stated above.

V

An attempt has been made in the above analysis of the interrelationship between the law of marriage and society to make it clear that the Special Marriage Act, 1954 and the Hindu Marriage Act, 1955 are good measures for social reform and change and provide the most fertile opportunity for the people to develop progressive outlook and proper understanding without giving room for disharmony and disunity among all the communities—Hindu, Muslim and Christian—on the grounds of race, religion and sex. However, the practice shows that people are still tradition bound, conservative, and fanatical in their outlook. Despite the progressive laws of marriage, traditional, customary, crude forms of marriage, early and arranged marriages with all religious paraphernalia, accompanied by the evil practice of dowry-giving and taking, are still the order of the day. People in general, including the so-called elite of the society, seem to be indifferent to the fast changing conditions in and around the society. A law based on radical notions and values, howsoever desirable and reformative, cannot succeed unless the society has been prepared for it earlier otherwise untimely legal reform, instead of

29. See s. 12 of the Special Marriage Act, 1954.

30. Reported in the *Indian Express* (daily) of August 8, 1974.

doing good to the society, may also cause unimaginable damage to it.³¹ The urge for reform and change should, however, come from the hearts of men and women, and the required change in the people's attitude has to be brought about by gradual stages. The necessary measures may be taken by the Government to influence their attitude. It may be noted finally that we all look forward to the day when the present society would fully imbibe the spirit of secularism, and develop progressive outlook in all respects. We may recall the statement of former President of India, S. Radhakrishnan, who observed :

To survive, we need revolution in our thoughts and outlook. From the alter of our past, we should take the living fire and not the dead ashes. Let us remember the past, be alive to the present, and create future with courage in our hearts and faith in ourselves.³²

31. *Supra* note 25 at 2.

32. Gunnar Myrdal, *Asian Drama*, 76 ; Romesh Thapar, Wiffle woffle in High Places, *The Economic Weekly*, 1683, (November 4, 1961).