

LAW COMMISSION OF INDIA

FIFTY-NINTH REPORT

ON

**HINDU MARRIAGE ACT, 1955
AND
SPECIAL MARRIAGE ACT, 1954.**

MARCH, 1974

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P. B. Gajendragadkar.

D. O. No. F. 1(1)/74-L.C.

12, Tughlak Road,
NEW DELHI-11.

March 6, 1974.

My dear Minister,

Today, my colleagues and I have signed the Commission's Fifty-Ninth Report on the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954.

You may recall that this Report is the result of the suggestion you had made in your letter addressed to me on the 17th January, 1974. As requested by you, the Commission took up the work on a priority basis, and I am happy that we have been able to complete the work within a month and a half.

The appendices to the Report are being typed and Mr. Bakshi, Member-Secretary, expects to forward the entire Report to you some time next week. Since I am leaving for Bombay *en route* to Geneva tomorrow, I am sending this demi-official letter to you for your information.

May I add that, since I took over as Chairman of the Commission, we have made fourteen reports so far; some of these are, no doubt, short documents then deal with specific problems which the Commission thought needs immediate attention on the ground of special justice. The present Report is our fifteenth Report.

Yours sincerely,

(P. B. GAJENDRAGADKAR)

Hon'ble Shri H. R. Gokhale,
Minister of Law, Justice & Company Affairs,
Government of India,
New Delhi-1.

CHAPTER 1

INTRODUCTION

The present inquiry—its genesis and scope

1.1. On the 17th of January, 1974, the Minister of Law, Justice and Company Affairs addressed a communication¹ to the Chairman of the Commission suggesting that the Commission may examine the question about revising the Hindu Marriage Act and the Special Marriage Act on a 'priority basis' and forward to the Union Government a Report at an early date. Along with this letter, the Minister forwarded to the Commission a draft Bill² which had been prepared by his Ministry after considering various suggestions received from some Members of Parliament and the general public. The Minister requested that the Commission might examine the question as to whether it would be reasonable and desirable to liberalise the divorce provisions so as to reduce the period of waiting for divorce after a decree of judicial separation or restitution of conjugal rights and to eliminate the period of restriction for remarriage after divorce.

It was further stated in this letter that the Draft Bill proposed "to permit a right of divorce only to the wife" if she had obtained an order for maintenance under section 488 of the Code of Criminal Procedure, and desired that the Commission may consider whether, in such a case, a similar right should be conferred on the husband.

The suggestions thus made by the Minister in his communication for examination of the two Acts constitute the genesis of the present inquiry.

1.2. Since the Commission was thus entering upon an inquiry in regard to the revision of the relevant provisions of the two Acts, it examined not only the draft Bill forwarded to it, but considered the other

1. Appendix 1.

2. Appendix 2.

provisions of the Acts not covered by the draft Bill. The present inquiry is thus not confined to the amendments proposed in the draft Bill, but examines the problem in relation to all the provisions of the two Acts. That is the extent of the present inquiry. In the course of the Report, the provisions made in the draft Bill will, for the sake of brevity, be described as "proposals".

Significance of the Hindu Code

1.3. The Hindu Marriage Act, with which the present inquiry is concerned, was passed by Parliament in 1955. It forms part of a larger legislative effort to codify the personal law of the Hindus. It was followed by the Hindu Succession Act, 1956; the Hindu Minority and Guardianship Act, 1956; and the Hindu Adoptions and Maintenance Act, 1956. Originally, Parliament intended to pass one Act comprehensively described as 'Hindu Code', but, later, the original Code was split up into four different Acts, which were passed one after the other; these four Acts, in substance, constitute the Hindu Code.

In adopting these four legislative measures, Parliament has acted upon the principle formulated by Dr. Radhakrishnan that "to survive, we need a revolution in our thoughts and outlook. From the alter of the past we should take the living fire and not the dead ashes. Let us remember the past, be alive to the present, and create the future with courage in our hearts and faith in ourselves."¹

1.4. When it was announced that Parliament intended to pass the Hindu Code making radical changes, where necessary, in the personal law of the Hindus, traditional and conservative Hindu opinion resisted the idea, because it thought that, by the proposal to enact a Hindu Code, Parliament was invading

1. Gunnar Myrdal, *Asian* (Drama, Vol. page 76, Romesh Tapar, "wiffle woffle in High Places", *The Economic weekly*, November 4, 1961, p. 1683).

the area of Hindu religion and was changing Hindu law which was "Sanatana", that is to say, which had not undergone any change and had remained as it was handed down by the Srutis and the Smritis.

The opposition thus expressed by traditional conservative Hindu opinion was met by the progressives' plea that personal law is essentially secular in character, and cannot be treated as a part of Hindu religion properly so called. Reformers also urged that Hindu law was never "Sanatana" or static and had undergone changes from time to time. Before the Bill was introduced in Parliament and during all stages of its progress in the form of four different Acts, there ensued a national debate; and that was as it should be under any democratic legislative process.

Parliament ultimately upheld the point of view strongly expressed by social reforms and proceeded to pass the four Bills in question on two fundamental assumptions; the first assumption was that personal law in the case of citizens of this country cannot be treated as part of their religion properly so called; and secondly, that the history of the development of Hindu law shows that it was never static and had changed from time to time so as to meet the challenge of changing requirements of different regions and different times.

1.5. It would not be out of place to point out, with respect, that both these assumptions are well founded. If we examine the sources of Hindu Law, it would be noticed that custom is one of its important sources. According to Yajnavalkya¹, Srutis and Smritis or the conduct of good people or good conduct constitute, *inter alia*, the sources on which the Hindu Law is founded.

1.6. It is obvious that, in different regions, different customs prevailed, and in the same region, from time to time, customs in regard to matters covered by the

1. श्रुति स्मृतिः सदाचार ।
स्वस्म न प्रियमात्मन ॥
सम्यक् संकल्पजः काम ।
धर्ममूलमिदम् स्मृतम् ॥

Yaj. I, VII.

Also see Manu II. XII.

provisions of law were likely to change. Thus, by assigning to changing customs the status of a source of law, the text has provided an inbuilt source of changes in law as and when they would become necessary.

One distinguishing feature of the development of Hindu law throughout the ages has been the remarkable part played by eminent commentators of the texts of Smritis. Amongst these commentators, Vijnaneswara occupies a pride of place. Scholars of Hindu law have justly paid a rich tribute to the work of these Hindu jurists in sustaining the living character of Hindu law by making necessary adjustments in its provisions from time to time on the basis of rational rules of interpretation.

1.7. In this connection, the first consideration which is relevant is that the Hindu law, as it was applied until the present Acts were passed, was divided into two Schools; one the Mitakshara and the other the Dayabhaga. The Mitakshara school, in turn, was divided into four sub-schools, the Benares, the Mithila, the Maharashtra and the Dravida. Broadly stated, the Mitakshara school adopted the interpretation placed by Vijnaneswara on the relevant provisions of the text of Yajnavalkya; while the Dayabhaga school which prevailed in Bengal, adopted the view expressed by Jimutavahana. There is general consensus that both these distinguished jurists thrived in the twelfth century. In regard to the sub-schools of the Mitakshara school, however, each one of them followed the interpretation placed on the same Smriti texts by different commentators who lived in the areas governed by the said sub-schools. It will thus be seen that, though the texts on which Hindu Law was founded in a primary sense were the same, different interpretations placed on the said texts by different commentators gave rise to different schools which are recognised in the respective areas. That itself is an illustration of the significant part played by the commentators in the development of Hindu Law. The texts were the same; but, by adopting rational and highly developed rules of interpretation, the commentators

brought the letter of the texts in conformity with the customs prevailing in their localities and the beliefs and faith of the people in the locality. That explains the existence of these different schools of Hindu Law.

1.8. We would like to illustrate our thesis by referring to two provisions of Hindu Law as interpreted by the commentators. The first relates to the broad and progressive concept of women's property evolved by Vijnaneswara. It is well-known that, until the Married Women's Right to Property Act was passed in England¹ in 1882, the position of English married women in relation to their rights to property was in a very unsatisfactory condition.

Consider, by way of contrast, how Vijnaneswara defines 'Stridhana'. Incidentally, it may be pointed out that the property, which is technically described as 'Stridhana', is property of which the woman is an absolute owner, over which she has full disposing power, and in relation to which there is a special line of succession.

Says Vijnaneswara:

"That which was given by the father, by the mother, by the husband, or by a brother; and that which was presented by the maternal uncles and the rest at the time of wedding before the nuptial fire; and a gift on a second marriage or gratuity on account of suppression and, as indicated by the word 'advya' (and the rest), property obtained by:—

- (1) inheritance;
- (2) purchase;
- (3) partition;
- (4) seizure, e.g., adverse possession;
- (5) finding;

and this is Stridhana, according to Manu and the rest."

1. The Married Women's Property Act, 1882 (45 & 46 Vic. 75).

It is significant that, whereas the first part of the definition given by Vijnaneswara reproduces the definition of 'stridhana' which is given by Yajnavalkya, the second part is the expansion made by Vijnaneswara basing himself on the word 'adya' which occurs in Yajnavalkya's definition of stridhana. By this juristic effort to widen the scope of "stridhana", Vijnaneswara included in the concept of stridhana not only the properties which were so treated by Yajnavalkya, but also five additional distinct kinds of property which were not regarded as "stridhana" by the early sages.

1.9. In this connection, it is interesting to refer to the observations made by the High Court of Madras in *Salemma v. Lutchmana*:¹

"It is scarcely necessary to say that Vijnaneswara's statement that 'stridhana' is not to be understood in a technical sense (Mitakshara, Chapter 2, section 11, Para 3) was not mere philological observation. By laying down that proposition, Vijnaneswara and other great commentators, who followed him, succeeded in effecting a beneficial change in the archaic Smriti law and placed women almost on a footing of equality with men as regards the capacity to hold property."

Unfortunately, the explanation made by Vijnaneswara in regard to the scope of the word "stridhana" went by the board as a result of the decision of the Privy Council in *Debi Mangal Prasad v. Mahadeo Prasad*²

1.10. The second example relates to a part of the law of adoption. The power of the woman to give or take a boy in adoption is based on the text of Vasistha.³ Says Vasistha:

"Let not a woman give or take a boy in adoption without the consent of her husband."

1. *Salemma v. Lutchmana*, (1898) I.L.R. 21 Mad 100, 103, 104.

2. *Devi Mangal Prasad v. Mahadeo Prasad*, 39 I.A. 21 (P.C.)

3. न स्त्री पुत्रं दधात् प्रनिगृह्णीयात् व अन्यत्रमनुजातत् यत् । Vasista

This text appears to be simple in its terms and clear in its meaning; and yet, different commentators, who lived in different regions, interpreted it in different ways. One view was that a widow cannot take or give a boy in adoption, because the consent of the husband in her case is impossible. Another view was that this prohibition is inapplicable to a widow, unless it is shown that her husband had expressly prohibited her from taking or giving a boy in adoption before his death. The third view was that a widow can give or take a boy in adoption if she secures the consent of the manager of the family. There were other finer shades of interpretation which it is unnecessary to set out.

1.11. These two illustrations emphasise the point that Hindu Law developed and changed to meet the requirements of changing times or of usages prevailing in different regions of the country by virtue of the very wise contribution of Hindu jurists in that process. Therefore, the conclusion is irresistible that Parliament was right in assuming that Hindu Law was never static; it was dynamic and was changing from time to time.

The object of law, whether personal or public, must be to sustain the stability of the society and help its progress:—

धारणादर्भं मित्याहुः । धर्मी धारयते राजाः

The structure of any society, which wants to be strong, homogeneous and progressive, must, no doubt, be steady but not static; stable but not stationary; and that is exactly the picture we get if we study the development of Hindu law carefully before the British rule began in India.

1.12. When the British came on the scene, two constraints were imposed on this healthy course of development of Hindu law. The first was imposed

by the decision of the Privy Council in the case of *collector of Madura v. Mootto Ramalinga*¹. In that case, the Privy Council laid down a clear and unambiguous direction to the Judge administering Hindu Law in India. The Privy Council held:

“The duty therefore of an European Judge who is under the obligation to administer Hindu law, is not so much to inquire, whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal and there has been sanctioned by usage. For, under the Hindu system of law, clear proof of usage outweigh the written test of the law.”

1.13. It is necessary to remember that judicial decisions made it very difficult, if not impossible, to prove the existence of any new custom because courts do not recognise the validity of any custom unless it was proved to be “ancient, certain and reasonable.”² A spirit of inquiry and an attempt to interpret the texts to adjust law to changing requirements were thus completely stalled; and that justified the observation made by Mayne in the first edition of his book on *Hindu Law and Usage*³ published in the seventies of the last century that under the British rule, Hindu Law “was in a state of arrested progress in which no voices were heard unless they came from the tomb.”

1.14. The other constraint, which stalled the progress of Hindu law during the British regime, flowed from purely political considerations. As a foreign power ruling over a very large country, it was the declared policy of the British not to interfere with the customs, faiths and beliefs of the population over

1. *Collector of Madura v. Mootto Ramalinga*, (1868) 12 M.I.A. 397, 436 (P.C.)
 2. *Hurpurshad v. Sheo Dyal*, (1876) 3 I.A. 259, 285.
 3. Mayne, *Hindu Law*, 1st Edition.

which it ruled and, naturally, the British Government frowned upon any effort to make radical changes in the provisions of the Hindu law, though Hindu reformers were agitating for such changes from time to time. No doubt, some laws were passed to meet the demand of social reform; but the efforts for changes in personal law were never positively encouraged and the steps taken in that direction were slow, halting and reluctant. That is how the growth of Hindu law was arrested during the whole of the British period in the history of India.

When we became free and the Indian Parliament, which was sovereign, began to function, the age of commentators came to a close and that of legislators commenced. Naturally, one of the first tasks to which Parliament addressed itself was to change Hindu law with a view to modernising its provisions and, wherever necessary, to effecting changes on the basis of social justice. The task of rationalising and modernising Hindu law was a challenging task and, as we have already pointed out, it led to a national debate and, in consequence of the heat generated by the debate, the attempt to introduce one comprehensive Code at one stretch had to be given up, and the task was accomplished by introducing four different Bills.

1.15. The significance of the Hindu Code at its revolutionary character lies in the fact that, by passing the four Acts pertaining to the personal law governing the Hindus, Parliament has emphasised that personal law is a social and secular matter and not a part of religion properly so-called. These four Acts thus constitute the first decisive step in implementing the important Directive Principle enshrined in Article 44 of the Constitution. That, in our view, is the real significance of the four Acts of which Hindu Marriage Act was the first to be enacted.

Revision of Laws is a continuous process

1.16. It may sound platitudinous but is nevertheless true that revision of laws is a 'must' in a dynamic society like ours which is engaged on the adventure of creating a new social order founded on faith in the

value-system of socio-economic justice enshrined in our Constitution. With the changing times, notions of fairness and justice assume newer and wider dimensions, and customs and beliefs of the people change. These, in turn, demand changes in the structure of law; every progressive society must make a rational effort to meet these demands. Between the letter of the law and the prevailing customs and the dictates of the current value-system accepted by the community, there should not be an unduly long gap. Ranade often said that the story of social reform, which involves reform in personal law, is an unending story; it continues from generation to generation. Each generation contributes to the continuance of the effort of social reform; but the effort is never concluded and the end is never reached in the sense that no further attempt to reform is required. It is in that sense that we believe that the revision of personal laws, and indeed, of all laws, has to be undertaken by modern societies. These thoughts have been present in our mind when we embarked upon the present inquiry.

Our approach

1.17. In holding the present inquiry, we have first examined the proposals and, after an elaborate and careful consideration, we came to our conclusions in respect of them. Then we examined all the provisions of the two Acts ourselves and considered the question whether any of them need to be revised. When we reached conclusions in this part of the inquiry, we proceeded to formulate our recommendations serially by reference to the different sections of the two Acts. In other words, Part I of the Report¹ will deal with the proposals and our recommendations in respect of them. Part II will deal² with our recommendations in regard to the provisions not covered by the proposals; and Part III will enumerate our recommendations serially by reference to the respective provisions of the two Acts.³

1. Chapter 2.

2. Chapters 3 to 8 (Hindu Marriage Act) ; Chapter 9 (Special Marriage Act).

3. Chapter 10.

In the course of our inquiry, we have examined important and relevant judicial decisions, taken into account the opinions expressed by Members of Parliament in their communications to the Minister of Law and Justice from time to time, and have carefully borne in mind the trend of public opinion in regard to the expanding horizon of social justice. Every section of both the Acts has been examined by us in the light of the test of the value-system of social equality which is enshrined in the Constitution and has gradually received more and more acceptance from the Indian Community.

We have also attempted, wherever we thought it necessary and advisable to do so, to bring about uniformity in matters which are essentially common to, the two Acts.

1.18. Before we conclude, we may refer to one more point which is relevant to the Hindu Marriage Act. We have already referred to the spirit underlying the enactment of these four Acts amongst them being the Hindu Marriage Act. While enacting these Acts, Parliament has taken care to preserve what it thought to be consistent with the spirit of modernism and social justice. It has also taken care to preserve what it thought to be the essential features of any fundamental proposition of Hindu law. In regard to marriage, for instance, it has preserved the requirement that the marriage should not take place between persons who are within the prohibited degree of *Sapindas* relationship, *vide* section 5(iv) and (v). Similarly, it has preserved the requirement as to *Saptapadi* (that is, taking of seven steps by the bridegroom and the bride jointly before the sacred fire) *vide* section 7(2) and that again, only when performance of the said rite is in accordance with the customary rites and ceremonies of either party to the marriage. Thus, broadly stated, though the Hindu Marriage Act has introduced radical changes in regard to divorce and judicial separation, it has maintained the basic feature of the marriage which is partly consistent with the provisions of Smriti texts. Under the Act, Hindu Marriage is not a sacrament in the religious sense; but,

7 M of Law/74—2

nevertheless, it is founded on the basic moral postulates, as evidenced, for instance, by the continuance of the pre-existing requirement as to *Saptapadi*.

1.19. Even in regard to divorce, there are some Hindu texts which permit divorce as, for instance, the text which says that, in five cases of misfortune, women are entitled to marry another husband. These cases are : where the husband is lost and is not heard of for the prescribed period, where he is dead, or has taken *Sanyas*, or where he is impotent, or has committed a sin as a result of which he is excommunicated.¹

1.20. Bearing in mind this distinctive character of the institution of marriage as envisaged by the Hindu Marriage Act, we have carefully considered the question of making changes in the provisions pertaining to judicial separation or divorce.

In any civilised and progressive society, marriage is an institution of great importance. It is the centre of a family which in turn, is a significant unit of the social structure. Children who are born of marriage, also contribute to the stability of the institution of marriage. These factors are material and have to be taken into account; but in some cases, their validity cannot be over-estimated because, if the marriage which primarily concerns husband and wife is irretrievably broken, then collateral considerations about the significance of the marriage institution or about the importance of children and their interest may have to play a subordinate role. It is in the light of this philosophy that we have attempted the somewhat sensitive and difficult task of recommending certain radical changes in the provisions of the Hindu Marriage Act.

Disputes concerning the family

1.21. Before we proceed to deal with the questions relating to revision or amendment of the provisions of the two Acts, we ought to mention here one important

1. नष्टे मृते प्रब्रजिते क्लीबे च पतिते पतौ,
अचम्बापत्सु नारोणां पतिरन्यो विद्योयते ।

consideration which is an integral part of our approach. In our Report on the Code of Civil Procedure,¹ we have had occasion to emphasise that in dealing with disputes concerning the family, the court ought to adopt a human approach—an approach radically different from that adopted in ordinary civil proceedings, and that the court should make reasonable efforts at settlement before commencement of the trial. In our view, it is essential that such an approach should be adopted in dealing with matrimonial disputes. We would suggest that in due course, States should think of establishing family courts, with presiding officers who will be well qualified in law, no doubt, but who will be trained to deal with such dispute in a human way, and to such courts all disputes concerning the family should be referred. What we have said in our Report on the Code of Civil Procedure should be treated as a part of the present Report also. We are clear in our mind that if these measures are adopted, they will go a long way towards the proper resolution of such disputes. We may add that selected judicial officers could be posted in courts empowered under both the Acts, and by dealing with disputes concerning the family, they will be able to acquire experience and knowledge which should not only be of value to them but will ultimately benefit the society.

1. 54th Report, Chapter 32A.

CHAPTER 2

PROPOSALS OF THE MINISTRY OF LAW

Introductory 2.1. In this Chapter, we shall deal with the proposals of the Ministry of Law.

Section 10 2.2. Under section 10(1) of the Hindu Marriage Act, a party to a marriage may present a petition to the District Court praying for judicial separation on the ground that the party has been guilty of the specified types of misconduct or has been suffering from the specified types of disease. Under clause (b), the fact that the opposite party has "treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party" is one such ground. The proposal now is that in place of this clause, the following should be substituted:

"(b) has after the solemnisation of the marriage treated the petitioner with cruelty."

The difference between the present section and the proposal is obvious. In the present definition, the element of apprehension as to harm or injury is comparable to the element of "injury or likelihood of injury to health" which, in England, was required¹, since 1897. It has been abolished in England,² and the corresponding ground in England now is, that "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent". If this is proved, the marriage can be taken to have "broken down irretrievably", within the meaning of the principal provision³ as to the ground for divorce. The behaviour of the respondent of the nature referred to above, seems to cover cases which, under the old law, would have amounted

1. *Russell v. Russell*, (1897) A.C. 395, CHL.

2. Section 2(1)(b), Divorce Reform Act, 1969 (Ch. 55).

3. Section 1(1), Matrimonial Causes Act, 1973.

to constructive desertion, and also rape, sodomy and bestiality and, apparently, conviction of serious criminal offences. Of course, proof of behaviour of the above nature (or for that matter, of any other type of misconduct specified in this context in the Act), merely creates a rebuttable presumption, it being still open to the respondent to prove that the marriage has not irretrievably broken down¹.

The statutory qualifications attached to "cruelty" in section 10(1)(b) of the Hindu Marriage Act are derived from the concept of "danger to life, limb or health", required at one time by the Ecclesiastical courts in England, for passing decrees of divorce, and need not be emphasised at the present day.

In view of what is stated above, we accept the proposal.

2.3. Section 11 of the Hindu Marriage Act, in so far as is material, provides that a marriage shall be null and void and may "on a petition presented by either party thereto," be so declared by a decree of nullity, if it contravenes one of the specified conditions,—(briefly, the conditions relate to monogamy, prohibited degrees of relationship, and absence of *sapinda* relationship). The proposal now is that the words "on a petition presented by either party thereto", should be omitted. The obvious object is to make the relief in question available at the instance of other parties who may have a legitimate interest in seeking such relief. The proposal was mooted because the present restriction causes hardship when a first wife, for example, seeks to get a second marriage set aside or when relief of nullity is sought after the death of a party. Section 11

The proposal may, at first sight, appear to be attractive. If a marriage is void, why, it is argued, should the relief under the Act be confined to the parties? It is stated that the words "on a petition presented by either party thereto" (or similar words) do not appear in the corresponding provision of the Special Marriage Act, 1954.

1. Lord Dilhorne, H.L. Debates, Vol. 304, Col. 1094.

2.4. At the same time, there is a strong argument against it. The Hindu Marriage Act is a piece of matrimonial law and decrees of nullity, contemplated by it, are decrees passed by a Matrimonial Court. It is fundamental that a Matrimonial Court has concern only with the marital rights of the parties to marriage (and incidentally with the rights of the children), but with nothing else. A petition for a decree of nullity in respect of a void or a voidable marriage can be made only by either the husband or the wife. It would not be appropriate to provide that a petition for the purpose can be made by a stranger to the marriage. A third party (for example, a person interested in the estate of either the husband or the wife) can certainly question the validity of their marriage in a civil suit and obtain a finding, or he may even bring a suit for a declaration that the marriage was void¹. But such a decree, made by a civil court, will not be a decree of "nullity", as contemplated by matrimonial law.

Proposal
not accept-
ed.

2.5. There is also a serious practical risk in allowing the grant of decrees of nullity after the death of either of the parties to the marriage², because the effect of "it is to bastard and disinherit the issues who cannot so well defend the marriage as the parties both living themselves might have" done³.

Then, there is the question of multiplicity. We may refer⁴ to the observations of Panchapakesa Ayyar J. :—

"The legislature has restricted the summary remedy of an application under section 11 to be actual parties to the void marriage, so that third parties may not interfere

1. See para 2.6, *infra*.

2. See also para 6.2, *infra*.

3. Code, 2nd Institute 614 : *R v. Sherwood* (1836) 1 Curt 173, 137, 138 (Dr. Lushington) : Graveson : Century of Family Law (1957), page 312, footnote.

4. *Lakshmi Ammal v. Ramaswami*, A.I.R. 1960 Madras 6, 7, para 5.

narassingly by taking advantage of this cheap remedy of an application."

A void marriage can, no doubt, be invalidated at the instance of other parties¹, but it is better not to incorporate the remedies of third parties into the Hindu Marriage Act and confuse matrimonial relief with declaratory relief.

We are, therefore, opposed to the proposed amendment of section 11.

2.6. This does not mean that third parties have no remedy at all. They have—but not by a petition under the Hindu Marriage Act. ^{Remedy available to third parties}

The Specific Relief Act², in section 34, provides as follows:

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled and the plaintiff need not in such suit ask for any further relief:

"Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

Explanation.—A trustee of property is a 'person interested to deny' a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

Under section 35 of the Act, the declaration is binding only on the parties etc³.

1. *Faremouth v. Watson* (1811) 1 Phil. 355 (Void Marriage).

2. Section 34, Specific Relief Act, 1963.

3. Section 35, Specific Relief Act, 1963

Banerji in his Tagore Law Lectures on the Law of Specific Relief, observed¹ :—

“The Indian enactment, in one respect at any rate, has a more extended scope, for it contemplates the settlement, not only of conflicting claims to property but also of disputes as to *status*.”

Holland,²⁻³ in his ‘Elements of Jurisprudence’, explaining the meaning of “status” says:—

“The chief varieties of status among natural persons may be referred to the following causes:

- (1) Sex, (2) minority, (3) ‘patria potestas’ and ‘manus’, (4) coverture, (5) Celibacy, (6) mental defect, (7) bodily defect, (8) rank, caste and official position, (9) race and colour, (10) slavery, (11) profession, (12) Civil death, (13) illegitimacy, (14) heresy, (15) foreign nationality and (16) hostile nationality. All of the facts included in this list, which may be extended, have been held, at one time or another, to differentiate the legal position of persons affected by them from that of persons of the normal type.”

There can, therefore, be no objection if a third party claiming an interest in the property, sues for a declaration that B was not the lawfully wedded of A. In an English case⁴, it was specifically held that a declaration may be granted that a marriage has been dissolved. The grant of similar relief was held to be competent in a Calcutta case⁵.

1. Banerji, Law of Specific Relief in British India (T.L.L. 1906), page 490, cited in *Abdul Karim v. Sarraya Begam*, A.I.R. 1945 Lah. 266, 270.

2. Holland, Elements of Jurisprudence page 351, cited in *Abdul Karim v. Sarraya Begam*, A.I.R. 1945 Lah. 266, 270.

3. See also *Ramakrishana v. Narayan*, A.I.R. 1915 Mad. 584.

4. *Har Shafei v. Har Shafei*, (1953), All England Reports 783.

5. *Noor Jehan v. Eugene Tischenko*, A.I.R. 1942 Cal. 345.

2.7. We are, for the above reasons, not inclined to accept the proposal under discussion. Change not recommended

2.7A. The next proposal is to substitute, in section 12(2)(b)(iii) of the Hindu Marriage Act, the words "said ground" for the words "the grounds of decree." This verbal change is obviously appropriate, and we agree with the proposal. Section 12 (2)(b)(iii).

2.8. Under section 13(1)(v) of the Hindu Marriage Act, (so far as is material), any marriage may be dissolved by a decree of divorce on the ground that the other party—"(v) has for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form." There is no restriction that the disease should not have been contracted from the petitioner,—restriction explicitly provided for in the corresponding provision relating to judicial separation¹. Section 13(i) (v) Venereal disease

The proposal is to add the words "disease not having been contracted from the petitioner" in s. 13(1)(v). It is pointed out that these words occur in s. 10(1)(d) of the Hindu Marriage Act dealing with venereal disease as a ground for a judicial separation.

2.9. While we agree that there should be no disparity between venereal disease as a ground for judicial separation and the same as a ground for divorce so far as the source of the disease is concerned, it appears to us that it would simplify the statement of the law if the condition that the venereal disease should not have been communicated by the petitioner, is removed from section 10(1)(d).

We take this view for several reasons. In the first place, it is wrong to throw the burden on the petitioner to prove the negative, and, *prima facie*, the fact that the respondent has been suffering from venereal disease for the specified period, should be enough to entitle him or her to divorce. Secondly, it is not,

1. Section 10(1)(d), HMA.

medically speaking, always easy to prove that where two spouses are found to be suffering from this disease, one got infected prior to the other. The party suing should not be burdened with the onerous task of proving this, in the first instance.

No doubt, the provisions of section 23(1)(a) of the Hindu Marriage Act will still continue to apply even after the above amendment, so that if the disease was contracted from the petitioner, the respondent can still take the plea that the petitioner is taking advantage of his or her "own wrong". That, however is a fair and just principle applicable to all cases of divorce.

Recommendation.

2.10. Our recommendation, therefore, on the topic discussed above is, that (i) the proposal to add the words in question in s. 13(1)(v), Hindu Marriage Act should not be accepted, and (ii) these words should be removed from section 10(1)(d) of the Hindu Marriage Act, if that section is retained in its present form. We are, however, separately recommending¹ that section 10 should be revised so as to refer to section 13.

Section 13(1)(viii)—the proposal to add cruelty as a ground of divorce.

2.11. We now proceed to consider the proposal to add, in the grounds of divorce under section 13(1), cruelty on the part of the opposite party. The fact that the respondent has "treated the petitioner with cruelty since the solemnisation of the marriage", it is proposed, should be a ground for dissolution of marriage. It may be stated that at present cruelty is only a ground for judicial separation², and that too where it causes a reasonable apprehension of harm or injury.

We welcome the proposal. If destruction of mutual confidence is the basic justification for dissolution of marriage—which we think is the basic position,—it cannot be denied that cruel treatment would constitute a strong ground for dissolution. There can be no more unimpeachable evidence of the destruction of

1. See Chapter 5, *infra*.

2. Section 10(1)(b), HMA para 2, *supra*.

mutual love and feelings than cruel treatment of one party by the other. Cruelty is the very antithesis of love and affection. The duration and frequency of the conduct to be proved (to establish cruelty) need not be explicitly spelt out¹ in the section, because the very words "treated with cruelty", in general, imply harsh conduct of a certain intensity and persistence. It was suggested to us that *some further indication is advisable* not as merely qualifying the type of cruelty, but as indicating that the ultimate ground of divorce is the impossibility of operating the marriage. The misconduct described as cruelty should, it was suggested, be one which amounts to cutting the sacred link that the parties had, when entering upon the marriage, sought to create between themselves.

2.12. A draft on the following lines was suggested during our discussion :

"that the respondent has, since the solemnisation of the marriage, treated the petitioner with such cruelty that the petitioner cannot reasonably be expected to live with the respondent."

We do not, however, think it necessary to add such limiting words, because we consider that the court would, even in the absence of such words, broadly adopt the same approach.

2.13. It may incidentally be mentioned here that in many countries, matrimonial relief is provided to the aggrieved spouse on the ground of cruelty. This redress is usually justified on the ground of the principle of protection.

2.14 to 2.16. Having considered all aspects of the matter, we have come to the conclusion that it is sufficient to provide for cruelty as a ground of divorce, and it should be left to the courts to determine on the facts of each case whether the conduct amounts to cruelty.

1. For English cases upto 1948, see Rosen, "Cruelty in Matrimonial Causes" (1949) 12 Modern Law Rev. 324.

Recom-
menda-
tion.

2.17. Accordingly, we recommend that in section 13(1), Hindu Marriage Act, a new clause should be added as follows:—

“has treated the petitioner with cruelty”.

Section 13
(1A).

2.18. Under section 13(1A) of the Hindu Marriage Act (inserted in 1964), either party to a marriage may present a petition for dissolution of marriage on the grounds:—

(i) that there has been no resumption of cohabitation as between the parties for two years after a decree of judicial separation, or

(ii) that there has been no restitution of conjugal rights as between the parties for two years after a decree for such restitution. The proposal is that the period of two years should be replaced by one year in each of the two cases.

We agree that the proposal is reasonable and should be accepted. As the proceedings for judicial separation or restitution may themselves take time, it is not proper to insist on a long waiting period. The facts required to be proved in each of the two cases governed by section 13(1A) imply that the parties have ceased to value each other's society, and their need for each other's company is *prima facie* at an end.

Section 13
(2) Liv-
ing apart
order of
mainten-
ance.

2.19. There is a proposal to add the following clause in section 13(2) of the Hindu Marriage Act, which deals with divorce at the instance of the wife:—

“(1) that an order has been passed against the husband by a Magistrate awarding separate maintenance to the petitioner, and the parties have not had marital intercourse for three years or more since such order.”

2.20. It may be said that, in one sense, this proposal treats the order passed for awarding separate maintenance to the wife under the Cr. P.C.¹ on the

1. Section 488 of the Cr. P.C., 1898; Section 125 of the Cr. P.C., 1974.

same basis as an order or a decree for judicial separation under section 10 of the Act; and, as such, it gives the wife a right to claim dissolution of the marriage by a decree of divorce on the ground that subsequent to the passing of the order under the Code of Criminal Procedure, the wife and the husband have not had marital intercourse for the stipulated period.

It will be noticed that a claim for the dissolution of the marriage by a decree of divorce passed on this new proposed ground is similar to the claim which can be made either by the husband or the wife under clauses (i) and (ii) of the section 13(1A).¹

2.21. It must, however, be pointed out that one significant point of difference between the position as contemplated by the proposal and the position under clauses (i) and (ii) of section 13(1A) is, that, whereas under the latter provisions, it is open either to the wife or to the husband to claim a decree for divorce, under the former, (i.e. under the proposal), it is only the wife who is to be entitled to make such a claim. Points to be considered

On this proposal, two questions fall to be considered². Would it be reasonable, fair and appropriate to insert the proposed clause, as suggested? And, if yes, would it be reasonable, fair and appropriate that, if the Commission recommends that the proposal should be accepted, the right should be given to claim a decree for divorce, not only to the wife, but also the husband?

2.22. In dealing with the first point³, it may be relevant to refer briefly to the nature of the proceedings for maintenance under the Code of Criminal Procedure. It is well-known that, in substance, these proceedings empower the competent Magistrate to pass an order for the maintenance of wife and children. With the problem of children, we are not concerned in the present discussion. The condition pre- Nature of proceedings for maintenance.

1. Para 2.18, *supra*.

2. See para 1.1, *supra*.

3. Para 2.21, *supra*.

cedent, which has to be satisfied by the petitioning wife under this section, is that though her husband has sufficient means, he neglects or refuses to maintain her, and, in the proceedings ensuing on such petition, one of the factors, which has to be considered by the Magistrate is whether the wife is justified in refusing to live with the husband even if he offers to maintain her on condition of her living with him. If this question is answered in favour of the wife, then, subject to the other terms and conditions prescribed by the section, an order for maintenance in favour of the wife can be and is passed.

It is plain that the main object of the proceedings permitted under the section is to prevent vagrancy by ordering the husband to support his wife. The provisions of this section are not in the nature of penal provisions; they are intended to serve the social purpose of compelling the husband to discharge his duty to maintain his wife on the ground that a default or failure on his part to discharge his duty may lead to the vagrancy of his wife. It is necessary to emphasise that neglect to maintain one's wife is not an offence, and an application made by the wife against her husband for suitable action under this section is not a "complaint" within the meaning of the Code of Criminal Procedure. The proceeding is not a criminal proceeding, and does not end either in order of conviction or acquittal. Therefore, in such a proceeding, the husband can be, and almost always is, examined on oath as a witness in a civil case. As a result, the provision relating to examination of the "accused"¹ does not apply to such proceedings. In other words, these proceedings though instituted under a section of the Code of Criminal Procedure, cannot be described as "criminal proceedings" as such.

Situation
one of
cruelty

2.23. Reverting to the basis on which an application under the Code can be founded, we may state that it is the neglect or refusal of the husband to maintain his wife, as a result of which, she is compelled to leave her husband and stay separately. It

1. Section 342, Cr. P.C., 1898 and Corresponding provisions in the 1974 Code.

is possible to take the view that where a wife is thus compelled to leave the shelter of her husband and seek the remedy provided by the Code, the husband, in effect, is guilty of cruelty towards his wife. We have decided to recommend¹ that cruelty *simpliciter* should be a ground for judicial separation under section 10(1)(b) and we are also recommending that it should be a ground for a decree of divorce under section 13. In the light of this recommendation, it may not be unreasonable to treat cruelty, involved in the conduct of the husband which drives the wife to seek for relief under the Code, as falling within the concept of cruelty contemplated by section 10 and 13.

Therefore, on principle, the fact that the wife has chosen to take recourse to the Code of Criminal Procedure and not to sections 10 or 13 of the Hindu Marriage Act, does not make a substantial difference to her case that her husband has treated her with cruelty. If that be so, we see no reason why she should not be given the right to claim a decree for divorce, and that, in fact, is the proposal which gives an additional right to the women who has been abandoned by her husband; and, on grounds of social justice, the proposal is, in our view, well-conceived and should become a part of the Act.

2.24. Having reached this conclusion, we have to consider the second question already formulated². Should a husband be given liberty to apply for a decree of divorce in cases falling under the Code? *Prima facie*, it may appear that, accepting the analogy³ of clauses (i) and (ii) of section 13(1A), there should be no objection to conferring a right on the husband similar to the one which it is proposed to confer on the wife by the proposal. If the order for maintenance under the Code is virtually and, in substance, the result of the cruelty practised by the

Question whether husband should be given the right.

1. See sections 10(1)(b) and 13(1) HMA as proposed to be amend d.

2. Para 2.21, *supra*.

3. Para 2.20, *supra*.

husband against his wife, why not allow the husband to claim a decree of divorce subject to the conditions prescribed by the proposal?

2.25. We have carefully considered this aspect of the matter; but, after elaborate discussion of the pros and cons, we have come to the conclusion that, having regard to the social conditions prevailing in our country, if liberty is given to the husband to apply for a decree of divorce in cases under which an order has been passed under the Code, in a large majority of cases, it may work great hardship to the wife. Moreover, we do not think that the guilty party—namely, the husband who is proved to have neglected or refused to maintain his wife, should be allowed to take advantage of his own wrong and get rid of the obligation imposed by the order for maintenance.

We are conscious that if, on the same cause of action, the wife applies for a decree of judicial separation under section 10(1), the husband would be entitled to claim for a decree of divorce, subject to the conditions prescribed by section 13(1A). But the wife may not adopt such a course, she may not proceed under section 10(1) for judicial separation or under section 13, for divorce. She may remain satisfied with an order for maintenance under the Code. In such case the husband cannot—and should not—(because on the hypothesis, he is guilty of cruelty), claim a decree of divorce under section 13(1A).

2.26. There are two more considerations which are relevant, and to which a reference must be made. One consideration is in favour of extending to the husband the option to claim a decree for divorce in cases falling under the Code. It may be said that a wife, grievously embittered by her husband's neglect or refusal to maintain her, may, out of spite or malice, refuse to avail herself of the option to ask for a decree for divorce and thereby prevent her husband from marrying another woman. But the short answer is that the wife would thereby be denying herself an opportunity to marry again and that, from a psychological point of view, is very unlikely.

On the other hand, if the right to claim divorce in such cases is conferred on the husband, it may be abused by the husband. It is not unlikely that a husband who is keen to get rid of his wife, will deliberately abandon her, and if a proceeding is brought against him under the Code, would readily submit to an order for payment of maintenance to her in the full knowledge that, after the lapse of the prescribed period, he will be able to get a decree of divorce and carry out his intention to marry another woman. In such a case, the wife will be exposed to grave jeopardy and in fact, may have to face the cruelty of vagrancy, which would be ironical because the prevention of vagrancy in the case of an abandoned wife is the very basic philosophy on which the section in the Code is founded.

2.27. Having considered all the relevant facts, we are not prepared to recommend the extension of the principle contained in the proposal to the husband.

2.28. This disposes of the main question. Now, some matters of detail regarding the above proposal may be referred to. We think that the period of one year should be enough¹. We are also of the view that the condition should be non-resumption of cohabitation, rather than absence of marital intercourse or as is put in the Ministry's proposal.²

Finally, we think that the provision proposed should apply also to a decree for maintenance obtained by a wife who is justifiably living apart³, under the Hindu Adoption and Maintenance Act, section 18(2).

2.29. Accordingly, we recommend that the following should be added in section 13(2) of the Hindu Marriage Act: Recom-
mendation.

“that in a suit under section 18 of the Hindu Adoption and Maintenance Act, 1956 or

1. *cf.* section 13(1A), H.M.A. as proposed to be amended.

2. Para 2.19, *supra*.

3. See, section 18(2), Hindu Adoption and Maintenance Act, 1956.

in a proceeding under section 125 of the Code of Criminal Procedure, 1974, a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or more."

Section 14. 2.30. Section 14 of the Hindu Marriage Act prohibits the Court from entertaining a petition for dissolution of marriage by a decree of divorce, unless, at the date of the presentation of the petition, "three years have elapsed since the date of the marriage." Under the proviso to the section, the court has, subject to rules made by the High Court, power to allow a petition to be presented before the three years have elapsed, on the ground that the case is one of "exceptional hardship to the petitioner or exceptional depravity on the part of the respondent". This proviso itself is subject to certain restrictions, and sub-section (2) of the section further requires the court, in disposing of any applications under the section (for leave to present a petition before the expiration of three years), to have regard to the interests of any children of the marriage and "to the question whether there is a reasonable probability of reconciliation between the parties before the expiration of the said three years".

The proposal now made is that period of one year should be substituted in place of "three years".

Recommendation as to section 14.

2.31. We are of the view that the section should be deleted. The object of prescribing a minimum period for entertaining a petition for divorce is to ensure that if there is a prospect of reconciliation, then efforts should be made in the direction.

While we appreciate the legislative policy of placing an emphasis on reconciliation rather than on a hasty divorce, we think that there should be no restriction as to time. The court will have, under section 23(2), opportunity to consider if the peace and harmony are beyond retrieval. If they are not beyond retrieval,

reconciliation under section 23(2) will succeed, because section 23(2) is intended to create condition for maintaining or restoring the mutual confidence between the parties.

We, therefore, recommend that section 14 should be deleted.

2.32. We now consider the proposal which relates Section 15. to section 15 of the Hindu Marriage Act. Under the main paragraph of the section, when a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree, or if there is such a right the time for appealing has expired without an appeal having been presented, or an appeal has been presented, but has been dismissed, it shall be lawful for either party to marry again. Under the proviso to the section, it shall not be lawful for the respective parties to marry again unless, at the date of such marriage, one year has elapsed from the date of the decree in the court of the first instance. The proposal now is that this proviso should be deleted. Apparently, the assumption is that the prohibition against the marriage during the period of appeal or during the period allowed for filing an appeal, whichever is the longer, is enough, and the further restriction that one year must have elapsed from the date of the decree in the court of the first instance, is not required.

In England there is no such restriction of one year¹ but there are, in most matrimonial causes, two decrees in England-nisi and absolute. The minimum period between the two decrees is three months². A degree absolute can be expedited in certain cases³.

The primary object of the prohibition against re-marriage in section 15, proviso, is two fold, first, avoiding confusion of parentage, and second, check-

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1. Section 8, Matrimonial Causes Act, 1965, re-enacting section 13 of the Act of 1950.
 2. Matrimonial Causes (Decree Absolute) General Order, 1957, First Schedule, Paragraph 1.
 3. Practice Direction in (1964) 1 W.L.R. 1473.

ing an attempt to obtain divorce from one woman with the specific object of marrying another woman.

We think that the consideration of the parties, freedom to marry and the inconvenience caused by the present law, should outweigh the above advantages. The proviso should, therefore, be deleted from section 15 of the Hindu Marriage Act.

It may incidentally be noted that the breach of section 15 renders the second marriage void¹.

Section 16-
Legitima-
cy of chil-
dren.

2.33. Under section 16 of the Hindu Marriage Act, the children of a void marriage are deemed to be legitimate, but only if certain conditions are satisfied. The section also deals with voidable marriages, but, we are not concerned with those marriages. As the section stands now, *where a decree of nullity is granted* in respect of any marriage under section 11 (i.e. in respect of a void marriage), any child begotten or conceived before the decree is made, who would have been the legitimate child of the parties to the marriage if the marriage had been dissolved instead of having been declared null and void, shall be deemed to be their legitimate child, notwithstanding the decree of nullity. Under the proviso to the section, this section does not confer, on any child of a marriage which is declared null and void any rights in or the property of any person other than the parents, in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents. (We are referring, only to that part of the section which relates to a void marriage, as already stated).

Now, the first proposal is that the condition that a decree of nullity must have been granted in order that the section may apply, should be removed. The second, and the more controversial, proposal is that this section should apply only if, at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage, where the marriage

1. *Uma Charan v. Kajal*, A.I.R. 1971 Cal. 307 (Reviews cases.)

follows the act.) both or either of the parties reasonably believed that the marriage was valid.

2.34. We are in favour of the first proposal¹. In our view, it should not be a condition precedent to the applicability of the beneficial provision in the section that there must have been actual legal proceedings resulting in a decree. Certain serious anomalies have resulted from the present position. Legal proceedings ought not to be necessary.

It may be noted that section 16 is an adaptation of section 9 of the (English) Matrimonial Causes Act, 1950. In making the adaptation, however, it seems to have been overlooked that the English section was concerned *solely with decrees of nullity* passed with respect to *voidable* marriages, and had nothing to do with *void marriages*. As a matter of fact, at the date of the Matrimonial Causes Act, 1950, children of void marriages were, in England, not yet regarded as legitimate issue in any circumstances². So far as voidable marriages are concerned, the children of such marriages should be treated as legitimate issues so long as the marriage is not avoided. But there was a doubt in this regard at common law. Hence the need for making them legitimate (notwithstanding a decree of nullity) by an express provision in the English Statute.

2.35. In England, section 11, Matrimonial Causes Act, 1965, used to govern the legitimacy of children of voidable marriages after 1965. It was as follows:—

“11. Where a decree of nullity is granted in respect of a voidable marriage any child who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled shall be deemed to be their legitimate child³”.

1. Para 2.33, *supra*.

2. See, now section 2, Legitimacy Act, 1959.

3. For present law see section 16, Matrimonial Causes Act, 1973.

Legitimacy of children of void marriage is governed by another provision¹. Legitimation of children, by the subsequent marriage of their parents, is governed by a separate law².

Condition of bona fide belief.
—Second point Considered—Four views as to legitimacy.

2.36. The second point³, however, is one of great difficulty. With reference to the status of children born of a void marriage, theoretically, four principal views are possible :—

- (i) One view is that such children must be regarded as illegitimate, because a void marriage has, in law, no existence, and the children of such a marriage can only be regarded as *filius nullius*;
- (ii) The second view is that they should be entitled to succeed to their parents, as if they were legitimate, provided that the parents had contracted the marriage *bona fide* and without knowledge of any impediment;
- (iii) According to the third view, they should, in all cases, be entitled to succeed to their parents as if they were legitimate.
- (iv) There could be a fourth view, namely, that they must be entitled to succeed to other relations in all cases.

2.37. The first view⁴ is the traditional common law view, but has now been modified in most countries. According to this view, the prohibition of certain marriages being based on grounds of public policy, it is unavoidable that in a conflict between the interests of the general public and the interest of the innocent offspring of prohibited marriages, the former must prevail.

While the first view is at the one extreme, the other extreme is represented by the fourth view, according

1. Legitimacy Act, 1959, section 2.

2. See the Legitimacy Act, 1926, section 1 as amended by the Legitimacy Act, 1959, section 1.

3. Para 2.33, *supra*.

4. Para 2.36, *supra*.

to which the rights of children of void marriages to succeed to the property are recognised as if they are legitimate.

As regards the second view, it is a compromise between the first and the third. When the parties to the marriage *deliberately* break the law, the second view gives effect to the public policy referred to above. But, if the parties are not aware of the true facts constituting the impediment to a valid marriage, the demands of public policy, according to the second view, are sufficiently met by declaring the marriage to be void, without visiting the consequences of the mistake of the parents on the children. In England, the Legitimacy Act, 1959, gave effect to the second view¹. This was already the position under the law of Scotland. Before the Reformation, the Canon law also held that child of a void marriage was legitimate where the *defect* rendering the marriage void was unknown to one of the parties².

The Hindu Marriage Act, however, has already adopted the third view it would be a retrograde step if it now reverts to the second view. That apart, the third view is obviously more fair to the innocent offspring of the marriage, and more in harmony with modern social notions. We are, therefore, of the opinion that there is no justification for reverting to the second view.

2.38. We may repeat that we are aware that the (English) Legitimacy Act, 1959—section 2—contains some such limitation as is suggested in the proposal sent to us. But we do not consider it to be a rational one. The English section was referred to in a Madras judgment³ pertaining to section 16 of the Hindu Marriage Act, but we do not think that the Madras High Court wished to suggest that every ingredient of

Section 2,
Legitimacy
Act, 1959.

1 Section 2, Legitimacy Act, 1959.

the Royal Commission on Marriage and Divorce (1955), Cmd. 9678, pages 305 and 306, paragraphs 1184 to 1186.

3. *Gowri Ammal v. Thulasi Ammal*, A.I.R. 1962 Mad. 510 (Ramakrishnan J.).

the section should be incorporated into our law. And, on principle, we think that such an approach is not well founded.

The fact that the scope of the section is being expanded in one respect—by removing the present requirement that there must have been a decree of nullity—also does not seem necessarily to require that the section should be narrowed down by adding a requirement that the parties must have believed that there was no impediment to marriage.

2.39. An argument may be advanced that what is stated above takes away the utility of the prohibitions against marriage. The answer to this argument is, first, that these prohibitions ought not to operate upon the children, and, secondly, that the prohibitions still retain some significance, as the parties are not husband and wife in law, and cannot sue each other for any relief based on a valid marriage (e.g. maintenance or restriction etc.). We should say, with Shakespeare¹.

“Why bastard, wherefore base? When my dimensions are as well compact, My mind as generous, and my shape as true, As honest madam’s issue? Why brand they us with base? with baseness? bastardy? base, base?”

2.40. It is of interest to note that in the U.S.A., the North Dakota Supreme Court, in declaring the state inheritance statute unconstitutional, stated that “a statute which punished innocent children for the transgressions of their parents has no place in our system of government which has as one of its basic tenets equal protection for all²”.

2.40A. The fourth view³, of course raises larger issues and it is not necessary to discuss its merits or demerits at least in the present social context.

A point of drafting.

2.41. This finishes the two points of substance concerning section 16. One point of drafting should

1. King Lear.
2. *In Re Estate of Jensen*, (1968), 162 N.W. 2d 861 (North Dakota).
3. Para 2.36, *supra*.

also be mentioned. The words "if it had been dissolved", which occur in the present section 16, are not very appropriate, because a "void" marriage cannot be dissolved. The wording to be used in this context should be such as to provide straightaway that the children shall be legitimate as if the marriage were valid.

[As to the view that only a valid marriage can be dissolved, see the undermentioned cases^{1,2}].

2.42. We may also note that, in England, though the status of "illegitimacy" is maintained in the legal system, the property rights of illegitimate children have been widely extended by recent legislation³. English Act of 1969.

2.43. In the light of the above, we recommend that this part of section 16(1) should be revised as follows:— Recommendation.

Revised section 16(1), in part.

"16(1). Notwithstanding that a marriage is null and void on any ground specified in section 11, any child is born before or after the commencement of the age had been valid, shall be legitimate, whether such child is born before or after the commencement of the Hindu Marriage (Amendment) Act, 1974, and whether or not a decree of nullity is granted in respect of that marriage⁴, under this Act and whether or not the marriage is held to be void otherwise than on a petition under this Act". Legitimacy of children of void and voidable marriages.

It is considered unnecessary to limit the operation of the new sub-section to children conceived before the decree of nullity is passed (where the case is

1. *Khambatta v. Khambatta*, (1933) 36 Bom. L.R. 11; AIR 1934 Bom. 93 (Submission of parties).

2. *Khambatta v. Khambatta*, (1934) 36 Bom. L.R. 1021; A.I.R. 1935 Bom. 5.

3. Family Law Reform Act, 1969 (Eng.) Sections 14 to 19.

4. The words "of such marriage" could be added after the words "any child", if necessary.

5. Children of voidable marriages to be dealt with in separate sub-section.

one in which such a decree is passed). Of course, after a decree of nullity, cohabitation would, in most cases cease, if it has not already ceased, and conception after the decree is, therefore, very unlikely.

The rest of section 16 could be recast as follows:—

“(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in this section shall be construed as conferring upon any child of a marriage which is null and void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents”.

Section 23A
(new),
Relief to the
respondent
on petition
for divorce.

2.44. There is a proposal to insert a new section permitting the court to give relief to the respondent who opposes a petition for divorce on the ground of the petitioner's adultery, cruelty or desertion. The proposal is that the court may give him the same relief to which he would have been entitled if he had filed a petition. Of course, the relief must be based on that particular ground—this is implicit, though the proposal does not state so.

The precise proposal sent to us for consideration is that after section 23 of the Hindu Marriage Act, the following section should be inserted:—

“Relief to
Respondent
on petition
for divorce.

“23A. If in any proceeding for divorce under this Act, the respondent opposes the relief sought on the ground of the petitioner's

adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief”.

We do not see any objection to the substance of the proposal in so far as it goes, but there are certain matters of detail or language which we would like to deal with.

2.44A. We may, for example, point out that the words “the same relief” (used in the proposal¹ of the Ministry) create an ambiguity. In a petition for divorce, the respondent should have a right to counter claim not only for divorce (“same relief”) but also for judicial separation, or, for that matter, any other appropriate relief. The respondent need not be confined to claiming divorce only.

There is another point. The proposition that the defendant may counter-claim is not directly brought out. Contrast the provision in the Parsi Marriage & Divorce Act, 1936 quoted below²:—

“37. In any suit under this Act, the defendant may make counter-claim for any relief he or she may be entitled to under this Act”.

There is obvious advantage in bringing it out more directly.

2.45. We would, therefore, recommend that **the** section to be inserted in the **Hindu Marriage Act** should be on the following lines:— Recom-
mendation.

“23A. In any proceeding for divorce or judicial separation or restitution of conjugal rights under this Act, the respondent may not only oppose the relief sought on the ground of the petitioner’s adultery, cruelty or desertion, but also make a counter-claim for any relief under this Act on that ground;

1. Para 2.44, *supra*.

2. Section 37 Parsi Marriage & Divorce Act, 1936.

and, if the petitioner's adultery, cruelty or desertion is proved, the court may give to the respondent *any relief* under this Act to which he or she would have been entitled if he or she had presented a petition seeking such relief *on that ground*".

Special
Marriage
Act—
Amend-
ments
desired in
the Minis-
try's propo-
sals.

2.46. We have already stated¹, that certain proposals for amendments in the Special Marriage Act have also been mentioned in the reference to the Commission, and the Commission's views sought thereon. We do not consider it necessary to deal with them in detail, but think it sufficient to state our general view that we see no objection to the relevant provisions of the Special Marriage Act, being brought into line with our recommendations in this Report as to the corresponding provisions of the Hindu Marriage Act, where necessary.

We may mention that the amendments proposed by the Ministry of Law in the Special Marriage Act, 1954 are only five in number.

(a) The first relates to section 2(c) of the Act, and is intended to revise the definition of "District Court" on the lines of the corresponding definition already existing in the Hindu Marriage Act.

We accept the proposal.

(b) The second relates to section 26 of the Special Marriage Act. That section deals with the legitimacy of children of void and voidable marriages, and is comparable to section 16 of the Hindu Marriage Act. In this connection, our comments with reference to section 16 of the Hindu Marriage Act² may be seen. Section 26 of the Special Marriage Act should be revised on the same lines as section 16, Hindu Marriage Act.

(c) The third relates to section 27 of the Special Marriage Act, and is intended to add, to the grounds

1. Para 1.1, *supra*.

2. Para 2.43, *supra*.

of divorce available to the wife, the new ground relating to the passing of an order for separate maintenance by a Magistrate. In this connection, our comments with reference to section 13(2) of the Hindu Marriage Act may be seen¹. Section 27 should be revised on the same lines as section 13(2), Hindu Marriage Act.

(d) The fourth relates to section 29 of the Special Marriage Act, which deals with restrictions as regards divorce during the first three years after marriage. Our recommendation to delete section 14 of the Hindu Marriage Act may be seen, in this connection². Section 29 should also be deleted.

(e) The fifth relates to section 30 of the Special Marriage Act, which deals with re-marriage after divorce. In this connection, our comments as to section 15 of the Hindu Marriage Act may be seen³.

Section 30 of the Special Marriage Act should be amended on the same lines. This finishes consideration of all the proposals contained in the draft Bill forwarded by the Minister of Law.

1. Para 2.29, *supra*.

2. Para 2.31, *supra*.

3. Para 2.32, *supra*.

CHAPTER 3

CONDITIONS OF MARRIAGE UNDER THE HINDU MARRIAGE ACT

Introduc-
tion.

3.1. In this Chapter, we shall deal with points relating to conditions of marriage under the Hindu Marriage Act, except points which we have already dealt with while¹ discussing the proposals of the Ministry of Law.

3.1A. There are certain conditions of a marriage, mentioned in the Hindu Marriage Act². The effect of breach of these conditions is not precisely the same in every case. Breach of some of the conditions merely renders the marriage void³. Breach of some of the conditions merely renders the marriage voidable⁴. Breach of some of the conditions—e.g. the condition as to minimum age—does not affect the validity of the marriage, though it may attract criminal penalties⁵.

3.2. Apart from the conditions of marriage specifically mentioned in the Act, it is elementary that a marriage must be based on free consent.⁶ Hence, if the consent is obtained by force or fraud, the marriage is voidable.⁷ Again, having regard to the sexual and reproductive aspects of marriage, impotence of a party renders the marriage voidable.⁸ Finally, the fact that the wife was at the time of

1. See Chapter 2, *supra*.

2. Section 5, H.M.A.

3. Section 11, H.M.A.

4. Section 12, H.M.A.

5. Section 18, H.M.A.

6. See para 3.8, *infra*.

7. Section 12(1)(c), H.M.A.

8. Section 12(1)(a), H.M.A.

marriage pregnant by some person other than the husband, unknown to the husband, renders the marriage voidable.¹

3.3. Hence arises the threefold classification of marriages into valid, void² and voidable marriages.³ A valid marriage gives rise to all the marital obligations. The obligations can be enforced by a decree for restitution of conjugal rights, and the children are legitimate. The obligations can be terminated (if at all) by obtaining divorce, or (to use an expression which is convenient), suspended by obtaining judicial separation. A void marriage is no marriage in the eye of the law, and need not be formally terminated,—although, for the sake of convenience, a decree of nullity can be obtained. A void marriage does not create any marital obligations between the couple, and but for the special statutory provisions in that regard,⁴ the children would be illegitimate. A voidable marriage stands midway between the two. It creates marital obligations, and can be terminated by obtaining a decree of divorce (if the requisite grounds exist), or those obligations can be suspended by obtaining judicial separation. It can, however, be avoided by a petition, presented by the party affected, on the ground of one of the statutory defects (mentioned above).⁵ In this sense, it differs from a valid marriage.

Valid, void
and void-
able marri-
ages.

3.4. This triple classification is unavoidable, and the scheme as a whole cannot be done away with. Such modifications as are required (if at all) concern mainly the conditions themselves, or the categorisation of a particular marriage as void or voidable, or other incidental matters.

We proceed to consider such changes as relate to the conditions of the marriage (section 5). Points concerning the effect of breach of a particular condition will be dealt with later (section 11-12).

1. Section 12(1)(d), H.M.A.

2. Section 11, H.M.A.

3. Section 12, H.M.A.

4. Section 16, H.M.A.

5. Para 3.2, *supra*.

Section 5
(ii)—Un-
soundness
of mind
as a
ground of
nullity of
marriage.

3.5. The first question concerns the effect of mental incompetency upon capacity to contract a valid marriage. This is a matter of some difficulty. The Hindu Marriage Act contains, in section 5(ii) and section 12(1)(b), a provision whereunder, if the opposite party was an "idiot or a lunatic" at the time of the marriage, the marriage can, subject to certain conditions, be avoided.

The words "idiot or lunatic" have not been defined in the Act. These words are, no doubt, familiar to Hindu Law. They occur also in the Indian Divorce Act,¹ and may have been derived from that Act. The word "lunatic" occurs in the Indian Lunacy Act, 1912, also. But the precise scope of this particular condition of marriage requires some examination.

3.6. Idiocy and lunacy are expressions used in the legislation that had been passed, relating to the removal of certain disabilities of Hindus. An idiot is one congenitally incapable of distinguishing between right and wrong.²

3.7. In a Calcutta case³, the meaning of the expression "lunatic" in section 5(ii) of the Hindu Marriage Act was discussed at length. The court referred to various cases, including *Ratneswari Nandan Singh v. Bhagawati Saran Singh*⁴—and noted the contention that unless total loss of reason, *incapacitating a party to the marriage to understand the very ceremony of the marriage*, is found, the extremely strong presumption in favour of the validity of the marriage remained unrebutted and, therefore, prevails (which is the law laid down by the Judicial Committee of the Privy Council in *Mouji Lal v. Chandrabati Kumari*⁵, and reiterated by the Federal Court in the *Ratneswari Case*. The Court pointed out that the old Hindu law under

1. Sections 19(3) and 48, Indian Divorce Act, 1869.

2. (a) *Tirumagal v. Ramaswami*, (1863) 1 M.H.C.R. 214;

(b) *R. Muthammal v. Sri Subramaniaswami*, A.I.R. 1960 S.C. 601, (1960) 2 S. C.R. 721.

3. A.I.R. 1969 Cal. at page 306.

4. *Ratneswari Nandan Singh v. Bhagawati Saran Singh*, A.I.R. 1950 F.C. 142.

5. *Mouji Lal v. Chandrabati Kumari*, (1911) I.L.R. 38 Cal. 700 (P.C.)

which insanity was not a disqualification for purposes of marriage, was no longer in force. Sir Gurusdas Banerjee had, in his Tagore Law Lectures on Marriage and Stridhan,¹ said:—

“Even considering Hindu marriage to be entirely a sacrament, the acceptance of the bride is a necessary and indispensable part of the ceremony. Therefore, he whose loss of reason is complete, should be deemed incompetent to accept the gift of the bride. Such marriage is invalid on the ground that the capacity for performance of the essential ceremony of the marriage is lacking in the bridegroom.”²

The Court then dealt with the section in the Act—
The (Hindu Marriage) Act does not say anything about various degrees of lunacy. But who is a lunatic? *The Hindu Marriage Act does not even* define a ‘lunatic’.³ The Indian Lunacy defines a ‘lunatic’. By section 3, clause (5) thereof, ‘lunatic’ means an idiot or a *person of unsound mind*.

“It is, therefore, a hard and fast definition and we cannot give any other meaning to the word ‘lunatic’ than that which is mentioned in the definition itself... Hence, going by the language of the Hindu Marriage Act, *it is not possible to make room for different degrees of lunacy.*”

3.8. At common law, the mental incapacity, due to unsoundness of mind, to consent to marriage, undoubtedly⁴ made the marriage void *ab initio*, because “consent is an essential ingredient of a valid

Position in England at common law, and Legislation of 19th century.

1. Banerjee, Marriage and Stridhan cited in the *Ratneswari case*, A.I.R. 1950 F.C. 142.

2. Emphasis supplied in the *Ratneswari case*, A.I.R. 1950 F.C. 142.

3. Emphasis supplied.

4. Tolstoy, “Void and Voidable Marriages”, (1964) 27 *Modern Law Rev.* at page 394.

marriage." In *Browning v. Reane*¹, it was stated², "want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent."

An Act of 1742³, replaced by an Act of 1811⁴, made *void* the marriage of any person who was found lunatic by inquisition or any one whose person or estate had been committed to the care and custody of trustees under any statute, and the marriage of such a person was *void though it might have been solemnized during the lucid period*. Thus, as Lord Stowell pointed out⁵, it was the state of insanity⁶, and not the affected person's *condition of mind at the time of the marriage*, which made the marriage void. The scope of the concept of lunacy was expanded in course of time⁷—this will be explained later⁸.

Mental incapacity now renders the marriage voidable, and not void in England⁹.

Position
in England
under Act
of 1937
and subse-
quent Acts.

3.9. The Act of 1811 (referred to above¹⁰) required that the person must have been found lunatic by inquisition, or must have been committed to care and custody under some statute. The Matrimonial Causes Act of 1937 (and later Acts) expanded the scope of unsoundness of mind in this respect. Even if a person is of unsound mind but is not so found by inquisition, it was felt that the marriage should

1. *Browning v. Reane*. (1812) 2 Phil. Eccl. 69; 161 E.R. 1080.
2. Also see *Re Park*, (1954) Probate 89, 96, affirmed (1954) Probate 112 (1953) 2 All E.R. 1411; 97 Sol Jo 830, approved in *Hill v. Hill*, (1959) 1 All E.R. 281 (P.C.).
3. (1742) 15 Geo. 2 Chapter 30.
4. The Marriage of Lunatics Act, 1811.
5. *Turner v. Meyers*, (1808) 1 Hagg. Const. 414, 417, 161 E.R. 600 (Lord Stowell).
6. This aspect is of importance.
7. (a) Section 7 (1) (b), Matrimonial Causes Act, 1937;
(b) Section 8 (1) (b), Matrimonial Causes Act, 1950;
(c) Section 9 (1) (b), Matrimonial Causes Act, 1965;
(d) Section 12, Matrimonial Causes Act, 1973—para 3.12, *infra*.
8. Para 3.9, *infra*.
9. Para 3.12, *infra*.
10. The Marriage of Lunatics Act, 1811, Para 3.8 *supra*.

be capable of annulment in the interests of the other party no less than in the interests of possible children of the marriage and of the State¹. Progress made in the classification of mental diseases also provided scope for improvement, and the Act of 1937, therefore, provided² that the marriage should be *voidable* on the ground that either party was, at the time of the marriage, "of unsound mind or a mental defective under the Mental Deficiency Act, 1913 to 1927, or was subject to recurrent fits of insanity or epilepsy." The principal object of this formulation was to make it clear that even though the *ceremony* and its resulting rights and obligations may have been understood by the party said to be mentally abnormal, the abnormal mental state, if it could be shown to have existed, would render the marriage voidable. In a case decided in 1885³ it was held that it was not sufficient that the marriage ceremony was understood by the party, and it was also necessary that that party should understand the obligations of married life. This aspect assumes importance, because it would appear⁴ that there could be cases where a person might be mentally abnormal, but, by reason of the administration of tranquillizers, he or she may not appear to be so at the time of marriage and may even appear to understand the marriage ceremony at that particular moment.

3.10. An analysis will reveal that there are two ideas which underline the approach of the common law towards capacity to exercise legal powers. First, there is the insistence upon the necessary *state of mind* to transact the business or legal act in question (the relevant state being dependent upon the exact nature of the business or act). Secondly, there is the proposition that soundness of mind is based upon ability to *manage* oneself and one's affairs.

Position at
common
law—two
aspects.

1. Report of Divorce Law Commission (1912), page 117, cited in Graveson, *Century of Family Law* (1957), page 337.
2. Section 7(1)(b), M.C.A. 1937.
3. *Durham v. Durham*, (1885) 10 probate Division 80, 81 referred to in *Re Park* (1953) 2 All. E.R. 1411, 1427.
4. Suggestion by an aggrieved party in a file of the Ministry of Law.

This approach clearly stated in an English case¹ where it was said that the question for decision was whether a person was of perfectly sufficient soundness of mind to form a valid contract of marriage. "If the incapacity be such," said Sir John Nicholl, in another case², "that the party is incapable of understanding the nature of the contract itself and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract."³

Position under Act of 1950, as amended in 1959.

3.11. In England, a marriage could, under the Act of 1950⁴ be avoided (even if originally valid) on the ground that "either party to the marriage⁵ was, at the time of the marriage, of unsound mind or was then suffering from mental disorder⁶ within the meaning of the Mental Health Act, 1959, of such a kind or to such an extent as to be unfitted for marriage and the procreation of children or subject to recurrent attacks of insanity or epilepsy." By this provision, a marriage could be annulled even though, at the ceremony, a spouse possessed the necessary capacity discussed above.

The phrase "subject to recurrent fits of insanity" (in the English Act of 1973) was construed⁷ to mean "subject to an increase of the acuteness or severity of unsoundness of mind recurring periodically in its course."⁸

-
1. *M'Adén v. Walker* (1813) 1 Dow. 148.
 2. *Browning v. Reane* (1812) 2 Phill. 69, 70, 71; 161 E.R. 10180.
 3. *c.f.* Sir William Scott, in *Turner v. Meyers*, (1808) 1 Hag. Con. 414, 418, 161 E.R. 600.
 4. Section 8(1)(b), Matrimonial Causes Act, 1950, as amended by the Mental Health Act, 1959, section 149, Schedule VII, Pt. I.
 5. See now the 1973 Act—Para 3.12, *infra*.
 6. As to mental disorders, see para 3.12A, *infra*.
 7. Section 7(1)(b), 1937 Act para 3.9 *supra*.
1-a *Smith v. Smith* (1940) Probate 179, (1940) 2 All E.R. 595; 84 Sol Jour. 359.
 8. Section 12, Matrimonial Causes Act, 1973.

Thus, a person who, at common law, though of un-
sound mind, contracted a marriage during the lucid
interval (which would have made the marriage valid,
unless he were a lunatic so found by inquisition,
when the Marriage of Lunatics Act, 1811, would
have applied, before its repeal in 1959), is regarded
as contracting a voidable marriage under the Act of
1950.

3.12. The current statutory provision in England Current
statutory
provision.
on the subject reads :—

12.A marriage celebrated after 31st July, 1971,
shall be *voidable* on the following grounds
only, that is to say—

* * * * *

(c) *that either party to the marriage did not validly
consent to it, whether in consequence of duress, mis-
take, unsoundness of mind ; or*

(d) *that at the time of the marriage either party,
though capable of giving a valid consent, was suffer-
ing (whether continuously or intermittently) from
mental disorder within the meaning of the Mental
Health Act, 1959, of such a kind or to such an ex-
tent as to be unfitted for marriage ;*

3.12A. As regards mental disorders, the Mental Mental
Health
Act, 1959.
Health Act¹ provides as follows :—

“In this Act, ‘mental disorders’ means mental ill-
ness, arrested or incomplete development
of mind, psychopathic disorder, and any
other disorder or disability of mind.”

3.13. So much as regards the substantive law. A Presump-
tion of
validity.
presumption of validity² of marriage arises where it
is alleged that a party was of un-**sound mind at the**

1. Section 4(1), Mental Health Act, 1959 (Eng.).

2. Tostoy, “Void and Voidable Marriage” (1964)
27 Modern Law Review, at page 394.

time or marriage and was, for that reason, incapable of giving consent to the marriage,¹ but that presumption is rebuttable².

Considerations relevant.

3.14. The above brief resume will show that, speaking from the social point of view, several considerations seem to have competed with each other for recognition in this field. The first is that the consent of the mentally incompetent person is no consent at all. The second is that it is not in the interests of the other spouse—who is of sound mind—that he or she should be made to live with a person mentally incompetent. The third consideration, which may be called one of eugenics, is that the marriage of a person with mental abnormality might lead to the birth of children who would be abnormal. There might be a fourth consideration also, namely, that even the party who was suffering from mental abnormality, though not of such a nature as to affect the competence to consent, should be free to present a petition for avoiding the marriage.

3.15 to 3.17. This, in fact, is the law in England, under which, subject to specified conditions, a marriage of a person of unsound mind is voidable at the instance of either party [See s. 12(1)(c)(d) Act of 1973]³

Giving the right of avoiding to the insane party may not necessarily conflict with section 23(1)(a) in so far as it prevents a party from taking advantage of his own wrong. Such a person would not be taking advantage of his own wrong⁴, because there is no deceit, and it would be a “most infelicitous use of language” to say so when there is no deceit⁵. However, it may conflict with the prohibition against tak-

1. *Browning v. Reane* (1812) 2 Phill. Eccl. 69; *Portsmouth v. Portsmouth* (1828) A Hag. Con. 355 at p. 359; *Cooper v. Grane* (1891) Probate 369; *Re Soier* (1947) W.N. 46; *Re Park* (1954) Probate 89 at p. 96.

2. *Cooper v. Grane*, (1891) Probate 369, 376.

3. Para 3.12, *supra*.

4. Section 23(1)(a), Hindu Marriage Act.

5. *cf.* Lord Merriman's observations, (with reference to importance) in *Harthan v. Harthan*, (1948) 2 All E. R. 639, 644.

ing advantage of one's "own disability" in section 23(1)(a). An express provision over-riding section 23(1)(a) could be inserted.

"Unsound mind" and "insanity" mean the same thing¹.

3.18 and 3.19. We are of the view that a provision substantially on the lines of the English provision² of 1973 should be substituted, and in addition, in order to avoid controversy, the situation of recurrent attacks of insanity or epilepsy should specifically mentioned³ (as in s. 8(1)(b) of the English Act of 1950). The revised provision in section 5(ii) should, therefore, be as follows⁴ :—

Recommendation to amend section 5(ii). H.M.A

"that at the time of marriage *neither party to the marriage—*

(a) *was incapable of giving a valid consent to it in consequence of unsoundness of mind ; or*

(b) *though capable of giving a valid consent, was suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children ; or*

(c) *was subject to recurrent attacks of insanity or epilepsy."*

3.20. One of the conditions which is required to be fulfilled for the solemnisation of a Hindu marriage is, under section 5(iii), that

Section 5(iii) and 5(vi)—Minimum age and Section 9(1)

"(iii) the bridegroom has completed the age of eighteen years and the bride the age of fifteen years at the time of the marriage."

1. (a) *Smith v. Smith*, (1940) Probate 179 ; (1940) 2 All E. R. 595.

(b) *Whysall v. Whysall* (1960) Probate 52, (1959) 3 All E. R. 389, 395.

2. Section 12, Matrimonial Causes Act 1973 ; para 3.12, *supra*.

3. Para 3.11, *supra*.

4. In section 23(1)(a), an express exception to be made for insanity, see para 3.15, *supra*.

However, the fact that a marriage has been solemnized in violation of this condition has not been made a ground for any matrimonial relief. The general understanding¹ is that the marriage remains valid, though criminal penalties may be attracted by reason of violation of the requirements as to minimum age. Certain observations in a Punjab case², however, require to be considered. In that case, which related to a petition for restitution of conjugal rights filed by the husband against the wife, the respondent wife, at the time of marriage, was hardly 12 years of age, and the petitioner husband was also 15 or 16 years of age, so that section 5(iii) was not complied with. It was the defence of the wife that, because of this, no marriage could validly take place. The High Court took the view that under section 9(2), only that fact could be pleaded in answer to a petition for restitution which was a ground for matrimonial or relief. The fact that the parties were under-age was not a ground for nullity or judicial separation or divorce. The High Court, therefore, held that it was not a defence to a petition for restitution that the parties were under-age. While doing so, however, the High Court observed : ---

“A marriage may not be valid if not performed between the parties who have not attained the requisite age as prescribed by law³ Invalidity or voidability of the marriage cannot be pleaded in defence in answer to a petition for restitution of conjugal rights.”

Suggestion
to give
right to
avoid the
Marriage

3.21. It was suggested before us that these observations create some doubt as to the effect and significance of the requirement of the minimum age. Since the general understanding⁴ is that the breach of

1. See para 3.21, *infra*.

2. *Budhan v. Man Rai*, (1970) 72, Punjab Law Reporter 102, 104 (H. R. Sodhi J.).

3. Emphasis supplied.

4. (a) *Ram Saran v. Sital*, A.I.R. 1939 All 340 (Case under the Child Marriage Act).

(b) *B. Siranandy v. P. Bājavathyamma*, A.I.R. 1962 Mad. 400 (case under the Hindu Marriage Act).

that condition does not affect the validity of the marriage, it was stated that it was advisable to avoid such controversies in future.

3.22. The suggestion was that from the social point of view, it would be more just to provide, that the party who was under-age (mostly, that party would be the wife) should have a right to avoid the marriage, subject to appropriate safeguards as to limitation of one year and non-consummation¹ of the marriage.

It may in this connection be noted that in England, before 1929, the age of consent for marriage was determined by puberty (fixed, by presumption, at 14 years for boys and 12 years for girls). Marriage under that age (if unconsummated) could be avoided by extra-judicial act, after the parties attained 14 years and 12 years respectively².

King Henry VIII, who, while under fourteen, married Catharine of Aragon in 1504, made³ a "protest" against the marriage in 1505, when he reached the age of fifteen. It may be noted⁴ that Catharine was the widow of his elder brother, and was five years older than Henry VIII. But the protest became irrelevant, because he later married her⁵ again in 1509.

3.23. We have, however, not accepted this suggestion, as we think that public opinion in India is not yet ready for such a change. Besides, having regard to the fact that many marriages in violation of the condition in question may be taking place, such a change might create serious difficulties in practice.

Suggestion
not accep-
ted.

1. Section 12 would then require amendment.

2. Geary, Marriage and Family Relations (1892), page 30, quoted in Graveson, A. Century of Family Law (1957), page 340.

3. Geary, Marriage and Family Relations (1892), page 30 quoted in Graveson, A. Century of Family Law (1957), page 340.

4. Anthony Toyne, An English Readers' History of England (Oxford, 1971), page 99.

5. Geary, Marriage and Family Relations (1892), page 30.

CHAPTER 4

RESTITUTION OF CONJUGAL RIGHTS UNDER THE HINDU MARRIAGE ACT.

Introductory. 4.1. This Chapter will be devoted to a discussion of the relief of restitution of conjugal rights under the Hindu Marriage Act.

Section 9—
Restitution. 4.2. The remedy of restitution of conjugal rights is dealt with in section 9 of the Act, which reads as follows :—

“9(1). When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the District Court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

(2) Nothing shall be pleaded in answer to a petition for restitution of conjugal rights which shall not be a ground for judicial separation or for nullity of marriage or for divorce.”

Section 9(2) considered. 4.3. Sub-section (2) of section 9 has created considerable difficulty, and the problem that has arisen is this.

Where the respondent cannot prove, on the part of the petitioner, a matrimonial misconduct constituting a ground for judicial separation or nullity of marriage or divorce under sub-section (2), can he or she still defend the petition for restitution on the ground that he or she (i.e. the respondent) has withdrawn from the society of the petitioner because of a reasonable excuse as mentioned in sub-section (1)?

4.4. The majority¹ of the High Courts answer the question in the affirmative. The Andhra Pradesh High Court, however, has taken a different view².

4.5. It is plain that the majority view is inconsistent with the clear and unambiguous words used in s. 9(2): As a matter of construction, it is impossible to hold that s. 9(2) does not control s. 9(1). If that be so, reading ss. 9(1) and (2) together, it follows that no plea can be taken under s. 9(1) in support of the contention that there is a legal ground why the application should not be granted unless such a plea satisfies the specific requirements of s. 9(2). Why the Legislature made a general provision in s. 9(1) and then proceeded to control it rigorously by s. 9(2), it is difficult to understand or appreciate; but, under no rule of construction can the width of the provisions in s. 9(1) resist the application of the rigorous test laid down by s. 9(2).

4.6. There is, however, no doubt that the effect of reading section 9(1) and s. 9(2) together is unfair and unjust. Restitution of conjugal rights covers a very sensitive area in matrimonial relations and it seems to us that it should be permissible for the party resisting restitution of conjugal rights to satisfy the court that restitution should not be granted on grounds, which may otherwise be reasonable, though they may not satisfy the test prescribed by s. 9(2). It is because courts felt that interpreting s. 9(2) as over-riding s. 9(1) may lead to social injustice that they felt compelled in substance to ignore the provisions of s. 9(2) and treat s. 9(1) as though it were independent of s. 9(2). We are, therefore, inclined to recommend that s. 9(2) should be deleted.

4.7 and 4.8. There is one more consideration which has weighed in our minds in coming to this conclusion. It is well-known that in proceedings under s. 488 of the Code of Criminal Procedure³, where a

1. *Shanti Devi v. Balbir*, A.I.R. 1971, Delhi 294 (reviews cases).

2. *Annapuramma v. Appa Rao*, A.I.R. 1963 A. P. 321.

3. Section 488 of the Code of 1898, see, now, section 125 of the Code of 1974.

wife, including a Hindu wife, applies for maintenance against her husband, she has almost in every case to justify her separate residence. Invariably, when a husband is confronted with a claim made by his wife for maintenance under s. 488, he pleads his readiness and willingness to maintain her provided she returns to his residence and when such a plea is raised by the husband, the wife has to satisfy the court under s. 488(4) that there is a sufficient and reasonable ground for her refusal to stay with her husband. It is not disputed that when the wife is required to show a reasonable cause for insisting to stay separately from her husband, she is not confined to the pleas such as are contemplated by s. 9(2) of the Hindu Marriage Act. In other words, the plea which the Hindu wife can take under s. 488 in justifying her separate residence need not necessarily be a plea which would be a ground for judicial separation or for nullity of marriage or divorce.

Recommendation to delete section 9(2), H.W.A.

4.9. If s. 9(2) were to remain on the Statute Book, it would, we venture to think, be very easy for a Hindu husband, against whom an application for maintenance has been made by his wife under¹ section 488 of the Code of Criminal Procedure 1898, to retaliate by filing a petition for restitution of conjugal rights, and if he adopts such a course, a decree for restitution would invariably follow unless the wife is able to prove any of the grounds contemplated by s. 9(2). Thus, s. 9(2) would indirectly, but decisively, restrict the rights of a Hindu wife under s. 488, that could not have been the intention of the legislature when s. 9(2) was enacted. We have, therefore, no hesitation in recommending that s. 9(2) of the Hindu Marriage Act should be deleted.

Section 9(1) Burden of proof

4.10. There seems to be some controversy as to whether the burden of proof of "reasonable excuse", mentioned in section 9(1), is on the party against whom the petition is made, or, whether the absence of such excuse is for the petitioner to prove. In a

1. Section 125 is the corresponding provision in the Code of 1974.

Delhi case,¹ it has been stated that for the success of the petition, the petitioner must prove three things,—namely, first, the absence of reasonable excuse for withdrawal from society, secondly, the absence of any legal ground why the petition should not be granted, and, thirdly, the truth of the statements contained in the petition. However, it seems to have been the view of the Punjab High Court² that the burden of proving reasonable excuse for staying away is on the person opposing the petition. This also seems to be the Madhya Pradesh view.³ In the circumstances, a clarification is desirable in this regard. Under the corresponding section in the Indian Divorce Act⁴, it is for the respondent to prove the existence of a reasonable excuse.⁵ This seems to have been the English law also,⁶ so long as the action for restitution was allowed. [The action has recently been abolished⁷].

4.11. Since, ordinarily, the presence of a “reasonable excuse” would be more within the knowledge of the respondent⁸ than the absence thereof could be within the knowledge of the petitioner, it would not be unfair to provide that the respondent should prove its existence. It may be difficult for the petitioner to prove the negative.

4.12. We recommend that section 9(1) should be amended as above⁹ as to the burden of proof.

Recommendation as to burden of proof under section 9(1).

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1. *Shanti Devi v. Balwant Singh*, A.I.R. 1971 Delhi 294, 296, para 12.
 2. *Hardip Singh v. Dalip Kaur*, A.I.R. 1970 Punj. & Haryana 284, 285, paragraph 5 (C. D. Suri J.).
 3. *Anna Sahib v. Tara Bai* A.I.R. 1970, M. P. 36.
 4. Section 33, Indian Divorce Act, 1869.
 5. *Wadia v. Wadia*, (1914) I.L.R. 38 Bom. 125, 130.
 6. *cf. Green v. Green*, (1916) Probate 188, 191 (Shearman J.).
 7. Section 20, Matrimonial Proceedings and Property Act, 1970 (Eng.).
 8. *cf.* section 106, Evidence Act.
 9. Para 4.11, *supra*.

CHAPTER 5

JUDICIAL SEPARATION UNDER THE HINDU MARRIAGE ACT

Intro-
ductory.

5.1. We shall be concerned in this Chapter with judicial separation under the Hindu Marriage Act, dealt with in section 10. This relief is purely the creation of statute. It first found place, under this name, in the matrimonial legislation passed in some of the provinces. But it may be noted that the Hindu Women's Right to Separate Residence and Maintenance Act, 1946, gave the wife some, though not all, of its advantages.

Recom-
mendation.
as to
section
10(1)
H.M.A.

5.2. In general, judicial separation is a milder relief than divorce, and for that reason, while most of the grounds for judicial separation and divorce are common, the requirement is milder in case of judicial separation under the present Hindu Marriage Act.

Since we are making the grounds of divorce more liberal, and doing away with the maximum periods¹ at present prescribed in connection with various diseases, the specific mention of grounds of judicial separation in section 10(1) is not necessary. The subsection should now be revised so as to refer to the grounds included in section 13(1), (which relates to divorce).

1. See recommendations as to section 13, H.M.A., para 7.6 to 7.23, *infra*.

CHAPTER 6
NULLITY OF MARRIAGE UNDER THE HINDU
MARRIAGE ACT

6.1. We deal in this chapter with nullity of marriage under the Hindu Marriage Act. Questions already dealt with in connection with proposals of the Ministry of Law¹ will not, of course, be discussed again.

Introductory.

6.1A. The question whether a declaration can be obtained under section 11 of the Hindu Marriage Act after the death of either party² is a matter of some uncertainty. The question came up for consideration in a recent Punjab³ case, where all the cases are reviewed. In the Punjab case, a petition under section 11 was filed after the death of the husband by Kishni Devi, one of the widows, impleading the (other) widow of her husband as a respondent, and claiming a declaration that the petitioner's marriage with her (late) husband was a nullity. Apparently, the ground for seeking such declaration was that the petitioner's husband had been already married to the respondent. The petition was dismissed on the ground that it was not maintainable in view of the husband's death. On appeal, the High Court set aside the dismissal, emphasising that in the case of a void marriage, there is no marriage in the eye of law. The High Court held that one of the spouses in such a marriage can obtain a declaration from the court about her *status quo* even after the death of the other spouse. The High Court dissented from the contrary view taken by the Madras High Court⁴.

Section 11 and petition for nullity after death of spouse.

1. Chapter 2, *supra*.

2. See also para 2.5 *supra*.

3. *Kishni Devi v. Tulsani Devi*, (1972) Punj. L. R. 561.

4. (a) *Gori Ammal v. Tulsi Ammal*, A.I.R. 1962 Mad. 510 ;
On appeal *Tulsi Ammal v. Gori Ammal*, A.I.R. 1964
Mad. 118.

(b) *Paranisami v. Sarnathammal*, A.I.R. 1969 Mad. 124.

We ought, however, to point out that in such a case, the proper remedy is a suit under the Specific Relief Act¹. A petition under section 11 of the Hindu Marriage Act cannot be appropriate, because the other spouse is an essential party to any such petition. This should be clarified by an amendment.

Recom-
mendation.
to amend
S. 11
HMA.

6.2. We recommend that section 11 should be suitably amended for the purpose.

Section
12(1)(a)—
Impotence
as a
ground of
avoidance.

6.3. In regard to voidable marriage, there is one matter in respect of which reform is urgently required. That relates to the case where a person is not impotent at the time of the marriage, but is found to be so when the marriage is, for the first time, attempted to be consummated². It cannot be disputed that such cases should be covered because, on the words of section, the petitioner's claim can be met technically on the ground that the impotence supervened after the marriage. Section 12(1)(a) of the Hindu Marriage Act, which makes the marriage voidable on the ground of impotence "at the time of marriage", should be revised so as to cover such cases. We think that the following re-draft would be simple, and achieve the object :

"the marriage has not been consummated owing to the impotence of the respondent."

Section
12(1)(b),
H.M.A.
and idiocy
or lunacy.

6.4. Section 12(1)(b) of the Hindu Marriage Act, which relates to idiocy or lunacy, will³ now be read in the light of section 5(ii) as proposed to be revised,

Section
12(1)(c).
H.M.A.

6.4A. Section 12(1)(c) is discussed later⁴.

Section 12
(1)(d),
H.M.A.
and pre-
marital
pregnancy.

6.5. Under section 12(1)(d) of the Hindu Marriage Act, subject to certain conditions, the pre-marital pregnancy of the wife is a ground on which the marriage could be avoided.

1. Section 34 S. R. Act see para 2.6, *supra*.

2. *Ravanna v. Susheelamma*, A.I.R. 1967 Mys. 165.

3. See, recommendation as to section 5(ii).

4. See para 6.8 *infra* para 3.19. *supra*.

The Act, however, does not provide for any such relief to the wife of the male with whom the pregnant wife had sexual relations. It was suggested that if the rationale of the present provision entitling the innocent husband (of the pregnant wife) to relief is that mutual love and affection cannot possibly survive in such circumstances by reason of the grave fraud of the one party, then the same rationale applies in favour of the innocent wife of the male who has been guilty of sexual relations with another woman leading to that woman's pregnancy.

6.6. As Morse J. observed :—

“The essence of the marriage contract is wanting when the woman, at the time of its consummation, is bearing in her womb, knowingly, the fruit of her illicit intercourse with a stranger ; and the result is the same whether the husband is ignorant of her pregnancy, and believes her chaste, or is cognizant of her condition, but has been led to believe that the child is his¹.”

This reasoning, it was stated, should apply against the father of the child.

6.7. We are not in favour of any such change. We think that a distinction can be made between the pregnant woman and her paramour. The former is burdening her husband with a child. The latter does not burden the wife with a child.

6.8. One of the grounds for avoiding a marriage is the fact that the consent of the petitioner (or his or her guardian) to the marriage was obtained by force or fraud. The relevant provision is to be found in section 12(1)(c) of the Hindu Marriage Act. The section does not expressly limit “fraud” to deception in relation to the marriage ceremonies only or to the identity of the party marrying. But many judicial decisions have taken that view. In a recent Bombay

Section
12(1)(c)—
HMA
Fraud
case law

1. *Sissung v. Sissung*, 65 Mich. 168, 31 N.W. 770, 773 (U.S.A.), cited in *Morres v. Morres*, (1940) 13A 2d 603, Goldstein *Family & the Law*, (1964) p. 652.

case,¹ for example, it was held that a person who freely consents to a solemnisation of the marriage under the Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of a fraudulent representation or concealment. Therefore, concealment of curable epilepsy and a false representation that a party to the marriage was healthy, does not amount to fraud within the meaning of section 12(1)(c) of the Act.

6.9. In a Calcutta case,² the marriage was sought to be annulled on the ground that at the time of the marriage, the girl was suffering from tuberculosis and that there was a fraudulent misrepresentation about her health. Evidently, the marriage was consummated. It was held that the marriage was not voidable under the Hindu Marriage Act, 1955. Relying on the English law and the position under the Indian Divorce Act, 1869, the High Court took the view that the fraud in relation to matrimonial consent must exist at the time of solemnization of a marriage.

The High Court also stated that the provisions of the Hindu Marriage Act, 1955, "clearly suggest that concealment of a disease other than those mentioned in the said section (section 13) cannot be the foundation for avoiding the marriage."

6.10. On the other hand, in a Madhya Pradesh case³, the respondent before his marriage was represented as a Brahman boy, when actually he was a dasiputra (an illegitimate child born of gurmi woman). The marriage was held to be voidable.

6.10A. It has been held in another case⁴ that "fraud" within the meaning of section 12(1)(c) means

Section 12(1)(c) 'fraud'—suppressing previous marriage effect.

1. *Raghunath Gopal Daftardar v. Vijaya Raghunath Daftardar*, (1970) 73 Bom. L.R. 840 (reviews cases).
2. *Anath Nath v. Lujjabati Devi*, A.I.R. 1959 Cal. 778, 782.
3. *Bimla Bai v. Shankerlal*, A.I.R. 1959, M. P. 8.
4. *Rajaram Viswakarma v. Deepabai*, (1973) M. P. L. J. 626 ; (1973) J. L. J. 662, cited in the Yearly Digest (Aug. 1973), col. 1392.

either deception as to the identity of the other party to the marriage, or deception as to the nature of the ceremonies being performed. Where consent is given with the intention of marrying the other party and with the knowledge that what is being solemnised is marriage, an objection to the validity of the marriage on the ground of any fraudulent misrepresentation or concealment is not tenable. Mere concealment of the fact that the party was once married to another cannot be a ground for annulment of marriage as it cannot be said that consent of the other party was obtained by fraud within the meaning of section 12(1)(c). Of course, the marriage would be declared a nullity under section 11 if a spouse was living at the time of the marriage.

The petition for annulment of the marriage of a 'pardanashin' girl was granted in a Patna case,¹ when the girl averred that she was given to understand, before the marriage took place, that the would-be husband was an affluent man and was of the age 25-30 years, but after marriage, she discovered that he was not so affluent, and was also over sixty years of age.

6.11. Thus, the law on the point requires to be settled. If the narrower view is socially the preferable view, it should be incorporated into the section, because the present language does not carry any such limitation. If, on the other hand, the wider view is socially preferable, then that should be given legislative recognition.

Need for clarification.

6.12. to 6.14. It should, in this connection, be pointed out that case law² under the Indian Divorce Act, section 19, is not a sufficient guide, because under that Act fraud is referred to as a possible ground for making the marriage void.

Section 19-Divorce Act distinguished.

6.15. In England, before the Reformation, want of consent, like any other impediment, rendered the

English Law

1. *Babul Panmate v. Ram Agya Singh*, A.I.R. 1968 Pat. 190, 192, para 10.

2. *E.g. Emmanuel v. Kamal*, A.I.R. 1934 Pat. 670.

marriage void *ab initio*,¹ and this must have remained so after the Reformation, except that in case of certain impediments, marriages became voidable, as for example, marriages within prohibited degrees or in the case of impotence².

Consent
and
essential
ingredient.

6.16. Decided authorities in England establish that consent is an essential ingredient of marriage, and that its absence, howsoever brought about, makes the marriage void *ab initio*^{3,4,5}.

Effect of
duress.

6.17. So far as duress vitiating an otherwise valid marriage is concerned it must be proved that the will of the party complaining has been over-borne by genuine and reasonably held fear caused by the threat of immediate danger, for which the party is not himself responsible, to life, limb or liberty, so that the constraint destroys the reality of consent to ordinary wedlock. Duress need not come from the opposite party⁶.

Effect of
fraud not
relating
to identity
or cere-
mony.

6.18. In relation to fraud, however, English courts have taken a narrower view. In *Moss v. Moss*,⁷ the point directly in issue was whether the marriage was vitiated by the wife's fraud in stating to the husband (in order to gain his consent to the marriage), that she was not pregnant *per alium*, when, in fact, she was. But in deciding this point, Sir Francis Jeune P. also examined the effect of duress and fear, and held that these factors which also caused "an absence of consenting will", likewise rendered the marriage void *ab initio*; he held that fraud or error invalidated a

1. D. Tolstoy, "Void and Voidable Marriages", (1964) 27 Modern Law Review 385, 387.
2. D. Tolstoy, "Void and Voidable Marriages", (1964) 27 Modern Law Review 385, 387.
3. *Fulwoods' case* (1638) Cro. Car. 482, 488, 493, referred to in *Moss v. Moss*, (1897) Probate 263, 268.
4. *Tarry v. Browne*, (1661) 1 Sid. 64, 65; see D. Tolstoy, "Void and Voidable Marriages", (1964) 27 Modern Law Review 385, 389.
5. *Harford v. Morris*, (1776) 2 Hag. Con. 423, 436; as explained in *Portsmouth v. Portsmouth*, (1828) 1 Hag. Eccl. 355, 359.
6. *Szechter v. Szechter*, (1970) 3 All. E. R. 905, (Sir Jocelyn Simon P) For comment, see 121 New Law Journal 160.
7. *Moss v. Moss*, (1897) Probate 263, 266, 267, 269.

marriage only if the petitioner was thereby deceived as to the identity of the respondent, and, since the petitioner (husband in that case) was deceived not as to the respondent's identity but as to her pregnancy, the marriage was valid.

6.18A. Fraud or mistake as to the ceremony made the marriage void¹. For example, where there is a mistaken belief that the ceremony was one of betrothal and not of marriage, the marriage is void for want of consent². As Lord Guest has said³, "In a void marriage, the decision depends upon the ascertainment of a state of facts instantly verifiable at the date of the marriage, such as lack of capacity or of the necessary consent or duress." Fraud as to ceremony.

6.19. We are of the view that having regard to Indian conditions, the law should not be so narrowly confined as has been done in England⁴. No doubt, scope should not be left for all kinds of flimsy excuses for avoiding a marriage on the ground of fraud. But, at the same time, serious injustice is likely to result if fraud affecting vital matters (such as, absence of a particular disease) is totally disregarded. We do not see any reason in justice for forcing the parties to hold on to a marriage when one of them has been cheated by or on behalf of the other on essential matters, even if those matters do not pertain to the ceremony or the identity of the party marrying. It should be noted that as to the actual situation in *Moss v. Moss*⁵, the legislature⁶ had to intervene in England. This shows that the test adopted there is not totally satisfactory. Proper approach.

1. See *Mehta v. Mehta*, (1945) 2 All. E.R. 690.

2. Per Hodson J. : View approved by Evershed M. R. (1951) Probate 124, 133 ; passage quoted in *Kassim v. Kassim*, (1962) Probate 224, 229.

3. *Ross-Smith v. Ross-Smith*, (1963) A. C. 280, 248 (H. L.).

4. Para 6.18 and 6.18A, *supra*.

5. *Moss v. Moss*, (1897) Probate 263, Para 6.18, *supra*.

6. Present provision as to pre-marital pregnancy is in section 12(f), Matrimonial Causes Act, 1973.

**Recommendation
to amend
section
12(1)(c),
H.M.A.**

6.20. In the light of the above discussion, we recommend that in section 12(1)(c) of the Hindu Marriage Act, in place of the word "fraud", the words "or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent", should be substituted.

CHAPTER 7

DIVORCE UNDER THE HINDU MARRIAGE ACT

7.1. We deal in this chapter with certain important questions concerning divorce under the Hindu Marriage Act¹. The substantive provision on this subject is contained in section 13. Before we deal with the specific grounds for obtaining divorce, we think that it would be useful to refer briefly to the position before the Act. Introductory.

7.2. Divorce was not totally unknown to the Hindus before the Hindu Marriage Act. Customary law, in many cases, recognised divorce. There were also provincial enactments in force in some provinces, which permitted divorce in specific circumstances². In fact, even in the ancient texts, there is the often cited revolutionary verse in Parasara³, which runs as follows :— Position before the Act.

“Another husband is ordained for the woman in five calamities, namely, when the husband is lost, is dead, has become a Sanyasin, is impotent or has falen.”⁴

This verse did not find acceptance, in its literal sense, in judicial decisions which constituted the Anglo-Hindu Law, and courts refused to recognise divorce except on the basis of custom or specific legislation⁵. Banerjee⁷ regards this text of Parasara as relating to a very primitive stage of the community when multiplication was the main goal, or as evidence of a difference of opinion amongst the Hindu sages. There is no doubt that, in general, the view taken was that a marriage was regarded as indissoluble.

1. See also Chapter 2 for proposals of the Ministry of Law.

2. See, *infra* para 7.3.

3. Parasara IV, 30.

4. The Sanskrit word is “Patita” (debased).

5. See also Para 1.19, *supra*.

6. *Kudomeo V. Joteeram* (1877) I.L.R. 3 Cal. 305.

7. Banerji, Hindu Law of Marriages and Streedhana, page 128, 131.

Legislation
in Native
States and
in the
provinces.

7.3. Baroda was the first Indian State to introduce divorce for all Hindus by legislation¹ in 1971. Divorce was allowed to certain Hindus of Malabar² in 1933. In 1946, divorce was introduced by Bombay. Madras provided for divorce for Hindus in 1949. Saurashtra passed its Hindu Divorce Act in 1952. There were also enactments in force in Madras and Travancore Cochin, providing for divorce for certain communities³.

Signifi-
cance of
Hindu
Marriage
Act.

7.4. The Hindu Marriage Act, 1955, introduced divorce—(i) for all Hindus; (ii) throughout the territories to which the Act extended; and (iii) on specifically enumerated grounds. It was, therefore, wider in its scope than the pre-existing law, and, for that reason, the legislature proceeded cautiously. Briefly speaking, section 13 of the Act provides for divorce on the ground of living in adultery, conversion, incurable insanity, virulent and incurable leprosy, venereal disease, renunciation of the world by entry into a religious order, not being heard of as being alive for at least seven years, non-resumption of cohabitation after judicial separation and non-restitution of conjugal rights after a decree for such rights. In addition, the wife can petition for divorce on certain special grounds.

General
approach.

7.5. We shall, in due course, discuss the amendments required in respect of specific grounds of divorce. But we may state, at the outset, that our general approach in this regard has been that while all reasonable efforts must be made to protect the stability of the marriage, at the same time, if circumstances exist which show that conjugal life is impossible either by reason of a matrimonial offence or by reason of a disease or other specified circumstances, then the reality must be recognised, and provision should be made for terminating the bond of marriage.

1. The Baroda Hindu Divorce Act, 1931, referred to in Report of Hindu Law Committee (1947), page 27, Paras 109,110.
2. Madras Act 21 of 1933.
3. Not enumerated here.

7.6. Under section 13(1)(i) of the Hindu Marriage Act, "living in adultery", is a ground for divorce. This should be contrasted with "adultery", which is the ground of divorce usually mentioned in legislation in other countries and also in the Special Marriage Act. In India, Parliament in 1955 took the view that a *single act of infidelity* to the marriage bond should not be a sufficient ground for relief by way of a decree of divorce for a Hindu marriage, but should only be a ground for judicial separation. It is, therefore, at present necessary that one of the parties to the marriage should be leading a *continuous course of adulterous life*¹. The course of adulterous "living" is not a matter of the past, but must be continuing at the time of presentation of the petition².

Section 13
(1)(i)
"living in
adultery"

7.7. In practice, however, it is difficult to establish adulterous "living". Apart from this, on principle, a single act of adultery should, in our view, be enough. In Indian conditions adultery is, in general, very likely to impair seriously the mutual confidence of the parties, thereby rendering conjugal life difficult if not impossible.

7.8. Both legally and morally, adultery has been regarded as the most serious matrimonial offence³ in other countries also.

7.9. to 7.11. It may, incidentally, be stated that the words "living in adultery" in section 13(1)(i), Hindu Marriage Act, seem to have been taken from section 488(4) of the Code of Criminal Procedure, 1898, under which, a wife "living in adultery" could be refused maintenance⁴. In that section of the Code those words have a relevance, because, if the wife is living in adultery, she would be practically receiving some kind of financial support from her partner in adultery, and there is no economic hardship or possibility of vagrancy if she is refused the aid of the prompt remedy under the Code, which is primarily

1. *Subramaniam V. Pennkshiammal*, A.I.R. 1958 Mys. 41.
2. *Rajani V. Prabhakar*, A.I.R. 1958 Bom. 254.
3. See *A V. A* (1962) 2 All E.R. 573, 577; (1962) 3 W.L.R. 212, 217 (Ormrod J.)
4. See now, the Code of 1974, section 125(5).

aimed at preventing vagrancy. But it is, in our view, inappropriate to adopt that test when we are dealing with the grounds of divorce.

Recommendation to amend section 13(1)(i) H.M.A.

7.12. In the light of the above discussion, we recommend that section 13(1)(i) of the Hindu Marriage Act, should be revised so as to read as follows:—

“(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse.”

Section 13(i)(iii) unsoundness of mind—Recommendation.

7.13. Section 13(1)(iii) of the Hindu Marriage Act deals with unsoundness of mind as a ground of divorce. The requirement is that one of the spouses should be incurably of unsound mind for a continuous period of not less than three years. We are of the view that the minimum period of three years, imposed on the right to seek divorce, is not reasonable. Unsoundness of mind, which is incurable, constitutes a situation wherein the parties can be hardly expected to share conjugal life together; and to insist on a minimum period is to demand a sacrifice which is unreasonable. The period should, therefore, be done away with.

Section 13 and the desertion as the ground of divorce.

7.14. At present, desertion is not a ground of divorce under the Hindu Marriage Act. It is a ground of judicial separation under section 10, but this affords no practical relief, because, when one party has deserted the other, the grant of judicial separation merely enables the deserted party to obtain a ruling from the court that, because of the unjustifiable conduct of the deserter, the deserted party will not be bound to cohabit with the deserter¹.

7.15. The fundamental duty of the parties to a marriage is to stay together, and to give each other the warmth and support expected by the partners in the marriage. If this warmth and support be denied, the marriage falls in its substratum, and the situation

1. Sec section 10(2), H.M.A.

is an appropriate one for the grant of divorce—subject, of course, to the usual safeguards. It would, therefore, be appropriate if desertion for a specified period—say two years—is made a ground of divorce under section 13(1) of the Hindu Marriage Act, by inserting a new clause for the purpose.

For this purpose, it will be convenient to adopt the definition of “desertion” contained in the Explanation to section 10(1) of the Act.

7.16. Accordingly, we recommend that in section 13(1), a new clause should be added as follows:— Recommendation.

“has deserted the petitioner for a period not less than two years immediately preceding the presentation of the petition, or”

And the following Explanation should be inserted at the end of section 13(1):—

“*Explanation.*—In this section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”

7.17. We now consider a suggestion made to us, to add a ground of divorce. There is, at present, no separate provision for relief under the Hindu Marriage Act, where either party wilfully refuses to consummate the marriage. In some circumstances, such conduct may amount to cruelty, but the suggestion was that the nature of the behaviour is such that it should be made a separate ground for divorce. Under the Special Marriage Act,¹ wilful refusal by the respondent to consummate the marriage is a ground which renders the marriage voidable. This was the law, and is the law, in England also². But, on principle, it was

Section 13 and wilful refusal to consummate the marriage.

1. Section 25(i), Special Marriage Act, 1954.

2. Section 8, Matrimonial Causes Act, 1960; section 9(1) (a), Matrimonial Causes Act, 1965; section 2(b), Nullity of Marriage Act, 1971 and the later 1973 Act.

stated, this is an incorrect approach. In general, a marriage is regarded as void or voidable by reason of some circumstances existing *at the time of the marriage*. This is obvious from a study of the various grounds which render the marriage voidable or void¹.

7.18. It may be mentioned that in England, Lord Simon urged that wilful refusal should be a ground for divorce,² though this suggestion was not accepted.

7.19. In England, wilful refusal of consummation was made a ground of nullity in 1937,³ as had been recommended by the Gorrell Commission of 1912⁴. In 1955, the Archbishops' Commission on Nullity reported⁵ as follows :--

“We cannot find any logic in a provision by which a marriage, valid at the time it was made, can be declared void *ab initio* as a result of a subsequent event.”

The Archbishops' Commission went on to recommend that the provision should be repealed, and that the following sub-section should be inserted at an appropriate place.

“In any proceedings for nullity of marriage, the Court may draw an inference of sexual incapacity at the time of the marriage from evidence that the marriage has not been consummated owing to the refusal of the Respondent to consummate the marriage.”⁶

1. Sections 11-12, H.M.A.

2. House of Lords debates, Vol. 317, columns 809 to 811.

3. Matrimonial Causes Act, 1937, section 7(1)(a).

4. Gorrell Commission (1912), Report (Cmd. 6478), para 553.

5. The Church and the Law of Nullity of Marriage (1955), page 34, cited in Putting Asunder (S.P.C.K. 1964), page 36.

6. The Church and the Law of Nullity of Marriage, page 48, cited in Putting Asunder (1964), page 36.

7.20. The Morton Commission took a similar view of the logic of the provision, and stated:¹

“To make this a statutory ground of nullity suggests some confusion of thought. Nullity should be granted for some defect or incapacity existing at the date of the marriage. Wilful refusal is something that happens after the marriage, and should therefore be a ground for divorce.”

7.21. In the Commonwealth of Australia it is a ground for divorce that “the other party to the marriage has wilfully and persistently refused to consummate the marriage.”²

7.22. The suggestion before this Commission was that the following should be added as a ground of divorce in section 13 of the Hindu Marriage Act:—

“that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate it.”

Of course, “wilful refusal” connotes a settled and definite decision, come to without just excuse³.

7.23. We are, however, of the opinion that this need not be a specific ground for divorce. Where such conduct amounts to cruelty, it can be dealt with under that head.

7.24. We have finished the grounds of divorce, and have now to deal with a point concerning relief. We propose to recommend a general provision to the effect that where the relief desired is divorce the court may (except in certain cases) grant judicial separation instead. The desirability of such a provision can be established even under the present scheme, because, since the court has a discretion, or rather a duty, to refuse the desired relief in certain

1. Morton Commission Report (Cmd. 9678), para. 89.

2. Matrimonial Causes Act, 1959 (Austr.), section 28(c).

3. *Horton v. Horton*, (1947) 2 All E. R. 871, 874 (Lord Jowitt, L.C.).

Section
13A
(New).

circumstances,¹ it should have the lesser power of granting the milder relief. It would be convenient if the court is given a discretion not to dismiss the proceedings *in toto*, but to grant a lesser relief instead. Since we propose to recommend expansion of the grounds of divorce,² and also propose to modify the requirement as to the period for which a particular ground of divorce should have been in existence,³ we think it is necessary that some such power should be conferred on the court in express terms. This discretion will be exercised where, in view of the special circumstances of the case, the court is of the opinion that in the interest of justice the marriage should not be immediately dissolved. We do not propose to confine this discretion only to cases where the grant of divorce is the alleged adultery of the respondent. Guidance in the exercise of the discretion could, of course, be drawn from the decisions relating to exercise of the discretion of the court where adultery is a ground of divorce.

7.25. The new section could be inserted as section 13A, on the following lines, in the Hindu Marriage Act:—

“13A. In any proceeding on a petition for a decree of divorce, except where the petition is founded on the ground⁴ mentioned in clause (ii), clause (vi) or clause (vii) of sub-section (1) of section 13, the court may, if it considers it just to do so having regard to the circumstances of the case, pass instead a decree for judicial separation.”

1. Section 23(1), H.M.A.

2. See discussion as to section 13 H.M.A. and cruelty.

3. See, for example, recommendation as to section 13 and venereal disease. (Hindu Marriage Act).

4. The references are to the existing clauses.

CHAPTER 8

Jurisdiction and procedure under the Hindu Marriage Act

8.1. We now proceed to consider several questions concerning jurisdiction and procedure under the Hindu Marriage Act.¹ Introductory.

Section 19 of the Hindu Marriage Act is as follows:

“19. Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together.” Court to which petition should be made.

8.2. We are of the view that this section is defective in several respects. In the first place, it does not take sufficient account of cases where one of the parties does not reside in India, or his whereabouts are unknown. The place of solemnisation of marriage or the last matrimonial home—two of the tests given in the section—may not turn out to be satisfactory, because both may have ceased to be of any importance to the parties, in these days of mobility of population. The place where the parties are both residing—which is the third test—is inapplicable on the facts. For such cases, a more satisfactory test should be devised. Defects of the present Section.

Courts have found a way out. Reading sections 19 and 21 of the Hindu Marriage Act and sections 3 and 20 of the Code of Civil Procedure together, the Court (it has been held) will be justified in holding that the provisions of the Code of Civil Procedure are also applicable² to application under the Hindu Marriage Act, and the Court within whose jurisdic-

1. See also Chapter 2, for proposals of the Ministry of Law.

(a) *Hariram Dhalumal Karamchandani v. Jasoti*, A.I.R. 1963 Bom. 176.

(b) *M. Gomathi v. S. Natarajan*, (1973) 1 M.L.J. 246.

tion the defendant is residing will have jurisdiction. However, it is desirable to make the section comprehensive.

8.3. In the second place, the word "together" is to be read only with the words "last resided"¹, and that should be made clear. There are also a few other points, which we shall explain in due course².

8.4. We are, therefore, recommending a redraft³ of the section. The following explanatory comments may be useful for understanding the salient points of the revised section.

The following comments explain each head of jurisdiction under the new section:

Clause (a)—See s. 19, H. M. A. and s. 31(1) S. M. A.

Clause (b)—This head of jurisdiction is not found (in that form) either in the Hindu Marriage Act or in the Special Marriage Act. It follows the principle behind section 20 of the Code of Civil Procedure, 1908, under which (*inter alia*), the defendant's residence confers jurisdiction on the court. Section 29(1) of the Parsi Marriage and Divorce Act, 1936, may also be compared. The defendant cannot have any ground of complaint by reason of this head of jurisdiction. It will be more rational than the present head of jurisdiction relating to the place where "*the husband and the wife*" reside. There is no reason why the law should insist that *both parties* should reside at the venue.

1. Para 8.5, *infra*.

2. Para 8.4, *infra*.

3. Para 8.9, *infra*.

8.5. It may be noted that the words "together" (in section 3, Divorce Act),¹ do not go with the words "husband and wife reside", and the same would be the position under the Hindu Marriage Act. Hence, the present formula cannot be supported, even on the basis of *matrimonial home also*.

An illustration will help to explain the matter:

Where the marriage was solemnised within the jurisdiction of court 'A', and the parties last resided together in the jurisdiction of court 'B', but the husband now resides in the jurisdiction of court 'C' and the wife now resides in the jurisdiction of court 'D', the case would not be satisfactorily covered by the existing provision in the Special Marriage Act or the Hindu Marriage Act, which drives the parties to court A or court B. Such a case will be covered by proposed clause (b), which authorises the filing of a petition in the court within whose jurisdiction *the respondent* is residing. In the absence of such a provision, the parties (in the above illustration) have to go either to court A or B—even though neither of the parties is staying there now.

8.6. *Clause (c)*—This is found in section 19 of the Hindu Marriage Act and section 31(1) of the Special Marriage Act.

Where the husband and wife are *residing in the same place at the time of presentation of the petition*, *clause (b)* will apply.

8.7 and 8.8. *Clause (d)*—While *Clause (a)* to *(c)* above will meet normal situations, there may be situations which are not covered by them.

Clause (d) takes care of one of them, and is new. It is found (in a different form) in the Parsi Marriage Act.²

1. See A.I.R. 1949 All 421 (reviews case law).

2. Section 29(3), Parsi Marriage and Divorce Act, 1936

Recomm-
mendation
to amend
Section 19.

8.9. In the light of the above discussion, we recommend that section 19 of the Hindu Marriage Act should be revised as follows:—

Revised section 19, H. M. A.

“Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

- (a) the marriage was solemnized, or
- (b) the *respondent* is residing at the time of the presentation of the petition, or
- (c) *the parties to the marriage* last resided together, or
- (d) *the petitioner is residing at the time of the presentation of the petition, provided the respondent is, at that time, residing outside India, or has not been heard of for seven years by those who would naturally have heard of him if he were alive.*”

Section
20(1).

8.10. Section 20(1) of the Hindu Marriage Act provides as follows:—

“20. (1) Every petition presented under this Act shall state as distinctly as the nature of the case permits the facts on which the claim to relief is founded and shall also state that there is no collusion between the petitioner and the other party to the marriage.”

As regards the “statement” required under the latter half, decrees of nullity should be excluded.¹ We recommend accordingly.

Section
21A (New).

8.11. and 8.12. In order to avoid multiplicity of proceedings and inconvenience to parties, and also to enable one court in one proceeding to go into the

1. See discussion as to s. 23 H.M.A.

entire marital life of the parties, we recommend the insertion of the following new section in the Hindu Marriage Act.

Section 21A, (New)

“Where—

- (a) a petition under this Act has been presented to the district court having jurisdiction by a party to a marriage praying for a decree for judicial separation or for divorce on any of the grounds specified in sub-section (1) of section 10 or section 13, as the case may be, and
- (b) thereafter, another petition under this Act praying for a decree for judicial separation or of divorce has been presented by the other party to the marriage on any ground, whether in the same district court or in a different district court, in the same State or a different State.

then, subject to the provisions of sub-section (2),—

- (i) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court;
- (ii) if the petitions are presented to different district courts, both the petitions shall be tried and heard together by the district court in which the petition praying for a decree for judicial separation or of divorce was presented earlier; and, for this purpose, the court competent under the Code of Civil procedure, 1908, to transfer, to the district court in which the petition presented earlier is pending, the petition presented later, shall exercise its power so to transfer the petition.”

8.13. The need for amending the Hindu Marriage Act and eliminating unnecessary and long waiting periods laid down in respect of judicial separation and ^{Section 21B (New)}

subsequent divorce has been emphasised by a Member of Parliament, who has stated¹—

“I know personally many young men and women, specially women, whose lives have been ruined because of the law’s proverbially long delays.”

8.14. Similar views have been expressed in suggestions made by private individuals.

8.15. We are of the view that in order to expedite the proceedings, the following provisions are required (compare the provision in the election law).²

- (i) A petition should be disposed of within six months of service of notice.
- (ii) An appeal should be disposed of within three months of service of notice.

8.16. The following new section is, accordingly, recommended for insertion in the Hindu Marriage Act:—

“21B. (1) The trial of a petition under this Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.

(2) Every such petition shall be tried as expeditiously as possible, and endeavour shall be made to conclude the trial within six months from the date on which notice of the petition is served.

(3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date on which notice of the appeal is served.

1. Suggestion dated 19th December, 1970 from Shri Madhu Limaye, M.P.—Legislative Department file No. 14(4)68-Leg. 2.

2. cf. section 86(6) and (7), Representation of the People Act 1951.

8.16A. There is one other matter in respect of which a provision can be usefully borrowed from the election law. The Representation of the People Act has the following provision¹ as to documentary evidence:—

“93. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence at the trial of an election petition on the ground that it is not duly stamped or registered.”

Since, in matrimonial proceedings, the court is required to play a role different from that in the trial of an ordinary civil suit, such a provision would be useful in the Hindu Marriage Act; it would facilitate substantial justice being done between the parties by ascertainment of the truth.

8.16B. We, therefore, recommend that the following new section should be inserted in the Hindu Marriage Act:—

“21C. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence at the trial of a petition under this Act on the ground that it is not duly stamped or registered.”

8.17. We now note a suggestion made to us to insert a new provision empowering the court to issue an injunction to prevent the removal of a child pending disposal of the petition. In England, at any time after filing a petition for divorce, and notwithstanding that³ the petition has not been served, the petitioner may apply *ex parte* to a Judge for an injunction restraining the respondent or any other person from

1. Section 93, Representation of the People Act, 1951.

2. See para 1.21, *Supra*.

3. Divorce Rules : Rule 55; Rayden on Divorce (1967) page 1605.

removing any child of the family (i) out of the jurisdiction of the court, or (ii) out of the custody, care or control of any person named in the application¹.

8.18. The application is to be made in open court. If an injunction is issued, restraining any person from removing a child out of the jurisdiction of the court, notice should be given to the Passport Office that a passport should not, without leave of the court, be issued in respect of that child².

Suggestion
not accept-
ed.

Some such provision, it was suggested, would be useful in our Act.

8.19. We have considered the matter, but do not see the need for a specific provision. We would leave this matter to the inherent powers of the Court. We think that Court has an inherent power to pass such order.

Section 22

8.20. Holding proceedings *in camera* and publication of such proceedings are matters governed by section 22. We think that the holding of proceedings *in camera* should be obligatory *in all matrimonial cases*, whether or not the parties so desire or the court thinks it fit.

We are also of the view that the publication of such proceedings should be prohibited, and permission for publication should be granted only in respect of judgment of High Courts.

Recom-
mendation.

8.21. We, therefore, recommend that section 22 should be revised as follows:

“22. (1) Every proceeding under this Act shall be conducted *in camera*,.....and it shall not be lawful for any person to print or publish any matter in relation to any such

1. (a) *Fabbri v. Fabbri*, (1962) 1 All E.R. 35; (1962) 1 W.L.R. 13;

(b) *Romilly v. Romilly*, (1962) Times, May 26th; for later proceedings, see (1962) Times, July 31st; (1964) Probate 22; (1963) 3 W.L.R. 732; Rayden on Divorce(1967) page 707.

2. Practice Note (1963) 3 All E.R. 96 (Direction No. 24).

"proceeding, except a judgement of the High Court printed or published with the previous permission of the Court.

- (2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees."

8.21A. We have already recommended that¹ an express exception removing the bar under section 23(1)(a) of the Hindu Marriage Act, should be made where a marriage is sought to be avoided on the ground of unsoundness of mind. Section 23(1)(a)

8.22. Section 23(1)(c) of the Hindu Marriage Act provides that the court shall decree relief under the Act only if it is satisfied that "the petition is not presented or prosecuted in collusion with the respondent." It is difficult to understand the applicability of this provision in relation to a proceeding for setting aside a void marriage under section 11, under which a marriage can be set aside on the ground of polygamy, prohibited degrees, or *sapinda* relationship. No matrimonial offence is involved here, and the only questions of fact to be decided are questions concerning the subsistence of a prior marriage or the existence of the prohibited relationship. At the most, it can be said that parties who wish to avoid their marriage may invent some set of facts to mislead the court that such prior marriage or prohibited relationship existed. This is very unlikely. On the other hand, where the parties discover that they are related within the prohibited degrees, they would often like to act in cooperation with each other, rather than in opposition to each other. It may be noted that in England², it was expressly provided that "collusion shall not be a bar to the granting of a decree of nullity whether the marriage took place, or the proceedings were instituted, before or after the commencement of this Act."

1. Para 3.15 *Supra*.

2. Section 6(1). Nullity of Marriage Act, 1971. (Eng.).

We are of the view that a similar provision (as to nullity) should be incorporated, and recommend that section 23(1) should be amended accordingly.

Section
23(2)—
Recommendation.

8.23. Under section 23(2), before proceeding to grant any relief under this Act, it is the duty of the court to make every endeavour to bring about reconciliation, in every case where it is possible to do so "consistently with the nature and circumstances of the case." From the words which we have quoted, it would appear that where relief is applied for on the ground of conduct not dependent on fault but on some other factor which is constituted by a disease or similar circumstance, an attempt at reconciliation would not be obligatory. We think that it would be appropriate to make this explicit, and, with this object, we would like to exclude, from the mandatory provision in section 23(2), cases where judicial separation or divorce is applied for on the grounds mentioned in section 13(1), clauses (ii) to (vii) of the Act. We recommend accordingly.

Section
23(3) (new).

8.24. While section 23, sub-section (2), imposes a duty on the court to effect reconciliation, it is silent about the machinery for doing so. It is desirable that for the purpose of aiding the court in bringing about such reconciliation, the court, (if it thinks it just) should have power to refer the matter to any person (named by the parties in this behalf or nominated by the court, if the parties fail to name any person). Such person could report to the court as to whether a reconciliation can be, and has been, effected.

The following sub-section should be added in section 23 to achieve this object :

"(3) For the purpose of aiding the court in bringing about such reconciliation, the court may, if the parties so desire or if the court thinks it just and proper so to do, adjourn the proceeding for a reasonable period not exceeding fifteen days and refer the matter to any person named by the parties in this behalf or to any person nominated by the court if the parties fail to name any person,

with directions to report to the court as to whether a reconciliation can be and has been, effected, and the court shall, in disposing of the proceeding, have due regard to the report."

8.25. Section 25(1) of the Hindu Marriage Act reads thus : Section 25(1).

"25. (1) Any court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, on application made to it for the purpose by either the wife or the husband, as the case may be, order that the respondent shall, *while the applicant remains unmarried*, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant and the conduct of the parties, it may seem to the court to be just, and any such payment may be secured, if necessary, by a charge on the immovable property of the respondent."

8.26. This sub-section raises several questions. In the first place, the condition that the applicant must "remain unmarried" is not intelligible in the case of a decree of judicial separation or a decree of restitution, because the parties to such a decree remain "married".

The Special Marriage Act has a provision for maintenance¹, but it does not contain the above condition.

8.27. The above condition should, therefore be removed from sub-section (1) of section 25. The court has to revoke the order on re-marriage² under section 25(3), and that is enough. Recommendation to remove the condition regarding remarriage.

1. Section 37(1), S.M.A.

2. See para 8.29, *infra*.

Recommendation
to add
"circum-
stances"
in section
25(1).

8.28. We also recommend that the word "circumstances" should be added in sub-section (1), of section 25 where it enumerates the considerations to be borne in mind while deciding alimony. The considerations to which the court is to have regard (as at present enumerated) are pecuniary (income and property) or moral (conduct), but there may be other circumstances, e.g., the health of the party applying for maintenance, or his or her age. This is, perhaps, implicit, but can be made explicit by amending section 25(1).

8.29. There are two circumstances in which a court is bound to rescind its order for permanent alimony and maintenance under sub-section (3) of section 25. The first is where the party in whose favour the order is passed remarries, and the second is, where the party does not remain chaste. The first case presents no difficulty, but the second case does. The difficulty arises in this way. Unchastity leads to cancellation of the order, if the unchastity *is subsequent* to the decree. Therefore, unchastity *before the decree* has, in some cases¹, been construed as disentitling the wife to any maintenance under section 25. Thus, indirectly, the mandatory provision as to subsequent unchastity reflects on maintenance to a party being allowed at all, where the party had been unchaste before the decree.

8.30. Now, it may be noted that such a harsh view is consistent neither with modern attitudes, nor with ancient doctrine². The Divorce Act³ contains no such limitation.

8.31. A decision of the Court of Appeal in England—*Clear v. Clear*⁴,—is sometimes cited to support the view that an adulterous wife is denied maintenance. That decision, however, takes no such extreme

1. *Rajagopalan v. Rajamma*, (1966) Kerala Law Times 891, A.I.R. 1967 Ker 181 (Vaidyalingham J.), cited with agreement in *Sardar Lal v. Vishni*, A.I.R. 1970 J. & K. 150.

2. For the Hindu Law, see *Amar Kanta v. Soyona*, A.I.R. 1960 Cal. 438.

3. Section 37, Indian Divorce Act, 1869.

4. *Clear v. Clear* (1958) 2 All. E. R. 353, 357, 358(C. A.).

view. In fact, the discussion in the judgment makes it very clear that, (i) the matter is within the discretion of the Court; (ii) the discretion is exercised on a variety of factors; and (iii) the *conduct* of the parties is one of them. The case law referred to in that very judgment brings out the wide discretion of the court.

8.32. Subsequent English cases do not take a substantially different view¹. In *Iverson's case*², Lately J. made it abundantly clear. He said :—

“In practice, a wife’s adultery may or may not disqualify her from succeeding in her application for maintenance and may or may not reduce the amount allotted. At one end of the scale her adultery may indeed disqualify her altogether. It may do so, for example, where it broke up the marriage, where it is continuing and where she is being supported by her paramour. At the other end of the scale, her adultery will not disqualify her and may have little, if any, influence on the amount. Where (as in this case) a wife, after doing all she can to persuade her deserting husband to return to her and their children, in her loneliness lapses and commits two isolated acts of adultery, I cannot believe that Parliament intended the court in weighing ‘the conduct of the parties’ to adjudge that such a wife should receive no maintenance or indeed that her maintenance should be reduced substantially, if at all. I know of no support for such a proposition in the reported cases.”

In *Spence v. Spence*³, a contention that by her subsequent adultery the wife forfeited right to maintenance was rejected.

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1. (a) *Iverson v. Iverson*, (1966) 1 All E.R. 258; (1966) 2 W.L.R. 1168, 1171B (Lately J.);
 - (b) *Courtney v. Courtney*, (1966) 1 All E.R. 53; (1966) 2 W.L.R. 524;
 - (c) *Miller v. Miller*, (1961) Probate 1; (1960) 3 All E.R. 115;
 - (d) *Medlicott v. Medlicott*, (1962) 1 All E.R. 449; (1962) 1 W.L.R. 136, C.A. (Adultery by wife after decree);
 - (e) *M.V.M.*, (1962) 2 All E.R. 895; (1962) 1 W.L.R. 845.
2. *Iverson v. Iverson*, (1966) 1 All E.R. 258.
 3. *Spence v. Spence*, v. (1964) 3 All E.R. 61.

Recommendation regarding section 25(3).

8.33. Apart from this, it appears to us that the ends of justice would be sufficiently met if the court is given a discretion, instead of being burdened *with a duty*, to cancel the order for maintenance in case of subsequent unchastity; and we recommend that subsection (3) of section 25 should be amended on the above lines. It may be noted that such an amendment will override the view taken by some of the High Courts¹ that a woman once divorced on the ground of proved unchastity should be "left to the resources of her own immorality and should be refused the lawful means of support by passing a decree for maintenance in her favour."

Section 27A (New)—Property presented by parents of other party.

8.34. It has been stated² that blackmail often plays its ugly part in litigation for matrimonial relief. It has been suggested that if it is laid down that whatever is given by the wife's parents to the parties should go to the wife, and *vice versa*, it will put an end of blackmail in many cases.

Apart from this aspect of blackmail, it appears to us that where the marriage comes to an end (or other relief is granted under the Act) shortly after the solemnization of the marriage, justice requires that the court should have power to direct return of the property presented by the wife's parents to the husband or by the husband's parents to the wife.

Broadly stated, our proposal, therefore, is this. If the proceeding under this Act is instituted within six months of the solemnization of the marriage, the court should have power, if it considers it necessary to do so in the circumstances of the case, to make such provision in the decree as it deems just and proper with respect to any property presented at or about the time of marriage to either party by the parent of the other party.

1. *Sardari Lal v. Vishani*, A.I.R. 1970 Jammu & Kashmir 150, 152, agreeing with *Sachindra v. Bandmali*, A.I.R. 1960 Cal. 438.

2. Suggestion of Shri Vayallar Ravi, M.P., in Legis. Deptt. Diary No. D. 1547/73-Leg. II dated 20-10-73.

For this purpose, "parent" will include a person standing in the relationship of a parent, where the parents are dead or out of India. "Property" should not include articles which the court regards as of trifling value.

8.35. We, therefore, recommend that the following section should be inserted in the Hindu Marriage Act, for this purpose:— Recom-
mendation.

"27A. In any proceeding under this Act instituted within six months of the solemnization of the marriage, the court may, if it considers it necessary to do so in the circumstances of the case, make such provisions in the decree as it deems just and proper with respect to any property presented at or about the time of marriage to either party by a parent of the other party.

Explanation.—In this section,—

- (i) "parent" includes a person standing in the relationship of parent, where the parents are dead or out of India ;
- (ii) "property" does not include articles which the court regards as of trifling value."

8.36. Under section 28, so far as is material, "all decrees and orders made by the Court in any proceedings under this Act..... may be appealed from under any law for the time being in force : Section
28.

Provided that there shall be no appeal on the subject of cost only."

A controversy arose in the past with reference to this part of the section, the question being whether this section itself confers a right of appeal, or whether the reference to "any law for the time being in force" implies that a right of appeal must be sought in some other law. As the language of the section is not very clear on this point, and has been criticised judicially¹

1. For an analysis of orders see para 8,38, *infra*.

the matter requires examination. Almost all High Courts now take the view that the right is conferred by section 28. The case law on the subject is reviewed exhaustively in the Andhra Pradesh Full Bench decision¹ and in a recent Bombay case².

8.37. It would appear that most of the remedies conferred by the Hindu Marriage Act (to be pursued by a petition) being of a special character, it would be meaningless to expect that the right of appeal in relation to orders under the Act would be available in any other law. The Code of Civil Procedure³ could not have anticipated the subsequent passage of the Hindu Marriage Act. The narrower view would make it difficult to apply section 28. Similar language is used in the Indian Divorce Act⁴, and the uniform interpretation on that section is that Act itself creates the right of appeal⁵. The Special Marriage Act⁶, uses also similar language, and does not seem to have been interpreted differently from the provision in the Divorce Act.

At the same time, it appears to us that an omnibus right of appeal against *orders* is not necessary, and is likely to delay the proceedings. Generally speaking, an appeal against orders of an interim nature should be excluded.

Analysis
of
orders.

8.38. It may be noted that the Court is empowered to pass orders under the following sections of the Hindu Marriage Act, 1955:—

<i>Section</i>	<i>Nature of order</i>
22 (1)	Order to hold proceedings <i>in camera</i> and order with regard to printing or publishing of such proceeding.
24.	Maintenance order <i>pendente lite</i> and expenses of proceedings.

1. *Kutumbrao Vs. Sesharatnamamba*, A.I.R. 1967, Andhra Pradesh 323, 328 (Full Bench).

2. *Madhukar V Malhi* (April 1973) 75 Bom. L. R. 311 (D.B.)

3. Section 104 and Order 43, C.P.C.

4. Section 55, Indian Divorce Act, 1969.

5. *A. v. B.* (1898) I.L.R. 22 Bombay 612.

6. Section 39, Special Marriage Act, 1954.

- 25 (1) Order for permanent alimony¹ and maintenance at the time of the passing of any decree or subsequent thereto.
- 25 (2) Verification, modification, or rescission of any order made under sub-section (1).
- 25 (3) Rescission of the order in certain circumstances.
- 26 (i) *Interim* order with respect to the custody, maintenance and education of minor children ;
- (ii) provision in the decree itself for such matters ;
- (iii) the court may also revoke, suspend or vary any such orders and provisions previously made.

As can be seen from the above, the Court can pass orders which are either of a permanent or interim nature.

8.39. Our proposal is that with respect of interim orders under this Act, there should be no appeal. Interim orders are only for a period of time and could, if necessary, be reviewed by the Court. Such appeals usually lead to delay. In other words, appeals should lie only in respect of decrees and orders of a permanent nature.

Therefore, the appeal should (so far as orders are concerned) be restricted to :—

- (i) orders under section 25.
- (ii) orders under section 26 which are permanent and not interim.

8.40. In order to expedite the disposal of the litigation, we also recommend that the period of limitation for appeals under the Act should be 30 days.

8.41. Section 28 should, in so far as it relates to appeal, be revised¹ as under, in the light of the above discussion :—

“28(1). All decrees made by the court in any proceeding under this Act shall, subject to

1. Execution should be dealt with in a separate section.

the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

- (2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3) be appealable if they are not *interim* orders, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.
- (3) There shall be no appeal under this section on the subject of costs only.
- (4) Every appeal under this section shall be instituted within a period of thirty days from the date of the decree or order”.

Section 28A should be inserted as follows to deal with the enforcement of decrees and orders:—

“28A. All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced.”.

CHAPTER 9

Special Marriage Act.

9.1. In this Chapter, we shall deal with the amend-Introduc-
ments required in the provisions of the Special^{tory.}
Marriage Act, 1954, in addition to those already
dealt¹ with in connection with the proposals of the
Ministry of Law.

The Special Marriage Act, 1954, occupies a significant place in Indian statute law. While introducing the Bill in the Lok Sabha, the then Law Minister, Shri C. C. Biswas, stated :—

“It is an attempt to lay down a uniform territorial law for the whole of India².”

From this point of view, the Act is of considerable legal interest.

9.1A. The amendments which we are going to propose in this Chapter, broadly speaking, fall into one or the other of the following categories :—

- (a) amendments needed in order to introduce uniformity where necessary and reasonable between the provisions of the two Acts covering the same points. (either as they exist at present, or as they are proposed to be amended) ;
- (b) amendments needed by way of additional provisions similar to the additional provisions proposed to be inserted in the Hindu Marriage Act;
- (c) amendments needed in other provisions of the Act on the merits³.

1. Chapter 2, *supra*.

2. Lok Sabha Debates (1954), Vol. 5, Part²II, Col. 7797.

3. For example, sections 19 to 21, Special Marriage Act.

In so far as the Special Marriage Act deals with the ceremonies of marriage and connected matters, the provisions—as the very title of the Act indicates—are of a specialised character, and the question of bringing uniformity between the two Acts does not, in general, arise. Nor have any suggestions been made for amending those provisions on the merits. We have, therefore, to concentrate on provisions connected with the special consequences of the marriage and matrimonial relief.

9.1B. Section 4 of the Special Marriage Act lays down the Section 4B, conditions for solemnizing a marriage under the Act. One of the conditions, as stated in clause (b), is that “neither party is an idiot or lunatic at the time of the marriage.” We have, while discussing the corresponding provision of the Hindu Marriage Act, recommended a re-draft¹, and we recommend that section 4(b) of the Special Marriage Act should also be revised on the same lines.

Section 19,
Special
Marriage
Act.

9.2. Section 19 of the Special Marriage Act. is as follows :—

“The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jain religion shall be deemed to effect his severance from such family.”

This section corresponds to section 22 of the Special Marriage Act, 1872, which was inserted in 1923, and its principal object is to replace co-parcenary rights and other rights concerning the Hindu undivided family by a position under which the person marrying will become a divided co-parcener. The section creates a statutory severance of a person married under this Act from the joint family of which he might have been till then a member. At the time when this section originally came on the statute book (*i.e.* in 1923) special marriages were rare, and the prejudice against them supplied some cause for visiting such marriages

1. See recommendation as to section 5(ii), H.M.A.

with the *compulsory consequence* of severance from the family. It appears that in the discussion on the 1923 Amendment to the Special Marriage Act, 1872 (then in force), this section occupied a prominent place. Dr. Gour (who had sponsored the amendment Act) says¹ :—

“The orthodox members of the Select Committee had proposed this clause as a deterrent against persons resorting to such marriages. But the present writer accepted it as a happy release from a continued union in which embarrassing situation might be created by the orthodox members of his family, contesting his right in his property by survivorship or inheritance, in which case the misfortunes of the widows married under the amended Act and their children would be aggravated because of the persons marrying under the amended Act having to declare that they professed the Hindu religion, and since the *lex loci* is construed by the Privy Council in a limited sense as noted under that Act, a Hindu marrying under the Act does not stand to gain by continuing to remain a member of the co-parcenary. But so far as his own rights are concerned, he remains entitled to all those rights of inheritance to his other relations, near and remote as if he had never married under the Act.”

9.3. We have also taken note of the discussion^{Discussion} relating to the Bill which led to the present Act. The^{in the} Joint Committee, in their report, note as follows as^{Bill.} regards the provisions of this section² :—

“*Clause 19 (old clause 18).*—The Joint Committee gave very anxious consideration to this clause as that had been made the subject of attack in many of the opinions received on the ground that it penalises marriages

1. Gour, Hindu Code (1938), page 1199.

2. Joint Committee Report (on the Bill which led to the Act, of 1954), cited in Chaudhri Special Marriage act, page 65.

under this law. After careful consideration the Joint Committee have decided to retain this clause in its original form, particularly because it has the desirable effect of simplifying the law of succession. Were the clause to be omitted, the share of the joint family property of a person marrying under this law will necessarily have to devolve on the survivors, which would mean that the daughters will be left out of account. Moreover, one of the chief reasons why persons marry under this law is that in case of intestate succession, the Succession Act will apply and it would be extremely inconvenient to have different laws of succession applicable to different types of property. Severance from the joint family does not, of course, prevent the parties from reuniting if they so desire."

No deterrent regards.

9.4. We have carefully considered the matter, and we think that no "deterrent" is required against special marriages. A provision of the nature contained in section 19 is certainly not required where both the parties are Hindus, Buddhists, Sikhs or Jains.

So far as the desire to protect the position of daughters is concerned, the passing of the Hindu Succession Act removes the difficulty, because they are given the right to succeed under that Act, and, where a female is alive¹, property does not pass by survivorship, but it passes by succession. Secondly, so far as the desire to maintain one system of succession for all properties is concerned, we are not disturbing that principle, as we propose to exclude², from section 21, Special Marriage Act, marriages where both the parties are Hindus.

Scheme proposed as regards section 19.

9.5. The scheme which we have in mind is, in other words, this—

- (i) Where the persons marrying are Hindus, Buddhists, Sikhs or Jains, the marriage

1. Section 6, Hindu Succession Act, 1956.

2. Para 9,11, *infra*.

should, in no case, result in a severance of status. The law otherwise applicable—*i.e.* the Hindu law—will continue to apply, both as regards undivided property and as regards divided property.

- (ii) Where, of the persons marrying, only one—the male coparcener—is a Hindu, and the other spouse is a non-Hindu, the Indian Succession Act will continue to apply and there will be severance also.

We are also aware that besides the two situations mentioned above, there is a third situation, where neither party is a Hindu. This could arise if the person marrying *i.e.* a Hindu Coparcener, has changed his religion before marriage. In such a situation, section 19 does not, by its terms, apply. His “pre-marriage” conversion may, of course, result in severance, apart from the statutory provision in section 19.

It may be noted that the embracing of Christianity by a person effected a division of status. This was the decision of the Privy Council in *Abraham v. Abraham*¹. Here, section 19 is not of any relevance.

We are accordingly proposing a new section² to override section 19 in cases where both the parties are Hindus.

9.7. Section 20 of the Special Marriage Act runs as follows :—

Section 20
Special
Marriage
Act.

“20. Subject to the provisions of section 19, any person whose marriage is solemnized under this Act, shall have the same rights and shall be subject to the same disabilities in regard to the right of succession to any property as a person to whom the Caste Disabilities Removal Act, 1850, applies.”

1. *Abraham v. Abraham*, (1861-1863) 9 M.I.A. 195; 1 W.R. 1; 2 Sar. 10; 1 Suther 501; (P.C.).

2. See section 21A proposed. in para 9.12, *infra*

9.8. It may be stated that the Caste Disabilities etc. Act, 1850 (referred to in section 20), protects those persons who—

- (a) have renounced a religion ; or
- (b) have been excluded from the communion of any religion ; or
- (c) have been deprived of caste¹.

As regards these three categories of persons, the Act provides that “so much of any law or usage as inflicts on any person forfeiture of rights or property², or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of, any religion, or being deprived of caste, shall cease to be enforced” in any court of law.

Effect of conversion on proprietary rights.

9.9. But for the Act of 1850, conversion would affect rights to property. In a very early Madras case³, for example, the plaintiff had renounced his religion in the year 1839, and his mother sold a property in the year 1846; it was held that the plaintiff, having lost his rights by his conversion, could not sue to set aside the sale. (The 1850 Act, not having retrospective effect, was inapplicable)⁴.

The Act of 1850 abrogates the rule by which an apostate (or a person deprived of caste) lost certain rights⁵⁻⁶. The Act applies only to protect the actual person, and not his children⁷.

1. For history of the 1850 Act, see *Keery Kohitance v. Moni Ram Koleta*, (1873) 19 Southern 1 and Weekly Reports 367, 378, 400.
2. There is some controversy as to whether the correct text is “rights of property” or “rights or property”.
3. Case No. 99 of 1858 reported in Rulings of the Court of Sudder Udalt, 1858 to 1862 (August), (Madras) at page 94 referred to in *Ranganatha Mallan v. Kathyayan* (1966), Kerala L.J. 73, 75.
4. Cf. *Ranbir v. Joginder*, A.I.R. 1940, All. 134, 140.
5. *Honamma v. Timannuchal* (1877) I. L.R. 1 Bom. 559.
6. For previous Regulations see *Nowroz Ali v. Aziz Bih* (1876) 11 Punj. Record, Civil Judgment No. 124, pages 253, 255, 264, 265.
7. *Mitar Sen v. Mukbul Hassan*, A.I.R. 1930 P. C. 251, 57 IA 313 (P.C.) (Lord Atkin).

The result of reading section 20 of the Special Marriage Act, 1954 with the Caste Disabilities Removal Act, 1850 is that a person does not, by reason of his marriage under the Special Marriage Act, forfeit his existing interest in the joint family property, or lose the right of inheritance to other members of the family, whether such right arises before or after the marriage. But, the operation of section 19, (previously section 22) of the Special Marriage Act must be borne in mind. By virtue of that section, the right of survivorship is completely extinguished, and there is a compulsory severance from the other members. Even under the Special Marriage Act of 1872, it was held¹ that—survivorship is not saved by the Act of 1850, or by the Special Marriage Act. This is now more clear, because section 20 is made subject to section 19 (It was not so in the 1872 Act).

9.10. This discussion becomes necessary because we have to consider the question whether the amendment which we recommend in section 19² (so as to restrict its scope) necessitates any change in section 20. We have come to the conclusion that this in itself necessitates no such change. Section 20 is subject to the provisions of section 19, and that position will continue. Where section 19 as modified applies, there will still be a severance of status; and that special consequence of the marriage will override section 20. But so much of section 20 as creates a disability should be excluded where both are Hindus. In such cases, there is no justification for creating any *disability*. We recommend accordingly³.

9.11. Under section 21 of the Special Marriage Act (so far as is material), succession to the property of the parties marrying under the Act and to the property of the issue of such marriage shall be regulated by the Indian Succession Act, 1925, notwithstanding that under that Act (*i.e.* under the Succession Act), there

1. (a) *Girdharilal v. Fakirchand*, A.I.R. 1955 Madhya Bharat 148, 153, para 12.

(b) *Subbayya v. Rangaya*, A.I.R. 1927 Mad. 883, para 12.

2. See recommendation as to section 19.

3. See section 21A (proposed), para 9.12, *infra*.

are certain restrictions with respect to its application to members of certain communities. This section, of course, does not alter the general family structure between the person marrying under the Act and his son¹. It may, incidentally, be noted that when a person is converted, succession to him is governed by the law applicable in his religion².

In our opinion, it is desirable to exclude from the scope of this section cases where both the parties are Hindus. In such cases, the law of succession otherwise applicable should continue to apply. We see no reason why the fact that the parties choose to marry under the Special Marriage Act should make a difference in such cases *i.e.* where both are Hindus. We recommend³ that such cases should be excluded from section 21.

9.12. In the light of the above discussion⁴, we recommend that section 21A should be inserted in the Special Marriage Act as follows :—

Recom-
mendation
for insert-
ing Section
21A.

“21A. Where the marriage is solemnised under this Act of any person who professes the Hindu, Buddhist, Sikh or Jain religion with a person who professes the Hindu, Buddhist, Sikh or Jain religion, sections 19 and 21 shall not apply and so much of section 20 as creates a disability shall also not apply.”

9.13. Section 22 of the Special Marriage Act deals with the restitution of conjugal rights. Withdrawal from society without reasonable excuse furnishes the cause of action for claiming this relief. We are of the view that it would be made clear that the burden of proving reasonable excuse should be on the opposite party⁵. We recommend that section 22 should be amended accordingly.

Section 22,
Special
Marriage
Act.
(Restitu-
tion).

1. *Sridharan v. C.I.T.* A.I.R. 1970 Mad, 292, 294; (1970) 2 M.L.J. 334.

2. *Mittar Sen v. Maqbul Hasan*, A.I.R. 1930, P. C. 251.

3. See section 21A, S.M.A. (proposed).

4. Section 12, Hindu Adoptions and Maintenance Act, 1956.

5. *C.f.* recommendation as to section 9, H.M.A.

9.14. Section 24(1) of the Special Marriage Act relates to proceedings for obtaining a decree of nullity of marriage. It does not contain an express limitation that the petition can only be filed by a party to the marriage. This should be mentioned¹. Also, it should be provided² that both the parties should be alive when the petition is filed.

Section
24(1),
Special
Marriage
Act.

9.15. Section 27(1)(a) of the Special Marriage Act deals with adultery as a ground of divorce. This ground should be re-formulated on the lines³ of the corresponding ground as proposed in the Hindu Marriage Act.

Section
27(1)(a),
Special
Marriage
Act.

9.16. Under section 27(1)(b) of the Special Marriage Act, desertion is a ground of divorce. The requirement has been thus stated :—

Section
27(1)(b)
S.M.A.

“(b) [the respondent] has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition ;”

We are of the view that the period should be two years—the period which we have recommended in relation to the corresponding provision in the Hindu Marriage Act⁴, and we are also of the view that the definition of “desertion” should be adopted from the Hindu Marriage Act⁵.

Accordingly, we recommend that section 27(1)(b) should be revised so as to read—

“(b) has deserted the petitioner for a period of not less than two years immediately preceding the presentation of the petition”.

1. *C.f.* section 11, H.M.A.

2. *C.f.* recommendation as to section 11, H.M.A.

3. See recommendation as to section 13(1)(i), Hindu Marriage Act; Para 7, 32, *supra*.

4. *C.f.* recommendation as to section 13, Hindu Marriage Act, with reference to desertion.

5. Section 10(1) Explanation, H.M.A.

And the following Explanation should be inserted at the end of section 27 :—

“*Explanation.*—In this section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.”

Section
27(1)(c).

9.17. Under section 27(1)(c) of the Special Marriage Act, it is a ground of divorce that the respondent—

“(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code (Act 45 of 1860) ;

Provided that divorce shall not be granted on this ground, unless the respondent has prior to the presentation of the petition undergone at least three years’ imprisonment out of the said period of seven years”.

Imprisonment as a ground of divorce has a history. From the Byzantine civil law, the Church¹ accepted certain grounds of divorce (high treason, disappearance or desertion, and supervening impotence), and rejected insanity, leprosy, *long imprisonment*², and incompatibility. This ground has found a place in the Parsi Marriage and Divorce Act³.

We are of the view that the proviso to the clause, under which the respondent must have undergone at least three years imprisonment, is uncalled for. The proviso gives some time for reflection, but we think that that should be left to the parties. In our view,

1. Letter written by Archbishop Germanos and printed as Appendix 11 to *The Church and Marriage* (1935), pp. 55ff, as cited in *Putting Asunder* (London, S.P.C.K. 1956) page 82.

2. Emphasis supplied.

3. Section 32(f), Parsi Marriage & Divorce Act, 1936.

the proviso unreasonably delays institution of proceedings, in a case where, if the innocent party has at all any cause for seeking divorce, the waiting period serves not much useful purpose. Cases where the sentence is set aside or reduced (on appeal or otherwise) do not also justify a statutory waiting period. In practice, it is unlikely that the aggrieved party will rush to court when an appeal is pending. The proviso should, therefore, be deleted.

9.18. One of the grounds of divorce mentioned in Section 27 of the Special Marriage Act is that the respondent has "since the solemnization of the marriage treated the petitioner with cruelty." This is in clause (d).

In conformity with our recommendation as to the corresponding provision in Hindu Marriage Act, we recommend that the words "since the solemnization of the marriage" should be deleted, as unnecessary¹.

9.18A. Under Section 27(1)(e) of the Special Marriage Act, a petition for divorce can be filed on the ground that the respondent "has been incurably of unsound mind for a continuous period of not less than three years immediately preceding the presentation of the petition." In conformity with the change which we have recommended² in the corresponding provision in the Hindu Marriage Act, the minimum period for which the insanity should have continued should be removed. The clause should, therefore, read—

"(e) is incurably of unsound mind".

9.19. Section 27(1)(f) of the Special Marriage Act allows a petition for divorce to be presented on the ground that the petitioner has, for a period of not less than three years immediately preceding the presentation of the petition, been suffering from venereal disease in a communicable form, the disease not having been contracted from the petitioner. In conformity

1. Cf. discussion as to section 10 and section 2.13, Hindu Marriage Act, with reference to cruelty and insanity.

2. See discussion as to section 13, H.M.A.

with our recommendation as to the corresponding provision¹, in the Hindu Marriage Act, we recommend that from section 27(1)(f) of the Special Marriage Act, (i) the period should be removed, and (ii) the requirement that the disease should not have been contracted from the petitioner, should also be removed.

Section
27(1)(g).

9.20. Under section 27(1)(g) of the Special Marriage Act leprosy is a ground of divorce if the respondent "has for a period of not less than three years immediately preceding the presentation of the petition has been suffering from leprosy, the disease not having been contracted from the petitioner.

In conformity with our recommendation as to² the corresponding provision in the Hindu Marriage Act, we recommend that the period should be removed. The clause should, therefore, be revised so as to read as follows:—

"has been suffering from leprosy, the disease not having been contracted from the petitioner; or"

Section 27,
Recommendation
to and
new
ground.

9.21. Non-resumption of cohabitation after an order for maintenance should be added as a ground for divorce (by the wife) in section 27 of the Special Marriage Act, on the lines of the corresponding provision recommended³ in the Hindu Marriage Act. We recommend accordingly.

Section
27A
(New).

9.22. On the lines of the new section which we propose in the Hindu Marriage Act⁴, a new section should be inserted as follows, in the Special Marriage Act also:—

"in any proceeding on a petition for a decree of divorce except where the petition is found on the ground mentioned in clause

1. See discussion as to section 13, Hindu Marriage Act, with reference to venereal disease.

2. See recommendation as to section 13, Hindu Marriage act, with reference to leprosy.

3. *cf.* discussion as to section 13(2), Hindu Marriage Act.

4. *cf.* section 13A, proposed to be inserted in Hindu Marriage Act.

“(h) of sub-section (1) of section 27, the Court, may, if it considers it just to do so having regard to the circumstances of the case, pass instead a decree for judicial separation.”

9.23. Section 29 of the Special Marriage Act, (relating to the remarriage of divorced persons) should be deleted, as we have already¹ recommended. ^{Section 29.}

9.24. Section 30 of the Special Marriage Act deals with remarriage after divorce. As already recommended,² in this section the period of one year should be deleted. ^{Section 30.}

9.25. Section 31(1) of the Special Marriage Act deals with venue, and should be revised on the lines of the corresponding provision³ in the Hindu Marriage Act, as proposed to be revised. ^{Section 31(1).}

9.26. Section 33 of the Special Marriage Act relates to proceedings being held *in camera*. It should be brought into line with the corresponding provision in the Hindu Marriage Act, as amended in accordance with our recommendation.⁴ ^{Section 33.}

9.26A. Section 34(1)(b) of the Special Marriage Act refers to ‘adultery’. As we have recommended a re-formulation of this ground of divorce,⁵ the relevant words in section 34(1)(b) should also be suitably amended. ^{Section 34(1)(b), S.M.A.}

9.27. Section 34(2) of the Special Marriage Act, dealing with reconciliation, should be brought into line with the recommendation made by us as to the corresponding provision⁶ in the Hindu Marriage Act. Also, a new sub-section should be inserted, to empower the court to seek the help of a third party in ^{Section 34(2) and section 34(3).}

1. Para 2.46(d).

2. Para 2.46(e).

3. See recommendation as to section 19, H.M.A.

4. See recommendation as to section 22, H.M.A.

5. See recommendation as to section 27(1)(a), S.M.A., Para 9.15, *supra*.

6. See recommendation as to section 23(2), Hindu Marriage Act.

its endeavour at reconciliation, on the lines of the new sub-section, proposed¹ in the corresponding provision in the Hindu Marriage Act.

Section
35.

9.28. Section 35 of the Special Marriage Act (relief to the respondent), should be re-drafted on the lines of the new provision² on the same subject which we have recommended in the Hindu Marriage Act.

Section
37(3).

9.29. Section 37(3) of the Special Marriage Act provides as follows:—

“(3) If the district court is satisfied that the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life, it shall rescind the order.”

This sub-section should be revised so as to substitute a discretion in case of unchastity. In this connection, our recommendation as to the corresponding provision³ in the Hindu Marriage Act may be seen.

In section 37(1) “circumstances” should be added.⁴

Section 39.

9.30. Section 39 of the Special Marriage Act, reads:—

“All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the law for the time being in force:

Provided that every such appeal shall be instituted within a period of ninety days from the date of the decree or order.”

1. See recommendation as to section 23(3)(New), Hindu Marriage Act.

2. Section 23A, H.M.A. (proposed).

3. See recommendation as to section 25(3), Hindu Marriage Act.

4. *cf.* section 25(1), Hindu Marriage Act as proposed.

This provision is in *Pari materia* with section 28 of the Hindu Marriage Act. The words in the Hindu Marriage Act are "may be appealed from under any law for the time being in force". In the Special Marriage Act, the word used is 'the' instead of 'any'. But there is no substantial difference in the language of the two provisions.¹

Under the Hindu Marriage Act², an appeal lies against an interim order passed under section 24 of the Act, and similarly, it has been held³ that an appeal lies against an interim order under section 36, Special Marriage Act. The language of the section is, thus, defective, inasmuch the same controversy could arise under this section as has arisen under the corresponding section in the Hindu Marriage Act. It should, therefore, be revised on the lines of the section in the Hindu Marriage Act, as proposed to be amended⁴.

9.31. The section in the Special Marriage Act does not exclude appeal on the point of costs.—a limitation which is found in the Hindu Marriage Act⁵, and which should be incorporated in the Special Marriage Act also.

9.32. The section in the Special Marriage Act has a proviso laying down a period of limitation of ninety days. This should be reduced to 30 days⁶.

9.33. We, therefore, recommend that section 39 of the Special Marriage Act should, in so far as it relates to appeal, be revised as follows:— Recom-
mendation,

"39(1)⁷ All decrees made by the court in any proceeding under this Act shall subject to

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1. See *Maharaj Singh v. Uma Singh*, A.I.R. 1169 All. 603, 604
 2. *Smt. Sarla Devi v. Sri Balwan Singh*, A.I.R. 1969 All 601.
 3. *Maharaj Singh v. Uma Singh*, A.I.R. 1969 ZAll. 603, 604.
 4. See discussion as to section 28, Hindu Marriage Act.
 5. Section 28, H.M.A.
 6. See discussion as to section 28, Hindu Marriage Act.
 7. Execution should be dealt with in separate section.

the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

- “(2) Orders made by the court in any proceeding under this Act under section 37 or section 38 shall, subject to the provisions of sub-section (2), be appealable if they are not interim orders, and such, appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.
- (3) There shall be no appeal under this section on the subject of costs only.
- (4) Every appeal under this section shall be instituted within a period of thirty days from the date of the decree or order.”

Section
40A
(new)
Special
Marriage
Act.

9.34. A new section to the effect that petitions between same parties shall be tried together should be inserted in the Special Marriage Act, on the lines of the corresponding provisions¹ recommended in the Hindu Marriage Act.

Section
40B
(new)
Special
Marriage
Act.

9.35. On the lines of our recommendation as to Hindu Marriage Act a new section should be inserted in the Special Marriage Act to provide that—

- (i) petitions under the Act should be disposed of within 6 months, and
- (ii) appeals should be disposed of within 3 months on the lines of the corresponding provisions proposed to be inserted in the Hindu Marriage Act².

1. cf. section 21A, H.M.A. (proposed).

2. See section 21B, proposed to be inserted in the Hindu Marriage Act.

9.36. A new section as to documentary evidence Section should be inserted in the Special Marriage Act, on ^{40C} (Docu- the lines of the corresponding provision proposed in mentary evidence), the Hindu Marriage Act¹.

1. cf. section 21-C, H.M.A. (as proposed).

CHAPTER 10
SUMMARY OF RECOMMENDATIONS AND
CONCLUSIONS

Our recommendations and conclusions are summarised below:—

HINDU MARRIAGE ACT, 1955

- Section 5(ii), H.M.A. Section 5(ii), H.M.A. relating to lunacy or idiocy at the time of marriage, should be amplified and revised as recommended¹.
- Section 5(iii) and 5(vi), H.M.A. The suggestion made with reference to section 5(iii) and 5(vi) of the Hindu Marriage Act that the breach of the condition as to minimum age under the Hindu Marriage Act should render the marriage voidable, is not accepted².
- Section 9(1), H.M.A. With reference to section 9(1), Hindu Marriage Act the burden of proof of reasonable excuse for the withdrawal of society should be on the respondent to a petition for restitution of conjugal rights³.
- Section 9(2), H.M.A. Section 9(2), Hindu Marriage Act which restricts the defences to a petition for restitution of conjugal rights, should be deleted⁴.
- Cruelty *simpliciter* should be a ground for judicial separation, under the Hindu Marriage Act⁵.
- Section 10(1)(d), H.M.A. (Judicial separation—venereal disease). See below, under section 13(i)(v), Hindu Marriage Act.

-
1. Para 3.19.
 2. Para 3.23.
 3. Para 4.12.
 4. Para 4.9
 5. Para 2.2.

Section 10(1) should be revised, so as to refer Section 10(1) to section 13(1)¹.

- (i) The proposal to remove the words "on the petition of either party" from section 11, Hindu Marriage Act, is not approved². Section 11, H.M.A.
- (ii) It may be expressly provided that after the death of a party, a petition under section 11, Hindu Marriage Act, cannot be filed³.

The condition as to imoptence in section 12(1) (a) of the Hindu Marriage Act, should be re-drafted, so as to lay down that the marriage has not been consummated owing to the impotence of the respondent⁴. Section 12(1)(a), H.M.A.

In place of the word "fraud" in section 12(1)(c), Hindu Marriage Act, the words "or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent", should be substituted⁵. section 12(1)(c), H.M.A.

The suggestion that pre-marital pregnancy should be made a ground of divorce by the innocent wife of the guilty husband who had intercourse (leading to such pregnancy) with another woman, is not accepted⁶. section 12(1)(d), H.M.A.

In section 12(2) (b) (iii), of the Hindu Marriage Act, for the words— section 12(2)(b) (iii), H.M.A.

"the ground of the decree" the words "said ground" may be substituted⁷.

1. Para 5.2.
2. Para 2.7.
3. Para 6.2.
4. Para 6.3.
5. Para 6.20.
6. Para 6.7.
7. Para 2.7A.

Section 13(1)(i), H.M.A. Section 13(1)(i), Hindu Marriage Act (living in adultery as a ground of divorce) should be revised so as to read as follows:—

“(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse¹”.

Section 13(1)(iii), H.M.A. (Unsoundness of mind as a ground of divorce). The minimum period of three years, imposed on the right to seek divorce, should be done away with in section 13(1)(iii), Hindu Marriage Act².

Section 13(1)(v), H.M.A. (Venereal disease as a ground of divorce). The proposal to add a restriction that the venereal disease was not contracted from the petitioner, is not accepted. In section 10(1)(d)—(Judicial separation) also, this restriction should be removed³.

Section 13(1), H.M.A. The fact that the respondent has treated the petitioner with cruelty should be a ground for divorce, in the Hindu Marriage Act⁴.

Section 13(1), H.M.A. (i) In section 13(1), Hindu Marriage Act a new clause should be added as follows:—

“has deserted the petitioner for a period not less than two years immediately preceding the presentation of the petition, or”

(ii) The following Explanation should be inserted at the end of section 13(1) of the Hindu Marriage Act.

“*Explanation.*—In this section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage,

1. Para 7.12.
2. Para 7.13.
3. Para 2.10.
4. Para 2.17.

“and its gramatical variations and cognate expressions shall be construed accordingly¹”.

The suggestion to add, as a ground of divorce under the Hindu Marriage Act, wilful refusal to consummate a marriage, is not accepted².

In section 13(1A), Hindu Marriage Act, the Section 13(1A), period should be reduced from two years to one H.M.A. year³.

In section 13(2), Hindu Marriage Act, provision Section 13(2), for divorce at the instance of the wife after obtaining H.M.A. a decree or order for maintenance should be inserted on the lines recommended⁴.

A new section should be inserted in the Hindu Section 13A, Marriage Act to empower the court, in any proceed- H.M.A. ing on a petition for a decree of divorce, to pass instead a decree for judicial separation; in certain cases⁵.

Section 14, Hindu Marriage Act should be delet- Section 14, ed⁶. H.M.A. (Bar against divorce within first three years of marriage).

The proviso to s. 15, Hindu Marriage Act should Section 15, be deleted⁷. H.M.A. (Prohibition against re-marriage within one year).

1. Para 7.16.
2. Para 7.22 and 7.23.
3. Para 2.18.
4. Para 2.29.
5. Para 7.24 and 7.25.
6. Para 2.31
7. Para 2.32.

Section 16, H.M.A. (Legitimacy of children). Section 16, Hindu Marriage Act, may be re-cast as recommended¹.

Section 19, H.M.A. Section 19, Hindu Marriage Act should be revised as under:—

“Every petition under this Act shall be presented to the district court within the local limits of whose ordinary original civil jurisdiction—

- (a) the marriage was solemnized, or
- (b) the respondent is residing at the time of the presentation of the petition, or
- (c) the parties to the marriage last resided together, or
- (d) the petitioner is residing at the time of the presentation of the petition, provided the respondent is, at that time, residing outside India, or has not been heard of for seven years by those who would naturally have heard of him, if he were alive².”

Section 21A (New) H.M.A. In order to avoid multiplicity of proceedings and inconvenience to parties, and also to enable one court in one proceeding to go into the entire marital life of the parties, the insertion of the following new section in the Hindu Marriage Act is recommended³.

Section 21A (New)

Where—

(a) a petition under this Act has been presented to the district court having jurisdiction by a party to a marriage praying for a decree for judicial separation or of divorce on any of the grounds specified in sub-section (1) of section 10 or sub-section (1) of section 13, as the case may be, and

1. Para 2.42.
2. Para 8.9
3. Para 8.12.

(b) thereafter, another petition under this Act praying for a decree for judicial separation or of divorce has been presented by the other party to the marriage on any ground, whether in the same district court or in a different district court in the same or a different State, then subject to the provisions of sub-section (2),—

- (i) if the petitions are presented to the same district court, both the petitions shall be tried and heard together by that district court ;
- (ii) if the petitions are presented to different district courts, both the petitions shall be tried and heard together by the district court in which the petition praying for a decree for judicial separation or of divorce was presented earlier; and, for this purpose, the court competent under the Code of Civil Procedure, 1908, to transfer to the district court in which the petition presented earlier is pending, the petition presented later, shall exercise its power so to transfer the petition”.

The following new section should be inserted in the Hindu Marriage Act: Section
21B,
H.M.A.
(New).

- “21B (1). The trial of a petition under the Act shall, so far as is practicable consistently with the interests of justice in respect of the trial, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded.
- (2) Every such petition shall be tried as expeditiously as possible and endeavour shall be made to conclude the trial within six months from the date on which the notice of the petition is served on the respondent.

- (3) Every appeal under this Act shall be heard as expeditiously as possible, and endeavour shall be made to conclude the hearing within three months from the date on which the notice of the appeal is served on the respondent.”¹

Section
21-C,
H.M.A.
(New)

The following new section should be inserted in the Hindu Marriage Act²:

“21C. Notwithstanding anything in any enactment to the contrary, no document shall be inadmissible in evidence at the trial of a petition under this Act on the ground that it is not duly stamped or registered”.

Suggestion
as to
power to
issue in-
junction.

The suggestion to insert a new section authorising the court to issue an injunction to prevent the removal of a child from India is not accepted.³

Section
22, H.M.A.

Section 22 of the Hindu Marriage Act should be revised as follows:—

“22. (1) Every proceeding under this Act shall be conducted in *camera*.....and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding, except a judgement of the High Court printed or published with the previous permission of the court.

(2) If any person prints or publishes any matter in contravention of the provisions contained in sub-section (1), he shall be punishable with fine which may extend to one thousand rupees.”⁴

Section
23(1)(a),
H.M.A.

In regard to s. 23(1)(a), Hindu Marriage Act, an express exception removing the bar under s. 23(1)(a) should be made where a marriage is sought to be avoided on the ground of unsoundness of mind.⁵

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1. Para 8.16.
 2. Para 8.16B.
 3. Para 8.19.
 4. Para 8.21.
 5. Para 3.15 and 8.21A.

In regard to s. 23(1)(c), Hindu Marriage Act, Section 23(1)(c), collusion should not be a bar in a petitions for nullity under the Hindu Marriage Act.¹ H.M.A.

From the mandatory provision, (for reconciliation) in section 23(2), Hindu Marriage Act cases where judicial separation or divorce is applied for on the grounds mentioned in section 13(1), clauses (ii) to (vii) of the Act, should be excluded.² Section 23(2), H.M.A.

A sub-section should be added in section 23, Hindu Marriage Act empowering the court to seek the help of a third party in its endeavours at reconciliation.³ Section 23(3), (New), H.M.A.

Provision for counter claim should be inserted in the Hindu Marriage Act, as recommended.⁴ Section 23(A), (New), H.M.A.

Section 25(1)—The condition about the party remaining unmarried is inappropriate in regard to proceedings for judicial separation and restitution. It should be totally removed.⁵ Section 25(1), and 25(3), H.M.A.

The word "circumstances" should be added.⁶

Section 25(3)—A discretion to the court should be substituted in place of the present duty to cancel the order of maintenance in case of subsequent unchastity.⁷

The following new section should be inserted in the Hindu Marriage Act.⁸ Section 27A, (New), H.M.A.

"27A. In any proceeding under this Act, instituted within six months of the solemnization of the marriage, the court may, if it

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1. Para 8.22.
 2. Para 8.23.
 3. Para 8.24.
 4. Para 8.45.
 5. Para 8.27.
 6. Para 8.28.
 7. Para 8.33.
 8. Para 8.35.

considers it necessary to do so in the circumstances of the case, make such provision in the decree as it deems just and proper with respect to any property presented at or about the time of marriage to either party by a parent of the other party.

Explanation.—In this section,—

- (i) “parent” includes a person standing in the relationship of a parent, where the parents are dead or out of India;
- (ii) “property” does not include articles which the court regards as of trifling value.

Section 28, H.M.A. Section 28 of the Hindu Marriage Act should, in so far as it relates to appeal, be revised¹ as under, in the light of the above discussion²:—

“28. (1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (2), be appealable if they *not interim orders*, and such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in the exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be instituted within a period of thirty days from the date of the decree or order”.

1. Execution should be dealt with in separate section.

2. Para 8.41.

Section 28A should be inserted as follows in the Hindu Marriage Act to deal with the enforcement of decrees and orders¹.

28A. "28A. All decrees and orders made by the court in any proceeding under this Act shall be enforced in the like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction for the time being are enforced."

SPECIAL MARRIAGE ACT, 1954

The definition of "district court" in the Special Marriage Act may be revised on the lines of the corresponding definition in the Hindu Marriage Act².

Section 4(b) of the Special Marriage Act should be revised on the same lines as s. 6 (ii), Hindu Marriage Act³.

As to sections 19, 20 and 21, S.M.A. an exception should be made by inserting s. 21A as recommended to exclude marriages where both parties are Hindus etc.⁴.

The burden of proving reasonable excuse for withdrawal from society should be on the respondent to a petition for restitution under section 22, Special Marriage Act⁵.

Section 24(1) of the Special Marriage Act, which relates to proceedings for obtaining a decree of nullity in respect of void marriages, should be confined to cases where either party makes such a petition, and both are living⁶.

Section 26, Special Marriage Act (Legitimacy of children) should be revised on the lines of the corresponding section—section 16, Hindu Marriage Act,—as recommended to be revised in this Report⁷.

1. Para 8.41.
2. Para 2.46(a)
3. Para 9.1B.
4. Para 9.2 to 9.12.
5. Para 9.13.
6. Para 9.14.
7. Para 2.46 (b).

Section 27(1)(a), S.M.A. (adultery). The clause regarding adultery as a ground of divorce—section 27(1)(a)—should be re-formulated in terms of the clause regarding adultery in section 13(1) of the Hindu Marriage Act, as recommended to be revised¹.

Section 27(1)(b), S.M.A. (Desertion). In regard to desertion as a ground of divorce under the S.M.A., the period should be reduced from 3 years to 2 years, and “desertion” should be defined as in s. 10(1) Explanation, Hindu Marriage Act².

Section 27(1)(c), S.M.A. The proviso to s. 27(1)(c), Special Marriage Act, requiring that imprisonment for at least 3 years should have been undergone, should be deleted³.

Section 27(1)(d), S.M.A. The words “since the solemnization of the marriage” should be removed from s. 27(1)(d), Special Marriage Act which deals with cruelty as a ground of divorce⁴.

Section 27(1)(e), S.M.A. In section 27(1)(e) of the Special Marriage Act, the requirement of minimum period for which the unsoundness of mind should have lasted, should be deleted⁵.

Section 27(1)(f), S.M.A.—Venereal Disease. In section 27(1)(f), Special Marriage Act, the period should be removed, as also the requirement that the disease should not have been contracted from the petitioner⁶.

Section 27(1)(g), S.M.A. (Leprosy). The period should be removed from s. 27(1)(g) of the Special Marriage Act⁷.

Section 27, S.M.A. (New ground to be added). Non-resumption of cohabitation after a decree or an order for separate maintenance should be added as a ground of divorce in the Special Marriage Act.

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1. Para 9.15B.
 2. Para 9.16.
 3. Para 9.17.
 4. Para 9.18.
 5. Para 9.18A.
 6. Para 9.19 .
 7. Para 9.20.

on the lines s. 13(2), Hindu Marriage Act as recommended to be revised in this Report. The ground should be available only to the wife¹.

A new section should be inserted in the Special Marriage Act for empowering the Court to grant separation in place of divorce in certain cases, on the lines of the new section to be added in Hindu Marriage Act on the subject².

Section
27A
S.M.A.
(New)

Section 29, Special Marriage Act corresponding to section 14, Hindu Marriage Act should be deleted³.

Section
29 S.M.A.
(Prohibition against
divorce
within 3
years)

In section 30 of the Special Marriage Act the period of one year for re-marriage after divorce, corresponding to the period in section 15, proviso, Hindu Marriage Act, should be removed⁴.

Section 30
S.M.A.

Section 31, Special Marriage Act (venue) should be revised on the lines of revised s. 19, Hindu Marriage Act⁵.

Section 31,
S.M.A.

Section 33, Special Marriage Act should be revised on the lines of section 22, Hindu Marriage Act, as proposed to be revised⁶.

Section 33,
S.M.A.
(Proceedings in
camera).

In section 34(1)(b), Special Marriage Act the word 'adultery' should be replaced by suitable words referring to that ground as recommended to be reformulated⁷.

Section
34(1)(b),
S.M.A.

Section 34(2), Special Marriage Act should be amended and a new sub-section should be inserted, on the lines of the amendment proposed in section

Section 34,
S.M.A.
(Reconciliation).

1. Para 9.21 and 2.46 (c).

2. Para 9.22.

3. Para 9.23 and 2.46 (d).

4. Para 9.23, 9.24 and 2.46. (e)

5. Para 9.25.

6. Para 9.26.

7. Para 9.26A.

23(2), Hindu Marriage Act and the new sub-section proposed to be inserted in section 23, Hindu Marriage Act, respectively¹:

Section 35,
S.M.A. Section 35 of the Special Marriage Act should be revised on the lines of the new section as to counter claim, proposed to be inserted in the Hindu Marriage Act².

Section 37,
S.M.A. Section 37, Special Marriage Act should be revised on the lines of the amendments proposed in section 25, Hindu Marriage Act³.

Section 39,
S.M.A. (i) Section 39, Special Marriage Act should be revised on the lines of section 28, Hindu Marriage Act as proposed be revised.

(ii) Appeal on costs should be disallowed.

(iii) Limitation for appeal should be 30 days⁴.

Section
40A
S.M.A.
(New). A new section should be inserted in the Special Marriage Act so that petitions between same parties shall be tried together, on the lines of section 21A, Hindu Marriage Act, as proposed⁵.

Section
40B
S.M.A.
(New). A new section should be inserted in the Special Marriage Act be provide as follows⁶ :—

(i) Petitions should be disposed of within 6 months of service of notice.

(ii) Appeals should be disposed of within 3 months of service of notice. See section 21B, Hindu Marriage Act as proposed.

Section
40C,
S.M.A.
(New). A new section as to documentary evidence should be inserted in the Special Marriage Act to the effect that admissibility of documents shall not be affected

1. Para 9.27.

2. Para 9.28.

3. Para 9.29.

4. Para 9.33.

5. Para 9.34.

6. Para 9.35.

by absence of stamp or registration. This will be on the lines of the corresponding provision to be inserted in the Hindu Marriage Act¹.

We would like to place on record our warm appreciation of the valuable assistance we have received from Mr. Bakshi, Member-Secretary of the Commission in the preparation of this Report.

P. B. Gajendragadkar	.....	Chairman
P. K. Tripathi	.....	Member
S. S. Dhavan	.....	Member
S. P. Sen-Varma	.....	Member
P.M. Bakshi	.....	Member-Secretary.

Dated : New Delhi
the 6th March, 1974.

1. Para 9.36.

APPENDIX—1

LETTER FROM THE MINISTER OF LAW,
JUSTICE AND COMPANY AFFAIRS

D.O. No. F. 14(4)/68-Leg. II

New Delhi-110001.

January 17, 1974.

My dear Chairman,

Various suggestions for amending the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 were received in the past from some Members of Parliament and the general public. Those suggestions were examined and a draft Bill was prepared incorporating some of the main amendments proposed to the Hindu Marriage Act and the Special Marriage Act. A copy of the draft Bill is enclosed.

2. The amendments proposed in the draft Bill mainly seek to liberalise the divorce provisions so as to reduce the period of waiting for divorce after a decree of judicial separation or restitution of conjugal rights and to eliminate the period of restriction for remarriage after divorce. On the basis of the observations made by the Madras High Court in its two judgments, *Lakshmi Ammal vs. Ramaswamy Naicker*, A.I.R. 1960 Madras 6 and *Gowri Ammal vs. Thulasi Ammal* A.I.R. 1962 Madras 510, suitable amendments have also been proposed in sections 11 and 16 of the Hindu Marriage Act and in the corresponding provision in the Special Marriage Act, 1954.

3. A proposal for making suitable provision in law to provide relief to parties under an obligation to give maintenance under Section 488 of the Criminal Procedure Code was received from some Members of

Parliament. Provision has been made in the draft Bill to permit a right of divorce only to the wife against the erring husband. The Commission may, however, consider the question whether, in such circumstances, the husband against whom the order for separate maintenance has been passed may also be given the right to petition for divorce, having regard to the fact that the parties are practically living apart. This suggestion has not been incorporated in the Bill, but may be considered by the Commission.

4. As the matter is of sufficient importance, I feel the same may be examined by the Law Commission. I shall be grateful if the matter is processed in the Commission on a priority basis and a report forwarded to the Government at an early date.

5. The relevant files of the Ministry are being sent separately to the Commission.

With warm personal regards.

Yours sincerely,
Sd/- H. R. Gokhale

Dr. P. B. Gajendragadkar,
Chairman,
Law Commission,
New Delhi.

Encl : As above.

APPENDIX—2

BILL FORWARDED BY THE MINISTRY OF
LAW
THE MARRIAGE LAWS (AMENDMENT) BILL,
1974
A
BILL

further to amend the Hindu Marriage Act, 1955, and
the Special Marriage Act, 1954

BE it enacted by Parliament in the Twenty-fourth
Year of the Republic of India as follows :—

- Short title. 1. This Act may be called the Marriage Laws
(Amendment) Bill, 1974.
- Amend-
ment of
section 10
of Act 25
of 1955. 2. In section 10 of the Hindu Marriage Act, 1955
(hereinafter referred to as the Hindu Marriage Act),
in sub-section (1), for clause (b), the following
clause shall be substituted, namely :—
“(b) has, after the solemnization of the mar-
riage treated the petitioner with cruelty ;
or”.
- Amend-
ment of
section 11. 3. In section 11 of the Hindu Marriage Act, the
words “on a petition presented by either party there-
to,” shall be omitted.
- Amend-
ment of
section 12. 4. In section 12 of the Hindu Marriage Act, in
clause (b) of sub-section (2), in sub-clause (iii),
for the words “the grounds for a decree”, the words
“the said ground” shall be substituted.
- Amend-
ment of
section 13. 5. In section 13 of the Hindu Marriage Act,—
(a) in sub-section (1),—
(i) in clause (v), after the words “in a com-
municable form”, the words “the disease

not having been contracted from the petitioner" shall be inserted;

(ii) in clause (vii), the word "or" shall be inserted at the end;

(iii) after clause (vii), the following clause shall be inserted, namely :—

"(viii) has, after the solemnization of the marriage, treated the petitioner with cruelty." ;

(b) in sub-section (1A), in clause (i) and (ii) for the words "two years", the words "one year" shall be substituted ;

(c) in sub-section (2),—

(i) in clause (ii), the word "or" shall be inserted at the end ;

(ii) after clause (ii), the following clause shall be inserted, namely :—

"(iii) that an order has been passed against the husband by a Magistrate awarding separate maintenance to the petitioner, and the parties have not had marital intercourse for three years or more since such orders."

6. In section 14 of the Hindu Marriage Act,— Amendment of section 14.

(a) for the words "three years have elapsed", in both the places where they occur, the words "one year has elapsed" shall be substituted ;

(b) for the words "three years", wherever they occur, the words "one year" shall be substituted.

7. In section 15 of the Hindu Marriage Act, the Amendment of section 15. proviso shall be omitted.

8. For section 16 of the Hindu Marriage Act, the following section shall be substituted, namely:—

Legitimacy of children of void and voidable marriages.

16. (1) Where a marriage is null and void on any ground specified in section 11, any child of such marriage, whether born before or after the commencement of the Marriage Laws (Amendment) Bill, 1974, shall be treated as the legitimate child of his parents, whether or not a decree of nullity is granted in respect of that marriage, if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage, if later) both or either of the parties reasonably believed that the marriage was valid.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 12, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in this section shall be construed as conferring upon any child of a marriage which is void or which is annulled by a decree of nullity under section 12, any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”.

Insertion of new section 23A.

9. After section 23 of the Hindu Marriage Act, the following section shall be inserted, namely:—

Relief to respondent on petitions for divorce.

23A. If in any proceeding for divorce under this Act, the respondent opposes the relief sought on the ground of the petitioner's adultery, cruelty or desertion, the Court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.”.

10. In the Special Marriage Act, 1954 (hereinafter referred to as the Special marriage Act) in section 2, for clause (e), the following clause shall be substituted, namely:—

Amend-
ment of
section 2
of Act 43
of 1954.

(e) "district court" means, in any area for which there is a city civil court, that court, and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act;.

11. For section 26 of the Special Marriage Act, the following section shall be substituted, namely:—

Substitu-
tion of new
section for
section 26.

"26. (1) Where a marriage is null and void on any ground specified in section 24, any child of such marriage, whether born before or after the commencement of the Marriage Laws (Amendment) Act, 1947, shall be treated as the legitimate child of his parents, whether or not a decree of nullity is granted in respect of that marriage, if at the time of the act of intercourse resulting in the birth (or at the time of the celebration of the marriage, if later) both or either parties reasonably believed that the marriage was valid.

Legiti-
macy of
children
of void
and
voidable
marriages.

(2) Where a decree of nullity is granted in respect of a voidable marriage under section 25, any child begotten or conceived before the decree is made who would have been the legitimate child of the parties to the marriage if at the date of the decree it had been dissolved instead of being annulled, shall be deemed to be their legitimate child notwithstanding the decree of nullity.

(3) Nothing contained in this section shall be construed as conferring upon any child of a marriage which is void or which is annulled by a decree of nullity under section 25 any rights in or to the property of any person other than the parents in any case where, but for the passing of this Act, such child

would have been incapable of possessing or acquiring any such rights by reason of his not being the legitimate child of his parents.”.

Amend-
ment of
section 27.

11A. In section 27 of the Special Marriage Act,—

- (a) in sub-section (1), the words “and by the wife on the ground that her husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality” shall be omitted;
- (b) after sub-section (2), the following sub-section shall be inserted, namely:—
 - “(3) A wife may also present a petition for divorce to the district court on the ground—
 - (i) that the husband has, since the solemnisation of the marriage, been guilty of rape, sodomy or bestiality; or
 - (ii) that an order has been passed against the husband by a magistrate awarding separate maintenance to the petitioner, and the parties have not had marital intercourse for three years or more since such order.”.

Amend-
ment of
section 29.

12. In section 29 of the Special Marriage Act,—

- (a) for the words “three years have passed”, in both the places where they occur, the words “one year has elapsed” shall be substituted;
- (b) for the words “three years”, wherever they occur, the words “one year” shall be substituted.

Amend-
ment of
section 30.

13. In section 30 of the Special Marriage Act, the words “and one year had elapsed thereafter but not sooner” shall be omitted.