

The Special Marriage Act:

Not Special Enough

by

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THE Special Marriage Act provides for a civil and nonreligious form of marriage between a man and a woman, whether belonging to the same or to different communities. Marriage under the Act is popularly known as "civil marriage" or "court marriage."

This Act embodies a ratification by the Indian parliament in 1954 of the Special Marriage Act, 1872, introduced by the British rulers in India. The 1872 Act provided for persons belonging to different religions to marry. By an amendment in 1923, persons belonging to the same religion were also permitted to marry under the Act. The Special Marriage Act was the first legislation applicable to all citizens which allowed divorce. The divorce provisions of the Hindu Marriage Act 1955, were modelled on, those of the Special Marriage Act. The Act has been amended several times since 1954, the major amendment being the introduction of the provision for divorce by mutual consent, subsequently also introduced into the Hindu Marriage Act.

Form of Marriage

Under the Act, any unmarried, widowed or divorced man and woman who wishes to marry, are above the age of 21 and 18 respectively, are not insane or chronically epileptic, and are not related to one another by blood or by

marriage in any of the ways specified in a list attached to the Act, can approach the marriage officer (also known as registrar of marriages) of the district in which one of them has resided for at least 30 days prior to the date on which they give notice that they wish to be married. They have to jointly give in writing a notice that they wish to be married within three months. In the notice, they have to state their names, addresses and marital status. The marriage officer then puts up the notice on a public notice board in his or her office which is normally situated in the district court. If the man and woman concerned are not permanent residents of that district, the marriage officer also sends a copy of the notice to the district of which they are permanent residents, where it is similarly displayed.

Any person may raise an objection to the proposed marriage, within 30 days of the notice being put up, on the ground that one of the conditions under the Special Marriage Act (minimum age, single status, sanity and non relatedness of the parties) has been violated. The objection has to be given in writing to the marriage officer. The officer, who is also an executive magistrate, will enquire into the objection and decide within 30 days whether or not it is valid.

In the course of the investigation, the officer has the powers, which a civil court

normally has, to examine witnesses and documents and receive evidence. If the officer upholds the objection, either party to the intended marriage may appeal to the district court within 30 days, and the court's decision will be final.

If no objection is made, or the objection is overruled, the marriage can take place a month after the notice was put up, either at the marriage officer's office or at any other nearby place such as a home or public hall for an additional fee. The man and woman have each to sign a declaration that they, are legally single, above the required marriageable age, and are not related to each other within prohibited degrees (unless the custom of their community permits such related persons to marry). These declarations have to be signed by three witnesses.

The man and woman also have to say to one another in the presence of the marriage officer and three witnesses, in any language understood by both: "I, --, take thee --, to be my lawful wife (or husband)." In addition, the parties may have any other form of solemnisation of marriage they desire such as exchange of garlands or rings, reading of vows or signing of contract, or any religious ceremony. If not, the above verbal and written declarations are sufficient to constitute a marriage. The marriage

officer issues a marriage certificate signed by both parties and the three witnesses, and also enters the same in a marriage certificate book, also signed by the parties and witnesses. This is a registered marriage, of which written evidence exists both with the spouses and in the marriage officer's records.

People who are married under other laws (such as by a Hindu, Muslim or Christian ceremony) can also, after both reach the age of 21, register their marriage under the Special Marriage Act, after which all its provisions will apply to them. The formalities for doing so are the same as detailed above. This enables persons married by other ceremonies to get written evidence of their marriage, in case they fear that the legality of their marriage or legitimacy of their children is likely to be challenged in court, say, in the case of a property dispute. If the marriage is not conducted within three months of giving notice, a fresh application has to be filed,

Disputes and Dissolution

Either spouse can appeal for the marriage to be declared null and void on any of the following grounds:

1. That the other spouse was already married earlier, was under the marriageable age, was insane or chronically epileptic or was within the degrees of prohibited relationship;

2. that the other spouse was impotent at the time of marriage and continues to be so;

3. that the wife was pregnant at the time of marriage by some person other than the husband, that he discovered this only after the marriage, that he did not cohabit with her after the discovery, and that he sued for nullification of the marriage within a year of their getting married;

4. that the other spouse has wilfully refused to consummate the marriage;

5. that the consent of either party was obtained by force or fraud, that after the force ceased or the fraud was discovered, they have not lived together as husband and wife, and that the suit

Devising Your Own Safeguards

A self devised contract can incorporate many useful specifics for the protection of the woman. Although a private contract has legal validity, it is wiser to sign on stamped paper in the presence of witnesses, in a public gathering so as to involve the two families and friends.

One private contract between two Delhi University lecturers who got married recently makes the following major stipulations:

1. We shall have independent bank accounts and shall manage our finances separately but we are free to ask each other for assistance in matters concerning us jointly. In expenditure on food, clothes, gifts, furnishings for the house, both shall contribute according to ability. This is because one of us, not having a permanent job, may not have a salary from time to time, and the other may be paying substantial amounts towards repayment of housing loan or car loan. A joint account shall be operated only for depositing funds jointly held by us, such as cheques received as wedding gifts. All expenditure should be discussed, unless it is of a purely personal nature, such as money paid for meals at work and transport.

2. Neither of us shall force the other into parenthood and we shall not have any children unless both of us are emotionally, physically and materially ready to support a child. Our practice of birth control shall take into account the fact that in India contraceptives for women are limited to the IUD and the pill, both of which have been found to be painful and harmful.

3. We shall try to like each other's families and friends but we reserve the sole right to determine our relationships with our own friends and families, that is, one shall not impose on the other "duties" towards his or her own parents. But each one's parents shall be free to claim as much of his or her time and attention as he or she desires to give them.

for nullification has been filed a year from that time.

Nullification of a marriage means that the party's status is not that of a divorcee but of a never-married person. However, even if the marriage is nullified, the children of the marriage are considered legitimate and are entitled to inherit the parents' property.

If at any time after marriage, either husband or wife withdraws from the society of the other without reasonable excuse, the aggrieved party can sue for restitution of conjugal rights. The court can order restitution of conjugal rights, but has no power to enforce it. Neither husband or wife can be forced to stay or cohabit with the other against his or her will, nor be punished for not doing so.

If both husband and wife decide that they wish to divorce, they can present a petition for divorce by mutual consent.

This is a joint statement that they have been living apart for one year or more and that they have mutually agreed to dissolve the marriage. They do not have to make any allegations against one another. Six months later, the divorce will be effected, if the petition is not withdrawn in the meantime.

However, if one spouse wants a divorce and the other does not, then the divorce may be granted on the ground that the sued spouse:

1. has committed adultery (if, however, the petitioner is proved to have condoned the adultery, that is, encouraged it, or not raised any objection to it, divorce will not be granted on this ground);

2. had deserted the spouse continuously for two years or more. Desertion includes leaving the marital home, forcibly throwing out the other

spouse from the home, and wilfully neglecting the spouse even while living in the same house;

3. has treated the spouse with cruelty, physical or mental (if the petitioner is proved to have condoned the cruelty, divorce will not be granted on this ground);

4. is undergoing seven years or more imprisonment for a criminal offence;

5. is incurably insane;

6. is suffering from venereal disease in a communicable form;

7. is suffering from leprosy;

8. has not been heard of as alive for seven years or more.

In addition, a wife can also sue for divorce on the grounds that the husband has, after marriage, committed rape, sodomy or bestiality; or that she is living apart from him, has obtained a court order for payment of maintenance by him to her, and has, since then, continued to live apart for a year or more.

Divorce can also be obtained by either spouse on the ground that a court order was issued for restitution of conjugal rights but no restitution has occurred even a year after the order. Earlier, courts used to interpret this

clause on the principle that a petitioner cannot take advantage of his or her own wrong doing, which meant that the spouse who refused to resume cohabitation could not then sue for divorce on the ground that cohabitation has not been resumed. However, courts are now interpreting the clause more liberally, on the principle that people should not be forced to live together, and therefore either spouse can sue for divorce on this ground.

Thus, courts, through liberal interpretation, have created a somewhat roundabout but relatively less acrimonious route to divorce, if one spouse wants it but the other does not. One can first sue for restitution of conjugal rights, live apart for a year, and then sue for divorce. Of course, the first step is very difficult, as the court

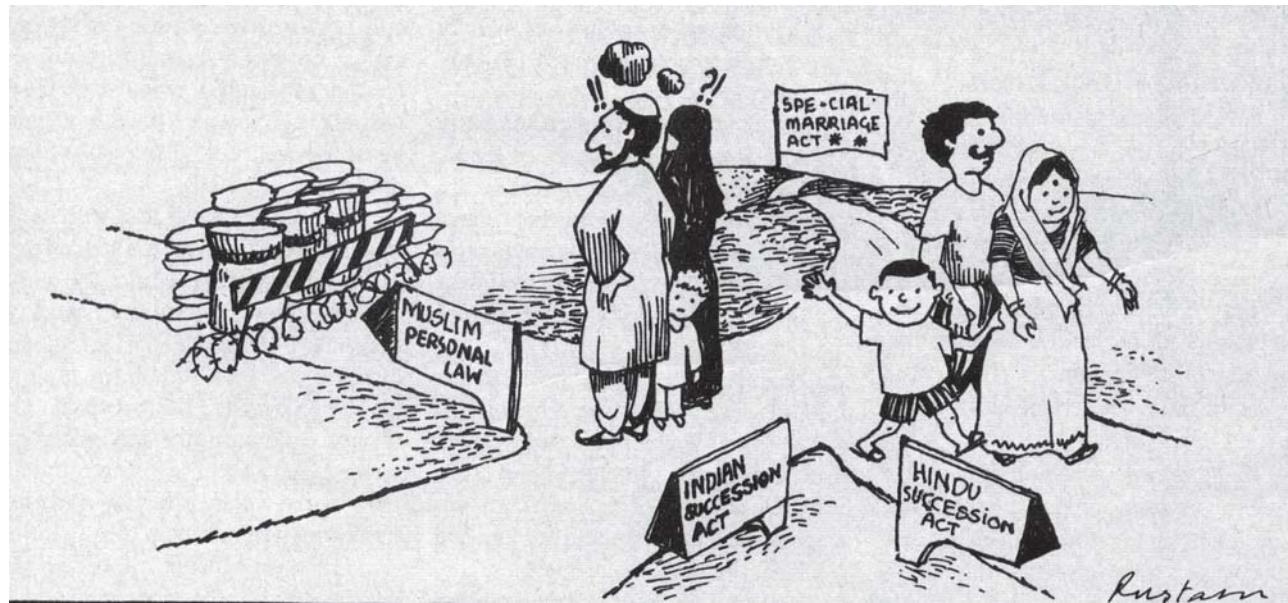
is unlikely to pass an order for restitution if the other spouse declares his or her willingness to live together with the suing spouse.

In case one spouse wants to live separately but wants to retain the status of being married (for inheritance or other purposes) he or she can apply for judicial separation instead of divorce on

any of the above listed grounds. Once judicial separation is effected, the spouses are not required to live together, but they remain legally husband and wife, and they cannot remarry. They can also resume cohabitation without any legal formalities, and can get the separation order revoked if they so desire.

Petitions for nullification of marriage, restitution of conjugal rights, judicial separation or divorce are to be presented in the district where the marriage took place, or where the sued spouse is residing, or where they both last lived together as husband and wife, or, if the sued party is abroad or has not been heard of for seven years, then in the district where the petitioner is living.

Under the Special Marriage Act, the court can, after issuing an order for divorce or judicial separation or nullification, order the husband to pay maintenance to the wife, either in a lump sum or in instalments. However, the court can change or revoke this order later if the wife remarries or "is not leading a chaste life." A court can also order the husband to pay for the wife's support during the period she is suing him, and



order him to pay the expenses of her suit against him, if it appears that she is not in a position to bear the expenses. .

Succession

Two Hindus, Sikhs, Buddhists or Jains who marry under the Special Marriage Act will continue to be governed by the Hindu Succession Act in matters relating to inheritance of property.

If a Hindu, Buddhist, Sikh or Jain marries a member of any other community under this Act, the former will be presumed to be separated from the Hindu undivided family. However, if two members of any other community, for example, two Muslims, marry under this Act, they will be governed in matters of inheritance and succession by the Indian Succession Act and not by the laws of their own community, for example, by Muslim law.

The Indian Succession Act does not make any distinction between ancestral property and self acquired property as in the Hindu Succession Act, and the former gives the daughter equal inheritance rights with the son. Thus, Hindus (Buddhists, Sikhs and Jains are defined as Hindus for succession purposes) are the only community exempted from the clause that provides for those married under the Special Marriage Act to be governed by the Indian Succession Act in matters of succession. Therefore, for Hindus who marry under the Special Marriage Act, it is essential to make a will if they wish to leave property equitably to spouse, sons and daughters.

Positive Features

Marriage under the Special Marriage Act automatically ensures registration of marriage. It provides one with indisputable written evidence of marriage, to establish one's legal status

and that of one's children. Such evidence is often especially needed by the woman in order to claim inheritance rights and maintenance rights in the event of separation, or to sue for bigamy. Marriage merely by religious ceremony



is relatively more difficult to prove in a court of law, especially if years have passed, the witnesses have died and the other spouse denies the legality of the marriage. Therefore, it is desirable to register one's marriage under the Special Marriage Act in addition to whatever other marriage ceremony or contract, religious or otherwise, one may wish to perform.

As far as divorce and related provisions are concerned, the Hindu Marriage Act has the same provisions, so two Hindus do not benefit substantially in this regard by marrying under the Special Marriage Act. However, others, such as Muslims and Christians, can take advantage of the Act's provisions. If two Muslims marry under this Act, the man cannot remarry

or get a verbal divorce, even though he remains a Muslim. Similarly, two Christians who wish to divorce and cannot do so due to the archaic provisions of the Indian Christian law,

can register their marriage under the Special Marriage Act, and subsequently divorce by mutual consent. Of course, this can happen only if both spouses are willing to be governed by the provisions of the Special Marriage Act.

In matters of succession, most Christians gain nothing by marrying under the Act as they are already governed by the Indian Succession Act, Muslims can choose to be governed by the Indian Succession Act by marrying under this Act. Hindus, however, are not allowed this choice, if they marry a Hindu under this Act. The only way they are allowed to opt out of the Hindu succession law is by marrying a member of another religious community surely a somewhat absurd position.

The Special Marriage Act allows members of different religions to marry without renouncing or changing their respective religions. Marriage under the Special Marriage Act can be more easily performed by people whose marriage is,

for whatever reason, opposed by their families or communities.

Marriage under the Special Marriage Act has the advantage of being very simple, easily understandable by both parties and flexible. The parties can devise their own ceremony or contract in addition to that laid down in the Act. The formalities laid down by the Act are equal for both man and woman. The woman does not have to make any special vow of obedience or the man of protection, nor does either have to make any renunciatory gestures, as is the case in certain other marriage ceremonies.

Limitations: British Bias

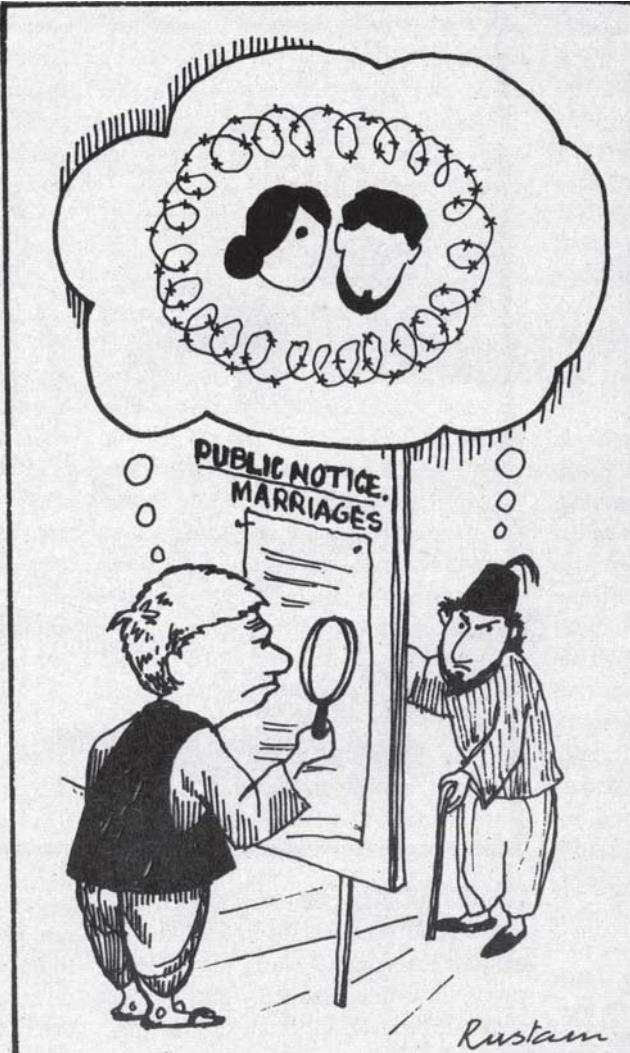
The two major influences on the Special Marriage Act are

1. Western, specifically British, jurisprudence, with its Anglican, Christian bias; and

2. what has come to be established as "Hindu" law but is in fact a confusing, sometimes eccentric, version of the practices of certain dormant communities, heavily influenced by the British rulers' interpretations.

Most communities (using the term not to signify monolithic religious communities like Hindus and Muslims on an all India level, but local communities united by lifestyle, practices, language and alliances) in India practise some form of customary separation or divorce, where *de facto* separation, brought about by the refusal of one spouse to live with the other, or of both to live with one another, is followed by negotiations, interventions by family and community members, and, finally, if reconciliation efforts fail, by a separation with

some sort of settlement regarding monetary matters and children. Remarriage may or may not be allowed or encouraged by the community, and is likely to be easier for the man than the woman, yet even in communities where



remarriage of the woman is forbidden, her living separately from the husband, while retaining the status of a married woman, is possible.

The institutionalisation of adversarial divorce, where a spouse can get the right to separate and remarry only by accusing the other of offences, and trying to establish these, arises, in British jurisprudence, under a system where the church, on the ground that "What god hath joined together, let not man put asunder" forbade divorce and allowed separation only when serious offences by one spouse were proven. The process of allowing divorce and the expansion of the grounds on which it was allowed was very slow in Britain. Thus, famous

nineteenth century cases in British courts, for example, Lord Byron's case, involved sensational charges like incest and sodomy, as these were the grounds on which separation was most likely to be granted. When the so-called "secular" marriage law was introduced into India via the Special Marriage Act, 1872, this concept of a divorce as a battle between spouses treating one another as adversaries, was part of it. The colonial origin of the Act is evident even in the archaic language used (for example, "I take thee" instead of "you"). It took British law centuries to evolve the concept of mutual incompatibility as a ground for divorce, and also that of the individual's right to refuse to live with a spouse, without necessarily accusing him or her of offences. The Special Marriage Act and Hindu Marriage Act have trailed behind, and have yet to explicitly acknowledge these rights. The concept of irretrievable breakdown of marriage, whereby if one spouse feels unable to live any

longer with the other, he or she is entitled to divorce (provided an equitable property division takes place and the wife and children are financially looked after) has not been introduced into the Special Marriage Act, even though it has long been debated and even introduced into parliament. Thus, if one spouse refuses to agree to divorce by mutual consent, the other cannot re-marry and is forced to remain legally married although they may have been living apart for years.

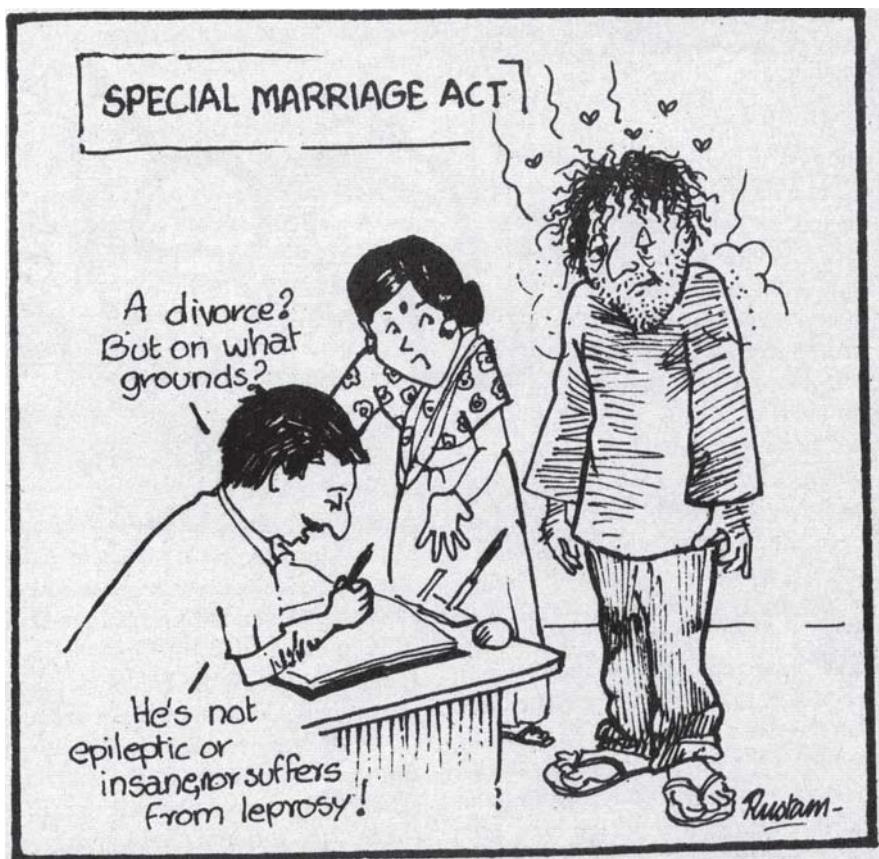
Many of the grounds provided for divorce are extremely difficult to prove, especially given the privatised domestic context of the marital relationship. It is possible for a legal battle to drag on for

years, through various courts of appeal, with one party trying to prove desertion, cruelty or adultery, and the other trying to disprove it. This can embitter the lives of both parties and of the children, who are often the only witnesses and are placed in the unfortunate position of having to testify against a parent in public.

Since incompatibility is not a ground for divorce under the Act, parties are usually forced to lie, to falsely accuse the other party of cruelty or adultery, although the truth may be that they just cannot get along with one another, or that the petitioner wishes to remarry. Thus, the stringent provisions which are supposed to prevent easy divorce, in fact help obstruct any possible reconciliation, as, once you have been falsely accused of cruelty or adultery in court, you are less likely to consider reconciliation with the accuser.

The adversarial notion of divorce also entails people being sued for and made to feel guilty for disabilities which they cannot help, such as insanity, epilepsy or leprosy. In fact, retaining the latter two as grounds for divorce is open to serious question, since far more virulent incurable and communicable diseases have not been listed. This is a "hangover from" times when leprosy was incurable and viewed with horror as a plague, and when epilepsy was not understood and was feared as a form of insanity or a demoniac visitation.

Another hangover in the Act from nineteenth century British jurisprudence is the condonation clause whereby if a party has "condoned" cruelty or adultery, he or she cannot get a divorce on that ground. This clause led to such absurdities in nineteenth century England as G.H. Lewes and George Eliot having to live together without marriage because Lewes could not divorce his first wife (although she was openly living with and had children by another man) simply because he had been liberal minded enough not to sue for divorce earlier when the adultery began.



This anomalous provision, which suggests that if you do not object to an offence right away, you can never object to it all your life, has been retained in the Special Marriage Act. The provision is especially open to misuse against women. Many women, because of their financial, social and cultural dependence on the husband, may have to endure his adultery or cruelty and may continue to live with him and bear his children. If the breaking point comes after a number of years when she is finally able to get the resources, support and the courage to resist, he ought not to be allowed to argue that she "condoned" his misbehaviour earlier. Endurance, even if silent, is not condonation. The idea of cruelty being condoned by the victim is particularly obnoxious, based as it is on the assumption that the victims of cruelty, especially women, invite, even enjoy, being cruelly treated, and hence may be accused of condoning it.

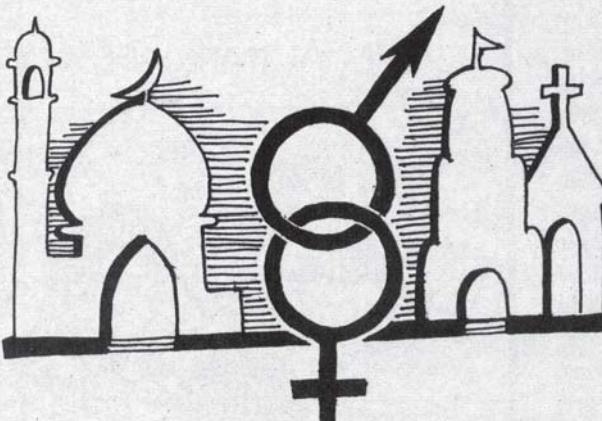
The notion of restitution conjugal rights is another irrational notion, based on the idea of a spouse owning the other and having rights over his or her body. Mahatma Gandhi had rightly argued that marriage does not mean that a person surrenders all rights over their body; they retain the right to say "yes" or "no" each time to cohabitation. Since the court, fortunately, cannot enforce cohabitation, the clause functions today primarily as a useful stepping stone towards judicial separation or divorce. However, divorce were permitted on the ground of irretrievable breakdown of marriage; the restitution of conjugal rights clause could be eliminated.

Stirring Up Trouble

The provision regarding public display of the notice of intention to marry; and the subsequent process of raising objections, is another unnecessary import which actually today serves mischievous purpose for which it was not intended. It

appears to have been originally modelled in English law on the practice of “calling the banns” or announcing the intended marriage on three successive Sundays in the church where the marriage was to be conducted. This may have served some purpose in a small integrated community where the congregation generally included persons connected to one or both parties, although even so, it could lead to harassment when the marriage was of a kind that was frowned upon.

In India today, the Special Marriage Act is usually resorted to by couples whose marriage is disapproved of by their families. These are often inter-caste, interregional, or interreligion marriages, and it was to facilitate them that the Act was passed. It is when the families raise objections on irrational grounds and wish to deny the two adult ‘individuals’ right to decide their own lives, that the Act should come to the individuals’ rescue. In such a context, publicly



the work of such bodies by presenting them with the names and addresses of people wishing to marry. The purpose for which the clause is supposedly intended is rarely served as, if a man has a first wife and wishes to remarry on the sly, he is likely to marry in a more devious way and not in court. Although, technically, objections can be presented to the marriage officer only on the grounds specified (underage, former spouse living, insanity), and frivolous or malafide objections are punishable, yet it will always be possible for families

That the Special Marriage Act is availed of by a tiny minority is evident from the fact that in 1989, only 444 marriages were conducted under this Act in Delhi, city with a population of about eight million.

notifying the intended marriage can, and often does, place the partners at grave risk by alerting powerful members of their communities who may be ready to abduct or even kill them rather than allow them to marry. This is particularly the case when it comes to Hindu Muslim marriages. For example, certain chauvinist groups are known to inspect daily the notices at the Tis Hazari court in Delhi, and if they see from the names that a Hindu and Muslim are planning to marry, immediately proceed to dissuade and pressure the individuals and their families, even in cases where the families are agreeable to the marriage. The legal machinery is thus practically facilitating

to raise false objections in order to delay and obstruct the marriage. For example, since not all births are registered, the woman’s family could claim that she is underage. Even allegations of insanity would take time to disprove. The family would thus get time to pressure, threaten and harass the parties, especially the woman.

Irrational Restrictions

An example of bias introduced into the Act by the so called Hindu law is the prohibition it imposes on marriage between people related to one another in a variety ways. The long list of prohibited relationships attached to the Act includes cousins, uncle and niece.

Of course, the Act, following the standard loop hole strategy of Indian civil law, provides that if one of the persons belongs to a community which has a longstanding custom, notified in the Official Gazette, allowing marriages between those related in any of these prohibited degrees, then they may marry under the Special Marriage Act. This permits many Muslim and Christian communities who allow cousin marriage to marry cousins

under the Act; and many Hindu communities, especially in the South, who customarily marry certain kinds of cousins and nieces, are also able to do so under the Act.

However, why should the norm for a permissible marriage be set by certain dominant communities mainly in the north, and all other kinds of widely, prevalent marriages first be prohibited and then be smuggled in as exceptions? One might logically prohibit all marriages except cousin marriages and then allow others to marry as exceptions if the custom of their community permits.

More important, secular India with its Constitution guaranteeing equality before the law to all citizens, is today in the absurd position of not allowing two Hindu cousins who fall in love to marry, if their community has no custom allowing cousins to marry. They are disallowed from marrying under the Hindu Marriage Act and also the Special Marriage Act. This is a very serious anomaly in an Act which is supposed to be based on rational principles.

The Act also discriminates against non Hindus (or against Hindus depending on how one looks at it) by laying down that Hindus who marry under the Act will be governed by the Hindu Succession Act, while others who marry under the Act will thereby cease to be governed by their respective community laws and will instead be governed by the Indian Succession Act.

This is a clear case of discrimination on grounds of religion and is therefore violative of the Constitution.

Although the vast majority of people in our country marry, separate, divorce, remarry and settle all matters relating to marriage without recourse to courts, nevertheless the Special Marriage Acts of importance because it offers some sort of model for a law under which people can get their marriages registered. Registration of marriage is useful to women when they are deserted and the husbands refuse to recognise them as legal wives and their children as legitimate heirs. In order to facilitate registration of marriages, it might be desirable to provide facilities for a written record of marriage and issuance of certificates in every place of worship where marriages are conducted and with every religious authority who conducts marriages. The government could arrange for copies of the records to be sent to a central office in the district. This would save people the extra trouble of going to court to register a marriage. Even in Western countries, in church weddings, the marriage register is signed and witnessed in church itself, not in the court.

Further, the Special Marriage Act needs to be amended in the following ways to make it a more useful and desirable piece of legislation, from which people would benefit substantially if they chose to register marriages under it:

1) Removal of the prohibited degrees of relationship clause.

2) Anyone who marries under the Act to be governed by the Indian Succession Act in matters of succession. Hindus not to be exempted from this provision.

3) Introduction of mutual incompatibility and irretrievable breakdown of marriage as grounds of divorce, providing simultaneously for joint matrimonial property, that is, equal division at divorce of all property acquired after marriage by the spouses; and award of alimony in a lump sum form

to the wife and children in lieu of maintenance at the standard of living to which they are accustomed. The ultimate objective should be gradually to eliminate all adversarial grounds of divorce, retaining only irretrievable breakdown and mutual consent, criminal offences like cruelty should be dealt

with under criminal law.

4) Removal of the restitution of conjugal rights clause, of epilepsy and leprosy as grounds for divorce; and of condonation of cruelty and adultery as a bar to divorce on these grounds.

5) No public display of notices of intention to marry. □

South of the Nilgiris

*My son who is young
just six this year
knows the red soil of our land*

*Turning it in his palm
he said
'My sister is this earth
I am water
we will mix together.'*

I heard this in a dream

*He pointed at my belly
watermelon swollen
streaked as if mud
had dribbled over
lighter flesh*

*'I am glad
I was not born a girl.
I will never hold that weight
in my belly.'*

*He spun on his heels,
on his lean shoulders
I saw wings of bone
pale as the stones of Kozencheri*

*'Mother' he laughed
'You know I am not a girl'*

*under my ribs
she turned
his unborn sister,
green as a wave
on the southern coast
ready to overwhelm me,
overwhelm even the distant hills.*

Meena Alexander