Abstract and Keywords

This chapter discusses the Hindu marriage law. It shows that neither the Anglo-Hindu interventions, nor the modernist reforms of the 1950s in independent India, brought about any substantive change in Hindu marriage law. The chapter discusses the traditional Hindu law of marriage, which is placed within the proper conceptual framework. It also attempts to deconstruct modernist misconceptions of Hindu marriage.

Keywords: Hindu marriage law, Anglo-Hindu interventions, modernist reforms, traditional Hindu law, marriage, conceptual framework, modernist misconceptions

While marriage law has been quite prominent in Indian family law cases, litigation has almost always involved other legal problems concerning the status of the female spouse, her financial entitlements, or inheritance rights. The legal recognition of customary Hindu marriage arrangements also often relates closely to bigamy, maintenance law, succession, or joint family property. As a result, there is much fuzziness over what is actually meant
by ‘marriage law’.\(^1\) To clarify this term, it is necessary to distinguish the process of marriage itself, i.e. marriage solemnization and registration, from the social consequences of marriage. Many of the latter are not of central concern to the present chapter, but have given rise to comments about Hindu marriage traditions and their legal relevance.

The solemnization of Hindu marriages is first of all a matter of social conventions and ritual elaboration, involving the dramatization of social norms and all kinds of related beliefs.\(^2\) In the traditional Hindu system of marriage, there was no role for the state, as marriage remained a private affair within the social realm. In the traditional system, the solemn performance of a long sequence of traditional Hindu marriage rituals was assumed to evoke mental awareness of being married, both for the spouses concerned and for those who celebrated the marriage with them and witnessed it (Derrett 1963a). Hindu society, and not the state, legitimized and publicly ‘registered’ all proper Hindu marriages. Once the British became involved in the administration of Hindu law and sought fixed rules, it became an issue of central importance for lawyers how such Hindu marriages are solemnized and legally validated.

The present chapter shows that neither the Anglo-Hindu interventions, nor the modernist reforms of the 1950s in independent India, have brought (p.274) about any substantive change in Hindu marriage law. Even today, a Hindu marriage in India does not normally require the involvement of the state. Thus, behind a modernist smokescreen of formal legal reform and codification, the traditional Hindu law remains more or less fully in place.\(^3\) Agnes (2000: 210) correctly states that ‘under the present statute, a Hindu need never approach a state functionary or a religious institution either for solemnization of his/her marriage or for its dissolution’.

Here, then, is our first substantive case of postmodern Hindu law in post-colonial India. Analysing this postmodern condition of Hindu marriage law within a historical context, we need to ask whether the virtually complete blanket approval of ancient Hindu practices (which now of course appear in their current, contemporary avatar) constitutes a hidden surrender to Hindu traditions. Does it signify postmodern realism, namely that marriage is such an intimately social affair that its formal regulation is best left to the respective societies? Or should we apply the ‘limits of law’ argument as an explanatory model for why the modern state law admits so comprehensively that it is unable to regulate the relevant normative traditions?

It appears that there could not be a more clear-cut case for the preservation of the ethnic characteristics of Hindu communities, or the identity value of different social groups (Mansfield 1993), as discussed in Part I of this study. The modern state recognizes that it seems best to leave the solemnization and even registration of Hindu marriages to the jurisdiction of society, while offering judicial fora for dispute settlement and judicial supervision as a safeguard. This clearly reflects an acknowledgement that within the Hindu sociocultural framework—and not primarily therefore on account of Hindu religion—legal mechanisms exist which remain able to exercise meaningful social control at the lowest level, also today. In this field of analysis, there was evidently little
room for positivist intervention in the first place. But since the reformers did not hesitate to interfere in other areas of the law, why did they not intervene in Hindu marriage law too? The reason lies in the postmodern condition of Hindu marriage law, where to date there remains an uneasy coexistence of reformist rhetoric and sociocultural realism.

The Traditional Hindu Law of Marriage
The existing literature on Hindu marriage has developed into a complex combination of oddly mismatched evidence and comments. The painstaking study of ancient Sanskritic marriage rituals is not a mainstream job for lawyers, but a matter for Sanskritists, historians, anthropologists, and researchers of religious (p.275) studies. There are many serious attempts by Sanskritists to make sense of the phenomenon of traditional Hindu marriage and its consequences in a traditional context. However, these studies tend to become embroiled in ritual detail and thus discourage the legal reader who looks for certain, quick answers. Writers working within a modernist conceptual framework of reference, and generally without addressing details of Hindu marriage law and practice, have produced a barrage of criticisms of the institution of Hindu marriage. Somewhere in between are those writers who describe the patterns of traditional marriage but cannot resist glorifying Hindu tradition, fantasizing about certain aspects, or simply getting sidetracked into other related issues.

As a result, there exists a segregation of specialist literatures. The remarkably detailed literature on Hindu marriage includes hardly any writing by legal scholars, while a researcher on Hindu marriage will draw a blank in legal textbooks, returning to literature produced by scholars who are not lawyers. Nevertheless, at least non-legal researchers have been able to elucidate the conceptual framework of Hindu marriage and its central social functions for all levels of society. Within a Hindu framework of reference, it is agreed that every single Hindu marriage solemnization is a more or less conscious attempt to link the spouses to the cosmic dimension of Hinduism through the performance of certain rituals. These may be minimal, in certain circumstances, as Hindu marriages need not be elaborate, costly celebrations that last for several days.

(p.276) Conceptual Core: Unity in Diversity
A full discussion of traditional Hindu marriage law must be placed within the appropriate conceptual framework and should therefore begin from the central premises of the rta/dharma complex (see ch. 3). Right from the earliest Hindu literary sources onwards, in Rgyveda (RV) 10.85 and in Atharvaveda (AV) 14, we find two detailed sequences of Hindu marriage rituals. Beginning from such Vedic foundations, we have massive evidence of ancient Hindu marriage rituals, which elaborate and ritually dramatize the centrality of marriage as a cultural, social, and religious institution among Hindus. The detailed contextual interpretation of such ancient sources has remained problematic. My Ph.D thesis (Menski 1984) cracked some of the sophisticated codes of language and presentation that distinguish the Vedic texts as extremely intelligent and complex representations of human marriage vis-à-vis the Hindu universe. From this Vedic perspective, a Hindu marriage is seen as the microcosmic equivalent of the macrocosmic togetherness of the universe, as symbolized in the daily cycles of sun and moon.
Contrary to assertions by many modern Hindus, the Vedic patterns of marriage solemnization did not constitute a fixed, uniformly binding model for every couple. Furthermore, my research confirms that the ritual element of the sāptapadi, which appears to have been given such prominence later, and even appears in Section 7(2) of the HMA 1955, cannot satisfactorily be traced back to the Vedic stage of marriage solemnization. Instead, it appears in fullfledged form only in the domestic ritual sections of the important classical sūtra literature. It thus belongs to the realm of classical Hindu law with its emphasis on dharma rather than rta. It also fits there conceptually, rather than in the Vedic model, as it focuses primarily on the two spouses that are being joined in matrimony, rather than the cosmic links recreated through their marriage. The full-fledged sāptapadi is a ritual of friendship (Menski 1991b), a solemn promise of ‘going through thick and thin together’. It thus emphasizes the microcosmic sphere of dharma more than anything else, ritualizing the emerging close bond between the spouses within that conceptual mould.

The multiple transitions within Hindu traditional practices are well reflected in the specialist literature. Pandey (1969: 153) wrote that ‘[w]hen religious consciousness developed, marriage was not only a social necessity but became a religious duty encumbent upon every individual’. Nair (1978: 2) confirms (p.277) that an orthodox Hindu must marry, ‘whether he be an idiot, impotent or imbecile, for the proper discharge of his socio-cultural and religious duties’. During the classical period and its elaboration of dharmic duties for every Hindu individual, the central importance of marriage was further reinforced. Now it supposedly became the only saṃskāra for women. Within the framework of the ashrama theory and its sequence of stages of life, it became a major expectation that everyone, male or female, should be married. Detailed fieldwork confirms that such norms are also strongly reflected in contemporary Indian society.

The topic of traditional Hindu marriage solemnization was in itself an ocean of diverse beliefs, rituals, and practices. These made sense, if at all, only to those who practised such complex ritual dramatizations of the transition of a couple from one stage of life to the next within the varṇāśramadharma model of Hindu stages of life. As the ancient texts tell us in clear terms, there was virtually unlimited scope for local, caste, and family customs to be combined with these ‘traditional’ Hindu ritual elements. Āśvalāyana-grhītasūtra 1.7.1–2 (tr. Sharma 1976) significantly begins the marriage section of the text with a comment that emphasizes plurality and the overriding importance of customs:

Now, manifold indeed are the customs of different areas and villages, those one should observe at the marriage. Only what is common (to all), that we shall state here.

It has evidently been impossible, from the start, to bring any order into this complex pattern of unending diversity, despite the unifying conceptual core. (p.278) This is exactly where a postmodern analysis of Hindu marriage law needs to begin, in the early Vedic times. Hindus, as we know, have not been worried about the possible fissiparous tendencies of such diversity and plurality, since virtually from the start, Hinduism as a
religious tradition accepted a variety of coexisting interpretations of this religion, its origins, motivating forces, concepts, and purposes. Not much seems to have changed in this scenario of overlapping consensus since the earliest Vedic times. Throughout the traditional Hindu law periods, as we saw, this recognition of diversity is manifest in the texts themselves. Significantly, attempts to introduce uniforming models have been made from time to time, and the label of ‘Vedic marriage’ is being used for all kinds of purposes.

The Socio-legal Status of Marriage as a Sacrament

Within the traditional framework of reference, there is no doubt that the most important transitional point in a Hindu’s life is marriage. The leading studies confirm marriage (vivāha) as the most important of all the Hindu saṃskāras or life-cycle rituals. Shastri (1990: 25) notes that it is difficult to say when marriage as an institution came into existence but it appears that Vedic marriage was already a fully developed social institution. Shastri (1990: 26) argues that marriage was regarded as a sacred religious union brought about by divine dispensation, but not a contract. The marriage sacrament united the parties in an indissoluble union. Husband and wife were on equal footing and prayed that their love and friendship should be lasting, genuine, and indissoluble. This sounds like glorifying Hindu ideology, but is a paraphrase of certain verses that might be used ritually in connection with the saptapadi (see Menski 1991b). Nair (1978: 1) describes Hindu marriage in contrast with the contractual tribal marriage system:

The orthodox Hindu marriage is a sanskara or sacrament, the last of ten enjoined by the sacred scriptures of Hindus ... The legality of a marriage depended upon ceremonies. The consent of third persons was as essential to the validity of a Hindu marriage as were the religious ceremonies.

Marriage is undoubtedly of vital interest to society, since it is seen as the foundation of the family. Fruzzetti (1990: 108) emphasizes the nature of Hindu marriage as a sacred union and as the most auspicious saṃskāra, saying that the sacred conception of marriage in India can be traced back to the age of the Vedas. She also asserts that ‘Manu regards marriage as an individual and social necessity’ (id.). On Hindu legal tradition generally, Agnes (2000: 11) takes a typical feminist starting point that, seems to damage Hindu women forever:

It is generally believed that the ‘pristine’ Hindu law was particularly harsh towards women and denied them sexual and economic freedom. These two freedoms, in fact, are coordinate. The Hindu joint family structure based on male coparcenary, was the institution through which sexual control was effected by denying women the right to own property. In this realm of patriarchal domination, women were treated as chattels and upon marriage domination over them was transferred from the father to the husband within the confines of perpetual tutelage. In support of this premise, it is emphasized that Manu, the arch law giver of the Hindu religion stipulated: ‘A woman must be dependent upon her father in childhood, upon her husband in youth and upon her sons in old age. She should never be free’. The strict sexual control was also effected through ordeals. Sita’s ordeal by fire is set
out as an example. It is also believed that the modernity ushered in during the colonial rule and post-independence period helped to loosen out this strict sexual control by granting women the right of divorce and property ownership.

Agnes (2000: 11) asks whether ‘within these strict dictates, the Hindu law permitted any space for negotiating women’s rights’. But she also notes that ‘[p]lurality of laws and customs and non-state legal structure were the essential characteristics of the ancient Indian communities’ (ibid.: 12). How then can one maintain that there were or are strict norms that are binding on everyone? It appears that such writing only perpetuates modernist stereotypes about Hindu ‘tradition’ and its anti-women effects. At the same time, some writers are now beginning to recognize that the traditional methods of Hindu marriage solemnization continue to perform a useful function today. While this is not phrased as a postmodern analysis, some modernist authors realize now that insistence on formal registration of all marriages with the state ‘would adversely affect the rights of women and children’ (Agnes 2000: 170).

Legal textbooks have no difficulty reiterating the central concept of sacramental Hindu marriage or saṃskāra, but do not offer much insight into Hindu marriage solemnization. From a Sanskritist’s perspective, Pandey (1969: 153–233) discussed in elaborate detail how the traditional Hindu understanding of rituals and sacraments developed. Pandey (1969: 153) emphasized that marriage is the most important of all the Hindu sacraments and confirmed the assumption that every Hindu male is expected to marry, run a home, and create a family. Pandey (1969: 155) places Hindu marriage within a sociocultural framework of reference:

Marriage was a family affair rather than a personal one; indeed the generation of offspring was the supreme motive of every union to the end that a man’s house or family might not die out. Then religious motives were equally operative in assigning such a great regard to marriage. Worship of ancestors and gods was dependent on progeny, which could be obtained only through marriage. In later development of Hinduism, the last idea became more prominent than the social and economic ones.

Modernist writing also emphasizes the joint family context of traditional Hindu marriages, but clearly sees it in a less positive light. M. Basu (2001: 3) goes a little too far when she claims that ‘[t]he western concept of the nuclear family consisting of only a husband, wife and children had not emerged then’. Surely that concept was known, if only because premature deaths and disasters of all kinds constantly broke up joint families, which were not the only known form of social organization. Basu portrays marriage as a social alliance between two families and argues that ‘[i]t was believed that the woman’s sole aim in life ought to be to ensure the happiness and well-being of her husband’s family— her own happiness was of least importance’ (id.). The chief objects of marriage ‘were dharma or religious duty, praja, procreation and rati, sexual pleasure’ (M. Basu 2001: 4).

The leading sociologist Kapadia (1972: 167) placed Hindu marriage explicitly within the wider context of dharma, and found it obvious that ‘the Hindu thinkers regarded dharma
as the first and the highest aim of marriage and procreation as the second best'. Kapadia (1972: 168) also reflected on the performance of Hindu marriage rituals, but seems rather too strongly influenced by the lawyers' dogmatic insistence on certain central ritual elements of Hindu marriage:

There are certain rites which must be performed for marriage to be complete. The main rites are: homa, or offering in the sacred fire, pānigrahaṇa, or taking the hand of the bride, and saptapadi, the bride and the bridegroom going seven steps together. All these rites are performed by a Brahmin in the presence of the sacred fire and are accompanied by the Vedic mantras. They are necessary for marriage to be complete, because when they or any of them are not properly performed, the marriage may be legally questioned. Hindu marriage is a sacrament. It is considered sacred because it is said to be complete only on the performance of the sacred rites accompanied by the sacred formulae.21

Sharma (1993) discusses the multidimensional importance of marriage in ancient India in great detail, emphasizing the need for a man to progress in the stages of life (varṇāśramadharma). Sampath (1969: 29) argues that marriage leads to a different status in that it brings not only physical intimacy between the two individuals, but also effects important changes in the legal and social status of (p.281) the parties. Sharma (1993: 3-4) indicates that marriage was the centre and root of life and its basis was sexual power, i.e. the procreation of the next generation.22 More specifically, Sharma (1993: 9) states that, ‘[f]rom the biological point of view the institution of marriage was necessary for self-preservation and procreation of children’. Kapadia (1972: 168) emphasized the role of marriage as a rite of passage to one of the major stages of a Hindu’s life, and placed it firmly within a social context:

Marriage was a social duty toward the family and the community, and there was little idea of individual interest. The social background provided by the authoritarian joint-family, and caste with its domination in all spheres of life, afforded no scope for the recognition of any personal factor, individual interests or aspirations, in the relations between husband and wife (ibid.: 169).

Again, the language used here suggests fixed patterns within a patriarchal setting, whereas in social reality all these arrangements would have remained negotiable. Similarly, Nair (1978: 16) makes the overstated claim that patrilocal residence is ‘absolutely necessary among Hindus after marriage’.23 Qureshi (1978: 39) repeats the usual ideological humbug over Hindu husbands as gods and also takes a typically uncritical view of sages as lawmakers. This passage is only cited here to illustrate scholarly lack of care:

The Hindu sages in clear terms hold that the husband is ‘the lord and master of his wife’; he must be adored and obeyed, even if devoid of all virtues. He must be obeyed as long as he lives and the wife should remain faithful to his memory even after his death. He should be worshipped like God, even though he is a man of bad character.

There are many repetitive comments in the literature about whether Hindu marriages
are contractual or sacramental. The Hindu concept of marriage as a sacramental union implies several things. Above all, the marriage is declared to be ‘divine’ in nature and not a mere human contractual union. One would imagine that it has elements of both, but authors have been emphasizing one concept or the other to suit their other agenda.24 Sastri (1988: 176) describes Hindu concepts of marriage emphasizing the wider dimensions:

(p.282) They view marriage as a sacrament, as a holy act whose real meaning and purpose are beyond the ken of material and moral science. They regard it as a subject of injunction, of spiritual law or Dharma strictly so called, which should be learnt from the Shastra, from the Veda itself which deals with super-physical and purely spiritual matters.

Qureshi (1978: 39) argues that marriage under ancient Hindu law was not a civil contract. In the patriarchal society of Rgvedic Hindus, it was considered a sacramental union, binding not only in this life, but even in the life hereafter.25 However, it has also been argued that Hindu marriage is a contract. Qureshi (1978: 40–1) states:

A marriage under the Hindu law is a sacred covenant. In a Hindu marriage, the bridegroom has to promise that he will look after his wife. On the other side, the bride also promises that she will be faithful to her husband. In the approved form of marriage the essence is the transfer of the gift (kanyadan) by the guardian.

Does this amount to a contract between two men, then, as representatives of two joint families? The irksome conceptualization of the bride herself as a mere gift has led to protests about how callously Hindu tradition allows women to be treated as a piece of property, to be given and received in marriage. While M. Basu (2001: 2) blames Muslims and other raiders for the bad position of Hindu women, other writers become defensive. Sastri (1988: 208) emphasizes the Aryan ideal:26

Marriage, with us as with several other peoples more or less civilised, is a sacrament, an institution having a deep spiritual significance, and whose value cannot be judged from its uses and purposes which our external senses alone can give us to understand. The breeding of progeny and mere satisfaction of the natural craving for sexual companionship are not the only aims of married life cherished by cultured peoples all over the world. Among the advanced and cultured races of people, married life is intended to serve other and nobler purposes than these, however essential and valuable these are in themselves.

Many authors address specific aspects of marriage arrangements. Mishra (1994: 25–35) discusses the qualifications of the bride and groom, while Karve (1994: 60) distinguishes marriage and widow remarriage, since ‘[a]ll over India the words for “marriage” are always different from the words for “widow-marriage”. The second marriage of a woman needed no ritual and vows. It is merely considered a living together of a man and woman after letting a few friends and relatives know about it’. Agnes (2000: 20) also shows that differences in terms of social strata and the status of the spouses were highly significant:

(p.283) Marriages among the various lower castes were less sacramental and more contractual. The ritual of saptapadi (seven steps round the sacrificial fire,
which is essentially a Brahminical ritual) or kanyadan did not prevail among these communities. Child marriages were not the norm. The contractual marriages were based on consent of adult women and the rituals and ceremonies reflected this element of consent and contract. The rituals of remarriage of widows and divorcees varied from those of virgin brides.

The eight forms of traditional Hindu marriage are covered in great detail by many authors.²⁷ Pandey (1969: 170–1) specifically discusses the role of rituals in Hindu marriages, arguing that religious ceremonies are essential to make a Hindu marriage valid (p. 170) and that they are performed for legalising the marriage, legitimising the children, and avoiding public scandal (p. 171). In his view, ‘[t]he nuptials were supposed to impart sanctity to the marital relation. Hence it was thought necessary that they should be performed in every case’ (id.). Shastri (1990: 40) claims further that the presence of the wife is absolutely necessary for these rituals. According to Pandey (1969: 199), these Hindu marriage rituals have developed from inelaborate beginnings:

In the beginning they must have been very simple. A woman was given to a man by the constituted authority by which they became wife and husband. But as marriage was a very important occasion in the community, many rites, practices and customs arose, which were regulated by the community itself. In course of time the society became complex and many local and chronological differences came into existence.

A variety of cultural festivities surrounded a Hindu marriage as well. Pandey (1969: 200) briefly discusses the major Vedic ceremonies. Fruzzetti (1990: 121) writes that ‘Hindu marriage as a sacrament requires sacred rituals of two types, Brahmanic rituals handed down from Vedic times, and local rituals performed by women, without the involvement of a priest and without Sanskrit mantras’. She shows that ‘[b]oth types of ritual are concerned with the same theme: male and female union through the complementary roles of the sexes in securing the immortality of the male line’. This again shows the critical context of the joint family. Fruzzetti (1990: 123) also emphasizes life-cycle rituals:

Marriage is seen as a journey to a new locality, status, role, position, way of conduct—a new set of relationships. Bride and groom are reborn as husband and wife ... The rites highlight the severance of a married woman from her father’s house and the tying of a wife (strī) to a new environment in her inlaws’ house.

While this focuses on the cultural construction of the category of ‘wife’, Pandey (1969: 233) commented on the expected social transformation of the couple:

**(p.284)** The nuptials in their utterances, promises, hopes and fears symbolize a great social transition in the life of the bride and the bridegroom. They are no longer irresponsible youths depending for their bread and views on their parents. The seriousness of life dawns upon them ... This involves a great compromise and mutual sacrifice ... Marriage acquires its true meaning and reaches perfection only when the conjugal relationship is based on the realization that marriage is a willing sacrifice for the good of the partner, the family, the society and the world.

In their discussion of Hindu marriage concepts, Bedwa and Ullah (1992: 67) note that observance of shastric ceremonies or of customary rites of the particular community
brings about a valid marriage. They, too, comment on the diversity of customs, so that ‘it is not possible to state with certainty what formalities are required to be observed ... It is indeed a question of fact to be ascertained from the social context of the particular community’ (id.). These legal authors then elaborate on the rituals, highlighting that the dharmasāstras ‘have prescribed elaborate and complex ceremonies’ (id.). Through a gradual process of elaboration, Hindu society has developed a plethora of ceremonies. However, as Bedwa and Ullah (1992: 67) assert:

... there is a wide agreement among the leading works with regard to the performance of certain necessary ceremonies such as Kanyadan, Panigrahana, Saptapadi and Lajhoma. It is very difficult to say with any degree of certainty which of these ceremonies occasions the creation of matrimonial status. From the legal standpoint it is the ceremony of Saptapadi which brings into existence the matrimonial status, for it along [sic ] puts the stamp of finality on the transaction. Could it be then said that a marriage is valid even if Kanyadan and Panigrahana have not taken place since Saptapadi is the decisive factor regarding the validity of a marriage? Such a situation is most unlikely to arise for Saptapadi is the culminating ceremony, the Kanyadan and Panigrahana being the preliminary ceremonies. This position is still continuing even after the passing of the Hindu Marriage Act, 1955.

Here we are entering the realm of current legal debates on Hindu marriage in the light of Hindu traditions. The above quote demonstrates how easily modern legal authors conflate and confuse the Vedic and shastric ingredients of the traditional ritual plurality. In the end, the reader is left confused, as no clear guidance is given.

Deconstructing Modernist Misconceptions

Many of the existing writings do not address the ritual or legal detail surrounding Hindu marriage solemnization and simply challenge the institution as a whole. We saw earlier that Thomas (2000: 14) takes a totally negative view of marriage, describing it as a form of sexual slavery:

It is an institution by means of which the ownership of a woman is transferred from her father or guardian to her husband. While the rights of a parent (p.285) over his daughter is [sic ] restricted at least by the taboos of incest, those of a husband over his wife were complete and absolute. An abject slave to her owner, a married woman could not plead lack of virtue in her husband as an excuse for disloyalty, any more than a bond-slave could with regard to his owner ... The sanctity of matrimony is the sanctity of subtle tyranny. Perhaps the ancients had good grounds for sanctifying tyranny ....

Thomas (2000: 15) continues this argument by saying that in modern conditions, there ought to be significant changes. While sanctifying tyranny may have been suited to ancient society, today we know better forms of government than those founded on tyranny and ‘it ill-behoves us to retain the sanctity of an institution which has its roots in iniquity’. While this looks like a case of throwing out the baby with the bath water, Thomas (2000: 26–7) goes on to blame marriage ceremonies, in particular, as giving men totally
disproportionate powers and allowing them to do with women what they want. At p. 27 she argues:

All these undesirable aspects of marital morality are but offshoots of its essential vice, which is the absolute power the marriage ceremony gives a man over a woman. In certain respects this power is more despotic than that enjoyed by political tyrants. Marriage gives a man power to condemn an innocent woman to confinement in a cell he calls his home. It gives him power to disrobe a woman whenever he wants to and even against her will. It gives him power to demand work from her without remuneration.

While this amounts to a call for abandoning Hindu marriage rituals altogether, it is not explored what would or should replace them. To what extent is legal recognition by the state, through a secular ceremony or no ceremony whatsoever, going to circumvent the androcentricity of society? Instead, Thomas (2000: 28–9) gets carried away into comparing a ‘good’ Hindu wife to a dog who anticipates the master’s will: ‘And a woman knows, much better than a dog, that her daily bread, her happiness, and her honour depends upon the caprice of her husband and she takes infinite pain to see that she gives him no cause for complaint’. This author therefore concludes that ‘[o]ur marriage morality can best be described as a vicious circle in which husband and wife chase each other into disastrous ruin’ (p. 36). This is hardly constructive scholarship on marriage law.

Such negative conceptions of marriage appear to originate in deeper modernist (mis)constructions of traditional Hindu marriage. To a large extent these have developed as a result of the hegemony of modernist, positivistic assumptions about ‘law’, which distort our understanding of the legal status and role of marriage in Hindu society. Nair (1978: 11) shows how the knowledge of Indian scholars about Hindu marriage ceremonies has been influenced by the modern law, rather than traditional Sanskritic scholarship:

The orthodox Hindu wedding is a ceremonial marriage and it is solemnised in accordance with customary rites and ceremonies of the parties. Its essential validity depends upon (1) invocation before the sacred fire and (2) Saptapadi, whenever these two formed the essential rites. Marriage is completed only when the seventh step is taken if Saptapadi is observed; till then it is imperfect and revocable. Consummation is not necessary to make a marriage complete and binding.

This is almost a paraphrase of Section 7 of the HMA 1955, carefully phrased to avoid pitfalls. A similar passage, but full of mistakes, is found in M. Basu (2001: 22), to the effect that generally speaking, ‘a Hindu marriage is solemnized with the customary rites and ceremonies practised by both the families involved’. Basu then continues to emphasize the key role of the saptapadi, but makes another critical mistake when she writes, at p. 22, that ‘[o]ne of the most important Hindu marriage rituals is saptapadi, i.e. seven steps taken together by the bride and the bridegroom around the sacred fire. It is only after the seventh step of saptapadi is taken, that the marriage ceremony is considered complete’.
While this also attempts to be a paraphrase of Section 7(2) of the HMA, the Act itself does not say or explicitly assume that the seven steps have to be taken around the sacred fire, but actually uses the words ‘before the sacred fire’. Since Basu’s book is one of the most recent pieces of writing on Hindu marriage law, some warning about the current state of scholarship in this field must be given, for even the plain legal information is not accurately presented.

Unfortunately, the situation is also unsatisfactory when it comes to legal textbooks. Derrett (1970: xiv) had argued that the law of marriage was central to legal regulation and needed to be carefully studied in its own right. He warned that despite the focus on property, the highly sensitive topic of matrimonial status must be treated with a certain degree of discrimination, isolated partly from other topics. Derrett himself (1970: 287–301) discussed various aspects of Hindu marriage in detail. However, when we turn to Indian authors on this subject, we locate more cases of deliberate blindness, or at least a good deal of obfuscation. A leading author on Hindu law, Paras Diwan (1979: 78) wrote at the beginning of a chapter on ceremonies of marriage that ‘performance of certain shastric ceremonies is still necessary for a valid Hindu marriage. The ceremonies have been laid down in minute details in the Grihya Sutras’. Then follows a rather long, haphazard summary of some Hindu wedding rituals and other details, until Diwan (1979: 79) comes to the saptapadi:

Then comes the fourth and the most important and indispensable ceremony: the saptapadi. Near the vivaha-mandap the bridegroom leads the bride for seven steps in the north-eastern direction while reciting certain hymns. This is followed by an address by the bridegroom to the bride. Water is then poured on the hands of the couple and certain prayers are recited. Upon the completion of the prayer, the bridegroom joins hands with the bride and says to her, “Give thy heart to my religious duties, may thy mind follow mine. Be thou consentient to my speech. May Brihaspati unite thee unto me”. On the completion of the seventh step the marriage becomes final and irrevocable.

This idiosyncratic description and summary of the law conveys what a saptapadi ritual might consist of, but remains confusing. Evidently, the author combined his own knowledge and observation of (Punjabi) Hindu marriage rituals with elements taken from relevant specialist literature. But having declared the saptapadi indispensable, this particular discussion then concludes by stating that most of what has been described would not be performed in a Hindu wedding today. In fact ‘[t]he performance of all the above ceremonies is also not necessary for the validity of the marriage’ (Diwan 1979: 80). What then is necessary? A few paragraphs later, the author reiterates, having had a brief look at Section 7 of the HMA:

Thus, the shastric ceremonies and rites are still necessary. These can be dispensed with only if one of the parties to the marriage can establish a customary ceremony in substitution of the shastric ceremony ... Saptapadi is absolutely necessary for all Hindus. Whether the other ceremonies are also necessary for the validity of marriage is not clear (id.).
This confusing discussion continues for another few pages. Although this particular textbook has been re-published many times,29 the relevant passages are still not adequately modified and the readers, mainly legal practitioners, are not given clear and unambiguous guidance. A cynic might think of the professional habit of lawyers to avoid clarity to protect their own interests. It is doubtful that Professor Diwan sought to uphold Hindu tradition as such, since he argued vigorously elsewhere for its abolition and for modernizing, secularizing reforms.30

Few legal textbooks avoid such mischief, which could be seen as deliberate abuse of Hindu marriage traditions (Menski 2001, Chapter 1). However, the application of a presumption of validity of marriage in accordance with the Hindu concept of *saṃskāra* has been found useful to uphold the legal validity of Hindu marriages and the financial claims of married women. For example, Desai (1993: 100–1) states:

> There is of course a strong presumption in favour of the validity of a marriage if from the time of such marriage the parties are recognized by the people concerned as man and wife and such presumption applies also to determine the question whether the formal requisites of a valid marriage ceremony were satisfied.

In conclusion, it must be admitted that our knowledge of the complex field of traditional Hindu marriage law has remained patchy and rather inadequate. It is evident that this has worked to the potential detriment of women and children in a male-dominated legal environment, as stereotypes rule the roost, and the diversities within social reality are inadequately captured by the literature. In view of the male bias of the entire Hindu sociocultural system, it is tempting to suggest that reformist efforts might be directed at the regulation of Hindu marriages by the state. However, it is evident that for traditional Hindu rulers, there would be no perceived need for legal intervention, since the area of marriage falls squarely under the idealistic self-controlled order model of *sadācāra*. Within the realm of traditional Hindu law, therefore, and also under Muslim rule in medieval India, this particular area of the law remained remote from state intervention. We need to discuss next to what extent that situation may have changed under colonial rule and under the modern Indian legal system.

**Hindu Marriage Law Under British Rule**

Derrett (1978a: 10) reports that *dharmaśāstrīs* had threatened people with hell if they interfered with the sacred institution of marriage. Perhaps the British were gradually becoming aware of this, but they had their own reasons for not getting involved too deeply in Hindu marriage law. We saw in Chapter 4 that the general reluctance of the colonial rulers to interfere in the personal law sphere became a prominent pattern. Some writing on this period suggests that legal intervention by the colonial powers could bring no good anyway. Chandra (1998: 4) argues that the institutional sexism underlying the androcentric patterns of Victorian England was transposed, through the colonial claim to universality, onto the colonial framework of British India. However, as Chandra (1998: 73) emphasizes, there were many limits to the process of colonial intervention:
Reflecting the paradoxical structure of the larger imperialist exercise, a contradiction was inherent in the British Indian judicial practice. Driven by an expansionist urge for unquestioned jurisdiction over the affairs of the ruled, it was, simultaneously, obliged by the force of indigenous laws and usages into a self-limiting minimalist conception of its mediation.

Chandra claims that after 1857, a slight shift occurred, but eventually 'the experience of 1857 had introduced a new stress in the structural ambivalence of the colonial dispensation' (id.). Pujari and Kaushik (1994, III: 283) blame the British for maintenance of the personal law system, leading to the argument that the colonial rulers could not involve themselves in the customs and religions of their subjects, which then resulted in further stagnation. Taking the famous (p.289) case of Rukhmabai as a mirror of such tensions, Chandra (1998: 100) argues that after the 1860s, the gradual experience of codification of the general law emboldened the British to go further:

... massive codification of indigenous laws and usages had meanwhile induced a sense of knowledge about the subject people, and an attendant sense of power that could dispense with the earlier hesitancy and uncertainty. The British would now be the sole arbiters in India, even settling cases relating to the subjects’ private lives. They would assume the powers of the king and the functions of the caste ... They would not only exercise jurisdiction over conjugal rights as determined by Hindu laws, they would enforce those rights according to their own modes of procedure.

The process of judicial intervention, thus, allowed the British to become more closely involved with questions of Hindu marriage or, to be more precise, its social consequences. Did a child wife who had been married to an unsuitable, sick man have to agree to consummation of her marriage? In Rukhmabai’s case, it appeared that the colonial system asserted itself and intervened in favour of the husband’s traditional rights. However, since the negative judgment against Rukhmabai was not enforced, the law was deliberately left without implementation. Chandra (1998: 186) observes that the colonial officials, enjoying a monopoly of power, also claimed a monopoly of wisdom. As before, '[t]hey rationalized any position that helped to ensure their power and safety. They had developed cold feet on the question of altering the existing law for fear of popular discontent'. Thus, there was no scope for large-scale intervention in Hindu marriage law, and the British merely dealt with a few peripheral matters, such as removing the legal obstacles to widow remarriage.

Agnes (2000: 46–52) examines in detail the subversion of women’s rights under the British through the indirect introduction of English concepts and principles. Despite the initial policy of non-interference in personal law matters, she observes a gradual process of tampering with established local customs through various means, prominently by law. Agnes (2000: 46) confirms what we found in Chapter 4 earlier:

At this stage, the process of evolving laws at the local level through commentaries, which incorporated within them the local customs, was arrested. The British interpretations of the ancient texts became binding and made the law certain, rigid...
and uniform. This clear marker of modernity was welcomed by the newly evolving English-educated middle class of Bengal and provided the British a moral justification for ruling India as (p.290) harbingers of enlightenment. Through their interventions the Hindu society could rid itself of its ‘barbarism’ and enter an era of ‘civilization’. An image of the cruel and superstitious natives who needed Christian salvation was deliberately constructed by the Evangelists. The entry of Hindu social reformers into the campaign against Sati at the advent of [the] nineteenth century strengthened the process of interventions not only by judicial decisions but also by legislative reforms.

Agnes (2000: 46–7) lists four legal areas in which significant reforms were spearheaded, the Sati Regulation Act of 1829, the Hindu Widows’ Remarriage Act of 1856, the Age of Consent Act, 1860 and the Prohibition of Female Infanticide Act of 1872. None of these legislative interventions concerns Hindu marriage solemnization directly, but all are linked to marriage-related arrangements among Hindus and sought to remedy perceived abuses in society. Agnes (2000: 47) comments that these laws, focusing on ‘barbaric’ native customs, create the impression that interference in the realm of ‘personal’ laws was for the benefit of Indian women: ‘There is a presumption that by incorporating the concepts of modernity into the native jurisprudence, the status of women in India was alleviated. But recent scholarship has questioned this premise’. Agnes (2000: 52) goes further in her criticism of British legal intervention, identifying the effects of bias in favour of high-caste Hindu norms and male-centred assumptions:

The period between 1850 and 1930 witnessed the elimination of a wide range of customs which diverged from the Anglo-Hindu law as the standard of proof required was very high. Unless it could be proved that the custom was ancient, certain, obligatory, reasonable and not against public policy, it had a very slim chance of survival. Derrett comments that in this manner, the Anglo-Hindu law with its Dharmashastra background was spread more widely than it had ever been before. The only customs which were saved from the crushing effects of the British courts were the customs of the agricultural classes in the Punjab and matrilineal practices of the Malabar region. The tendency of both the British courts and of the urban Hindu middle class was to ignore the diversities and to impose a legal Hinduism upon these communities. Contrary to popular belief, many of the customs which were crushed were those in favour of women.

However, while various Acts were passed under British rule around the 1920s, with some regulating the consequences of marriage in terms of property relations, no direct intervention in Hindu marriage as such took place. Few further reforms then occurred in this field until after the Second World War, during which, as Derrett (1978a: 7) observes, social activism began to flourish:

Ladies of good family, and high educational attainments, pressed hard for a wholesale reform of the law of marriage since the 1920s at the latest. As (p.291) happened in both World Wars in England, national emergencies placed women’s claims to equality in a new light. The leaders of the movement had personal access to Indian jurists and public men; which meant that before Independence, indeed as
early as 1941, they were able to inspire numerous Bills before the Legislative
Council.

Kapur and Cossman (1996: 45) show that social reformers in colonial India used the
women’s question for a variety of purposes. Some legal changes were sought from the
colonial administration to improve the status of women, tackling specific social problems
like sati and widow remarriage, as well as child marriage. Reforms of Hindu personal law
were first looked at during the 1920s as an aspect of achieving women’s uplift (Kapur and
Cossman 1996: 55). By 1928 the focus was broadened to encompass female inheritance
rights. Agnes (2000: 204) notes that rights for Hindu women in the traditional periods
were based on traditional notions of equity, while during the colonial era, the British
influence had been negative. Agnes (2000: 205) explains that,

... the English common law contained several stringent anti-women biases. These
biases crept into India through the Anglo-Saxon jurisprudence and subverted the
traditional legal systems which provided women with a certain measure of
economic security. The traditional systems were remoulded into linear, formal and
stringent structures, which exercised greater patriarchal control over women and
their right to property.

Agnes (2000: 206) argues that ‘[c]oncepts of justice, equity and good conscience became
the direct channels of introducing English laws, principles and puritanical notions of
morality into India’. Agnes (2000: 205–6) also clearly recognizes that the ancient texts
were distorted in this process of colonial superimposition:
The colonial interventions also facilitated the construction of distinct and mutually
hostile religious communities of Hindus and Muslims, to be governed by their
respective personal laws along the model of the canon law. The basis of the legal
system were the ancient scriptures translated with a western mind set. These
scriptures were never meant to be used as rigid legal principles of an adversarial
legal system. The translated texts drastically changed the nature and character of
the customary and scriptural Hindu law and the Hindu woman’s right to property
suffered a severe set back. In the process of streamlining the pluralistic society
several customary rights of women were crushed as they could not meet the legal
requirement set by the British courts to prove a custom. Ironically, in this process
the character of the communities was fixed and the mutually exclusive communities
of Hindus and Muslims were constructed through litigation over property
disputes.

The colonial intervention could not, and did not, interfere in traditional patterns of Hindu
marriage solemnization, which remained as complex and (p.292) custom-dominated as
ever.34 Anglo-Indian case law upheld the Hindu concepts of saṃskāra. Venkatacharyulu v
Rangacharyulu (1891) ILR 14 Mad 316, is a case on the validity of a child marriage, which
also concerns Hindu concepts of marriage. The parents of a young bride were restrained
from giving her in marriage to someone else and it was held at p. 318:

There can be no doubt that a Hindu marriage is a religious ceremony. According to
all the texts, it is a samskāram or sacrament, the only one prescribed for a woman
and one of the principal religious rites prescribed for purification of the soul. It is binding for life because the marriage rite completed by saptapadi or the walking of seven steps before the consecrated fire creates a religious tie, and a religious tie when once created, cannot be untied. It is not a mere contract in which a consenting mind is indispensable. The person married may be a minor or even of unsound mind, and yet, if the marriage rite is duly solemnized, there is a valid marriage.

An impression has thus been created that, in this area of the law, traditional Hindu practices, even Sanskritic scriptural traditions, have been strictly maintained and preserved. Exaggerated assumptions about the fixed nature of ‘tradition’ in this context abound. Bedwa and Ullah (1992: 68) engage in myth making when they claim that, even though we do not know much about Manu and other sages, ... even a few decades back, the Hindus were mainly and scrupulously following the injunctions prescribed by them. There were unbroken traditions continued from the earliest time up to the present period. This continuity of the tradition speaks a volume about the efficacy and the usefulness of the said injunctions which could not otherwise command so great a reverence and so faithful an observance by the entire Hindu society. As a matter of fact, until the passing of the Hindu Marriage Act, 1955, there was hardly any momentous change in the law of Hindu marriage.

The authors here conflate customary traditions, textual norms and legal rules, overstating the continuity and uniformity of traditions. On the other hand, most writing pays little attention to ‘tradition’, comments straight on the need for modernist legal reforms, or discusses the effects of the legal interventions brought about by the HMA of 1955, to which we must now turn.

Modernist Reforms to Hindu Marriage Law
As we saw, it has been a standard technique in post-colonial South Asian countries to reform the majority personal law first and to ignore the minority laws. The aim, it appears, was modernization as well as unification, in total conceptual opposition to traditional legal systems with their emphasis on contextspecificity rather than legal uniformity. In India, the debates about Hindu marriage law and its reforms have therefore been tied up with uniform civil code debates and the politics surrounding the perceived intransigence of the Muslim personal law.

In modern Indian law, Hindus, Buddhists, Jainas, and Sikhs were eventually to be governed by one uniform Hindu law, ostensibly for the sake of reducing diversities within the Hindu personal law, and to promote nation building. In this way, an artificial unity of Hindu law has been created to foster a national spirit. Desai (1998: 68) claims that ‘[t]he conditions and requirements of a ceremonial Hindu marriage are considerably simplified and any two Hindus, which expression includes not merely Hindus by religion but Buddhists, Jains and Sikhs as well, can solemnize the ceremonial marriage recognised by the Act’. Whether this has been successful—in a purportedly secular democracy which claims to value equidistance from all religions—must be doubted. Some Sikhs, in
particular, have violently objected to this legal intervention, demanding among other things greater recognition of their own personal law. Even today, local and tribal customary laws continue to play a much larger role in the Indian legal system than most lawyers readily admit. Custom remains evidently relevant and is a topic discussed in all major textbooks.

Modernist Agenda and their Problems

Legal intervention in marriage law by the post-colonial Indian state has been justified in classic eurocentric modernist statements. Qureshi (1978: 81) claims that ‘[t]he role of social engineering is complete in the west and it should be applied to India, if necessary, in remodelled or rectified form’. Qureshi (1978: 251–2) explicitly justifies such intervention in marriage law through the idealized concept of the welfare state:

In ancient days the ceremony of marriage was necessary because the state was not expected to see every aspect of human life. At that time the main task of the state was to maintain law and order. The reason of prescribing marriage ceremonies was to impose a moral binding on the husband to give shelter to his wife and children. Today, the state is a welfare state. It has to make laws for every aspect of human life. Therefore, if a marriage has been registered with the Registrar of Marriages, there should be no need of a marriage ceremony.

By stipulating that a ‘religious’ marriage ceremony may not be necessary, this author apparently suggests a secularizing agenda, a rather radical step for a Muslim writer. While the precise extent of state involvement remains debated, marriage as a major building block of society is now perceived to be of relevance also to the state. Earlier, Altekar (1978: 368) had clearly pleaded for reforms:

... even orthodox Smriti writers like Manu have recognised that a time might come when their rules would become obsolete, and have therefore declared that if any rules framed by them are found to be not conducive to the welfare of society, or against the spirit of the age, they should be unhesitatingly abrogated or modified. As a matter of fact they themselves have done so in many cases.

Modernist legal authors such as Ranbir Singh (1991) claim that the state should exert ever more control over marriage law and must make greater efforts to control the social aspects of marriage. Singh (1991: 39) argues in particular that compulsory registration of marriage ‘is certainly [the] need of the hour to prove the validity of a Hindu marriage’ and claims that ‘compulsory registration holds a key to the eradication of social maladies which are [a] by-product of defective marriage laws’ (ibid.: 40). Asserting that all kinds of benefits will accrue to women, Singh evidently relies on arguments by Professor Cretney from England, to the effect that registration is essential to ascertain a person’s status. But is this equally relevant in India? Singh (1991: 40) claims that ‘dogmatic insistence on the observance of essential ceremonies for the solemnisation of a Hindu marriage has provided a fertile ground for the nurture of many social evils’. As discussed further in Chapter 10 later, one of the modernist key arguments, as in Singh’s essay, is that formal registration of marriages would reduce polygamy. However, such claims
remain highly doubtful. Qureshi (1978: 251) insists on the importance of marriage registration, while recognizing that customary forms of marriage cannot just be legislated away:

... it is clear that in all the religions, some ceremony has been prescribed for the validity of a marriage. The performance of the ceremony is a religious matter and it should not be abandoned. I feel that it should be provided in the Uniform Civil Code that no ceremony is essential for performing the marriage. Every member of the society should be allowed to perform the marriage in accordance with his conscience. But the registration of that marriage within 30 days after the performance of the ceremony, should be made mandatory. If a marriage has not been registered, it should not be treated as valid. However, the courts should be given the discretion to accept any reasonable explanation for failing to get the marriage registered.

Qureshi (1978: 251) also argues that the intention of the parties to a marriage is the most important point for matrimonial relations. If the spouses are willing to live as husband and wife, the state should give full protection to them. More important for this author, though, appears to be the uniform civil code issue, leading to a surrogate debate which is not really concerned about marriage solemnization. Qureshi (1978: 290) writes:

There was a time in the history of human civilization when the duty of the State was only maintenance of law and order, protection of life, liberty and the property of the subjects. This concept of state has completely changed. Today we are living in a welfare state which has to guarantee prosperity and well being of all the people. The Indian Constitution, therefore, contains the chapters of Fundamental Rights as well as Directive Principles of State Policy. The chapter of Directive Principles of State Policy imposes on the state a duty to take positive actions in certain directions in order to promote the welfare of the people and achieve economic independence. One way of achieving economic independence is by having uniform matrimonial laws.

While one must question the logic of such arguments, Qureshi (1978: 292) is even more explicit that the uniform civil code is ‘intended to give equal facility of law to all sections of our people’, stipulating that all Indian citizens should be governed by the same set of laws, since ‘[t]here cannot ordinarily be any justification for having one set of laws for one section of the society and a different one for the other’ (id.). The simplistic argument promoted here, which (p.296) totally ignores the cultural input into legal norms, is to the effect that a uniform matrimonial law for all Indians would constitute one step towards social justice (ibid.: 293). Thus, as Qureshi (1978: 342) argues further, uniform marriage laws should give equal status to both spouses irrespective of caste, creed, and religion, since ‘[i]t is the duty of a good Government to introduce a good system of laws, which is certain, simple, lucid and uniform without giving rise to disputes or fostering disharmony among the people that are governed by it’ (id.). Qureshi (1978: 343) suggests finally that Parliament should introduce laws keeping in view the recent trends in private international law to establish uniformity in marriage laws all over the world. This chain of arguments clearly arises from modernist thinking and wishes for a globally standardized
legal system, divorced from the sociocultural needs of local people outside the Anglo-American realm.

Discussing the practical mechanics of marriage registration, Singh (1991: 51) rightly suggests that this should be located at the village level: 'It is not a naïve suggestion because when births and deaths can be registered and a proper record can be kept for that, why should marriages not be compulsorily registered, too?' However, contrary to Singh's claims, a full-scale system of registration for all births and deaths simply does not exist in India (Sarkar 1993: 1875). Any system of registration would therefore create its own problems of unreliability.

Pujari and Kaushik (1994, III: 304) uncritically repeat the assertion that registration of marriages would serve as an effective check on all kinds of social problems related to marriage. Singh (1989: 65) notes that Section 8 of the HMA 1955 enables the state governments to provide for compulsory registration of marriages but that failure to register a marriage will not affect its validity. Singh (1989: 65–6) notes that registration is compulsory among Parsis and Christians and for all marriages performed under the SMA 1954, although that Act has had very little social impact, as Singh (1989: 66) confirms, arguing that: 'The ultimate object is to recognise registration as the sole and conclusive proof of marriage, irrespective of the religious rites under which it was solemnised'. This author also asks that India should sign or ratify the UN Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriage and proclaims that it is necessary to introduce a system of compulsory registration for all marriages (id.). Pujari and Kaushik (1994, III: 282–3) note that independent India relied heavily on legislation in its effort to promote total gender equality.

(p.297) Stress on the removal of discrimination and special protective legislation for women was necessary in post-colonial India, because the British policy in the field of family law had such a crippling effect on women (Chandra 1998). Calls for modernist reforms suggest capacity on the part of the modern state to control the sphere of marriage solemnization. However, it has remained a central characteristic of Hindu law that the route of entry into marriage for Hindus, with very few exceptions, goes through adherence to 'traditional' customs and rituals. In practice, the social process of getting married has vigorously resisted central state control.46

Limits of State Law and the Modernist Discourse

Indeed, careful scrutiny of the state's law-making devices to reform Hindu marriage law would suggest that modern Indian law in this field simply underwrites Hindu tradition. This is contrasted by prevailing modernist assertions in the legal literature which continue to claim otherwise. Even today the legal criterion for validity of a Hindu marriage in India is not whether it was registered in some form by the state, but whether it was performed in accordance with traditional rituals and ceremonies. Thus, one must indeed wonder if any reforms have been achieved in this field at all. The relevant law in this field is found in Section 7 of the HMA of 1955, which reads as follows:

S.7 - Ceremonies for a Hindu marriage.
1. (1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

2. (2) Where such rites and ceremonies include the *saptapadi* (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken.

This means that subsection (1) has entirely preserved the old customary position under Hindu law, whereby solemnization of a marriage is a matter for the respective families concerned and is to be governed by family, community, and caste custom. As we saw, these vary by locality, caste and family, and from case to case, so that custom needs to be interpreted flexibly and undue rigidity is to be avoided.

When the legal validity of a Hindu marriage is at issue before a court, questions need to be raised about what is customary in a particular kind of marriage. Given the flexible framework of Section 7(1) of the HMA as cited above, several important questions may arise about when an action falls under *(p.298)* ‘custom’. On the definition of customs, Section 3 of the HMA 1955 is the guiding provision:

_S.3 - Definitions._

In this Act, unless the context otherwise requires -

(a) the expressions "custom" and "usage" signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family;

Provided that the rule is certain and not unreasonable or opposed to public policy; and

Provided further that in the case of a rule applicable only to a family it has not been discontinued by the family;

Our traditional understanding of custom in relation to the nature of a Hindu marriage suggests that large numbers of people would follow exactly the same patterns of solemnization, and a group of people would have done so as long as they could remember. However, as indicated in an earlier section on the traditional Hindu law of marriage, there is simply no such thing as a uniform traditional Hindu marriage ceremony that could be held up to all Hindus as the binding model. Anybody who doubts this should turn to Pandey (1969: 199), who clearly emphasized the complexity of local and different scriptural traditions. More specifically, while discussing the Vedic marriage rituals, Pandey (1969: 200) admitted that ‘we cannot be certain as to in what order they occurred’.

Thus, a Hindu marriage is customary in the sense that it constitutes a specially constructed sequence of ritual steps that have elements of customary traditions in them.
In essence such Hindu marriage rituals are ad hoc situationspecific reconstructions of cultural bricks that are being recycled as the rituals of marriage solemnization proceed. Viewed in this manner, every single Hindu marriage becomes an entity in its own right, operative within the conceptual framework of 'custom', yet not rigidly defined in every minute point of ritual detail. Taking this pluralistic and flexible view clashes with the formal, more restrictive understandings of the legal concept of 'custom', which are too rigid and inflexible.

After 1955, further reforms to the HMA were made in the Hindu Marriage (Amendment) Act, 1956 (Act 3 of 1956), the Hindu Marriage (Amendment) Act, 1964 (Act 44 of 1964), and the Marriage Laws (Amendment) Act, 1976 (Act 68 of 1976). None of these brought any significant changes to the law on solemnization of Hindu marriages. Therefore, much of the legal literature conveys a misleading picture when it suggests that the modern Hindu law on the subject of marriage has been drastically changed. This was neither the case under the HMA 1955 itself, nor under its subsequent amendments. Reddy (1999: 13) claims there were radical changes in the marriage laws of Hindus, but does not actually mention marriage solemnization when he writes that '[s]ection 5 has the effect of abolishing the prohibition on widow remarriage, child marriage and polygamy in one stroke. The woman stands on the same footing as the man in all these matters'. Variar (1985: 21) summarizes the present position in typical dogmatic lawyers' fashion:

... finally in 1955, the Parliament has enacted a law codifying and amending the law of marriage among the Hindus. Therefore at present the entire law is embodied in the Hindu Marriage Act of 1955, which supersedes the previous law contained in the Dharmaśastra works, commentaries and digests, customs, statutes, and decisions of courts, subject to the exceptions relating to certain aspects expressly recognised in the Act.

This very general position, carefully worded, prevails at a formal level, which assumes the supersession of Hindu tradition. But this general statement is clearly wrong as far as Section 7 of the HMA is concerned. Desai (1998: 650–70) claims that substantial changes were introduced in 1955, but totally overstates this in positivist fashion:

The Act abrogates all the rules of the law of marriage previously applicable to Hindus, whether by virtue of any text or rule of Hindu law or any custom or usage having the force of law, in respect of all matters dealt with in the Act. It also supersedes any other law, contained in any Central or State legislation in force immediately before it came into operation in so far as such legislation is inconsistent with the provisions contained in it.

Jain (1983: xxii) notes correctly that the HMA does not prescribe any particular form of marriage, but nevertheless claims that the Act introduced radical changes, brought about uniformity in the Hindu law of marriage, and abrogated custom. Other authors appear to agree. For example Reddy (1999: 12) summarizes the position after the HMA:

The Hindu Marriage Act, 1955 was the first of the codified Hindu laws. The Act does not specifically provide for any form of marriage. It made the marriage more consensual and secular than religious. It no more considers the marriage as a
'Samskara' as considered by Dharma Sastras. The marriage is solemnized as per the customary ceremonies prevalent in the community to which the bride and bridegroom belong.

(p.300) In fact, as is obvious from Section 7 of the HMA as cited above, the post-colonial Hindu law on marriage has simply restated and confirmed the dominance of customary law, but this rule now appears in codified form. Bedwa and Ullah (1992: 68) also seem to make exaggerated claims about the effects of modernist legal intervention:

The immediate effect of the Hindu Marriage Act, 1955, according to conservative view, has been an abrupt severance from the ancient tradition and acceptance of certain principles and nations [sic] hitherto generally quite alien to the genius of the people. But at the same time the Act removed uncertainties in the matter of certain aspects of marriage which were formerly under the traditional law ... in doubtful state.

But what has been this abrupt severance when it comes to the law of marriage? Again, the examples discussed concern formal abolition of polygamy and a number of other issues, but not solemnization of marriage. Bedwa and Ullah (1992: 80) write:

Section 7(1) of the Act provides that a Hindu marriage is to be solemnised by the customary rites and ceremonies of the parties. No preference is given to any party whose ceremonies are to be performed. It has been left to the option of the parties. As the rites and ceremonies to be observed are customary, they must possess the qualities which are necessary for the validity of a custom as defined u/s 3(a) which requires that for maturing into custom a rule should have been observed for a long time, continuously and uniformly.

Diwan (1978: 60) also suggested that the concept of Hindu marriage has undergone a tremendous change under the Act, asserting that '[t]he dharmic institution of marriage, in which marriage was meant to be an indissoluble religious union of man and woman, is sought to be transformed into a union of convenience'. Diwan (1978: 75) claimed that by repudiating the inviolable and sacramental character of the Hindu marriage, the HMA 'treats marriage as a conditional socio-legal agreement between adult and equal parties with their free consent to establish a home as husband and wife'. Qureshi (1978: 41) also argues that the HMA introduced a contractual element into Hindu marriage, which is now a union of one man and one woman to the exclusion of others. M. Basu (2001: 36) observes that '[t]he traditional concept of marriage is now greatly changed and Hindu marriage today has assumed more or less the nature of a contract for the mutual benefit of the parties concerned, duly aided by different legal provisions and reforms', although she recognizes that there are limits to what law can achieve. Singh (1993: 371) even claims that 'the sacramental character of Hindu marriage has evaporated as a result of induction of the remedy of divorce by the statutory law of Hindu marriage'.

Thus, despite their inflated assertions of the effective uniforming reforms of state law-making, such modernist authors are conceding their dissatisfaction with the extent of reforms to Hindu marriage law, which was clearly not (p.301) totally abolished or reformed. Diwan (1978: 62) complained that the HMA was merely 'paper legislation in
several respects’ and criticized that it ‘still allows customary marriages and marriages replete with religious ceremonies’. Diwan (1978: 63) argued that all these loopholes needed to be plugged, while trying to pronounce on the ideal of modern marriage:

The question that occurs to every one is, what is the ideal form of marriage that suits the modern conditions? Marriage ceremony in the present society must be a simple one, secular or civil, without any pomp and show, and it should combine all the sanctity and solemnity of the shastric marriage and the secular content and modernity of marriage by choice, in which the parties to the marriage actively participate without undue interference from elders, who may be, at the most, consulted before marriage.

Diwan (1978: 68) was therefore critical of retaining traditional Hindu marriages under the law, claiming that ‘the retention and recognition of shastric marriages under the present law of marriage is a retrograde step’. Arguing that the development of a secular outlook should be cherished by the modern Hindu law of marriage, Diwan (1978: 68) suggested that the law ‘should be either amended suitably so as to break the religious shell of the marriage or be removed completely from the statute book’.

Such comments and suggestions reflect the hegemony of modernist discourse on modern Hindu marriage law, continuing to inflate and extol the power and virtues of state law-making. Yet despite their language of uniformity, secularism, and value-free modernity, these are actually culture-specific modernist phrases inspired by legal developments in England, where during the 1970s important divorce law reforms were being debated in such terms. Clearly, a more realistic perspective is needed to critique such suggestions. For example, how would India remove marriage law from the statute book? The HMA 1955 was indeed an odd compromise of the old and the new, which initially left some litigants and judges confused. Interestingly, Bedwa and Ullah (1992: 80–1) observe:

It is submitted that even after the codification, the courts are not still certain as to which are the essential ceremonies of marriage, except saying that “Saptapadi” is an obligatory ceremony. It is denying the fact that among the Hindus there is no clarity about the essential “sastraic ceremonies”. Different classes and castes of Hindus and Hindus in different parts of the country perform different ceremonies and even the priest who officiates at Hindu marriage is unable to identify what are the essential ceremonies, as distinct from the non-essential. The result is that whatever the ceremonies right or wrong the priest performs, are essential ceremonies for that marriage.

It is therefore argued, at p. 81 that ‘it is very doubtful whether nonperformance of essential ceremonies would now have a fatal effect on marriage’. These authors also recognize that long cohabitation as husband and wife would raise a presumption of valid marriage. Bedwa and Ullah (1992: 81) therefore almost stumble across the finding that ‘the law relating to a Hindu (p.302) marriage is the same after the passage of the Hindu Marriage Act as it was before its passage’. This is indeed the correct position, provided
that the courts are ready to apply a presumption of marriage as liberally as they should. Yet this has continued to be constantly contested in the context of creating a modern legal order in the Indian courts.

Contesting Modernity in the Courts

Closer critical scrutiny of Section 3 of the HMA would appear to suggest that it actually supports such a flexible stance. The section does not speak of ‘ancient’ customs transmitted and followed ‘since time immemorial’, but explicitly mentions observance ‘for a long time’. Problems have arisen when communities have more or less radically changed their customs and have introduced new elements that seem to clash with the provisions of Section 3 of the HMA. In such cases, critical questions arose about how long is ‘a long time’. The legal requirement is manifestly not that such customs have to be ‘ancient’. Nevertheless, Indian courts have in many cases used precisely that word, or have even demanded evidence of customs ‘since time immemorial’, a phrase coming from Anglo-Hindu law. This remarkable imprecision in statutory interpretation should not have gone unnoticed, but the Hindu law on this subject remains confused today.

One famous early case exemplifying the imposition of such modernist, positivistic conceptions in Hindu marriage law concerns the pre-1955 case of the Tamil self-respecters, who refused to involve Brahmins and complex Brahmanical rituals in their marriage ceremonies and devised instead new, simpler, and cheaper customary forms of marriage solemnization, which were followed by a large number of people. In *Deivaini Achi v Chitambaram Chettiar* AIR 1954 Mad 657, it was held by the Madras HC, in conflict with local social norms, that a simple marriage solemnization without full rituals did not lead to a legally valid Hindu marriage. In other words, a full-fledged shastric marriage ceremony was held to be essential for legal validity. Denying the scope for the development of new customs and operating in favour of high-caste shastric norms, this decision created a grave social problem, for it legally invalidated thousands of Hindu marriages and confused people about their property rights and standing in society. Remarkably, it took the legislature of Tamil Nadu a good thirteen years to come round to resolving this conflict. Nevertheless, the resulting legislative amendment constitutes a significant victory for customary law.

(p.303) Later cases on Section 7 of the HMA, starting from the well-known precedent of *Bhauroa Shankar* AIR 1965 SC 1564, have tended to use the concept of ‘ancient’ custom and demand *shastric* rituals, especially the *saptapadi*. The insistence on custom having to be traced ‘from time immemorial’ is definitely a relic of British legal education, since in traditional Hindu law there was no such requirement. *Rabindra Nath Dutta v The State* AIR 1969 Cal 55 takes rather too strict a view of customs in Hindu marriages, virtually ruling out that any changes may be introduced. In this case, Hindu marriage is treated as a sacrament and it was held, at p. 58:

The Hindu Marriage Act does not lay down any special or particular kind or form of ceremonies to be compulsorily observed in all Hindu marriages. In fact, the form of marriage, prescribed by the Sastras, is subject to modifications by custom or
usage. But the expression ‘Customary Ceremonies’ cannot be taken to mean that ‘Sastric Ceremonies’ have been totally ignored. The expression ‘Customary Rites and Ceremonies’ naturally means such sastric ceremonies, which the caste or community to which the party belongs is customarily following. Customary rites and ceremonies to be accepted must be shown that such custom as an essence of marriage ceremony had been followed definitely from ancient times and that the members of the Caste, Community or Sub-Caste had recognised such ceremonies as obligatory. Once it is proved by evidence what ceremonies had been followed as customary rites, it is no longer left to the will of the Caste, Community or Sub-Caste to alter them as the essence of custom is that on account of its definiteness it had been recognised and adopted by the caste or community with certainty and without any variation.

This is clearly a strict legalistic approach that is not going to be feasible in practice. Given that the inherent customary flexibility of Hindu marriage rituals caused legal problems in some cases, some writers began to criticize the strictures of modernist, positivistic models. Anand (1992: 184), for example, while not consciously couching his analysis in this theoretical framework, observes that the official strictness of proof of marriage should be relaxed in view of social changes and new patterns of rituals:

Meanwhile ceremonies to a marriage be simplified so as to include the intention of the parties manifested by exchange of garlands or rings or the likes in the presence of relatives and friends. Such simple forms be recognised as valid marriage statutorily. After all, many rituals and ceremonies in connection with marriage are already not in vogue any more. Panditji is generally bribed to skip mantras at the Saptapadi and to hurry the whole show. Should not law keep pace with society?

Should the law not recognise those ceremonies which society has evolved to grant approval to a marriage?

This interesting suggestion means in effect that the law should recognize what society does, rather than seeking to dictate to people from above. Is this a conscious switch away from the colonial mode of the social reformers, or even (p.304) an early glimpse of the emergence of a postmodern condition? Other debates that reflect upon the contestation of modernist conceptions within the courts relate to the issue of prohibited relationships for Hindu spouses in Section 5 of the HMA. Here the legal need was to protect certain local customs, especially from south India. In view of the size of India, and the variety of customs about prohibited degrees, a uniform legal regulation could simply not be achieved. Similarly, clauses (iv) and (v) of Section 5 of the HMA make an exception in favour of a custom or usage governing each of the parties to the marriage when it comes to prohibited degrees. Some reported cases from the South are very instructive on this subject. In Balusami v Balakrishna AIR 1957 Mad 97, a marriage between a grandfather and his daughter’s daughter came up for consideration. The Court held this marriage to be void. In Meenakshisundaram Pillai v P. Nammalwar AIR 1970 Mad 402, a man had married his sister’s daughter after his first marriage remained without offspring. It was held, at p. 405:

The said marriage having taken place, after such marriages have been prohibited
by law, it would be invalid and the position of his wife who is also his niece is no better than that of a concubine. But he took his sister’s daughter in marriage as his second wife, as he had no issues by his first wife. Such a marriage was not prohibited by Sastras, or Hindu Law, as administered prior to the prohibition of such marriages by statutes.

This was a case about the Hindu law of charitable endowment, and the marriage issue was only a minor point. It is significant that nobody asked whether maybe, in this community, marrying a niece was within the scope of customary laws. It is certainly not the universally accepted position, as Bedwa and Ullah (1992: 72) seem to suggest, that all such marriages are necessarily void. In fact these authors themselves provide further case references (ibid.: 72–3) to the effect that a woman’s marriage with her maternal uncle may be considered desirable in some communities, but not in others. Bedwa and Ullah (1992: 73) add a touch of legal realism when they suggest that not much harm is done if people go on solemnizing such marriages since, ‘if the families are well educated and financially sound, it would make no difference to them if they marry by breaking the provisions of the statutory laws. Their action would not bring any social stigma in the society to them and their children’.

Predictably, an important aspect of writing on Hindu marriage concerns the position of women. Singh (1989: 157) argues that the reformative efforts of the 1950s ended up being reduced to ‘a tenuous and emaciated body fragmented into many laws’ and thus throughout the 1950s, male hegemony continued to rule. Many authors complain that modernist legislation was not radical enough and has not improved the lot of women. Singh (1980: 85) makes reference to Chinese family law reforms, arguing that the result has not been a copying of modern Western love marriage, but a ‘situation where young couples agree to marriage on the basis of both traditional and modern Chinese values, keeping in mind their parents’ preferences and advice’. For India, Singh (1989: 161) even asks for a degenderized society and, in a style reminiscent of Martin Luther King, Indu Prakash Singh (1990: xiv) imagines her own ideal society of the future:

I envisage the end of all oppression of women and exploitation in a depatriarchised socialist democratic society. Let us join hands in building such an egalitarian society where we would not be having women and men (gendertypes) but humans.

More realistic and academically cogent, Agnes (2000: 77) speaks of stilted efforts at gender justice in the post-independence period, finding that:

... the underlying motive of the reform was consolidating the powers of the state and building an integrated nation. This crucial objective could be achieved only by diluting women’s rights to arrive at a level of minimum consensus so that the agenda of reform could be effected without much opposition. Several customary rights were sacrificed to arrive at uniformity. The statutes that were finally enacted were merely ornamental instead of being markers of genuine and concrete efforts at rectifying the gender discrimination written into the Hindu law.

The fact that using the official mechanisms of the state law may even be
counterproductive is evident from *Sanjay Mishra v Eveline Jobe* AIR 1993 MP 54. This case concerns a Hindu man and an Indian Christian woman who allegedly married, but the ‘husband’ refused to acknowledge that a lawful marriage had taken place. The woman had distributed copies of a marriage registration document under the SMA 1954 to her friends, while the man admitted to having signed certain marriage registration documents in a Registrar’s office, but claimed that this had happened under duress. The woman alleged further that they were married in 1985 in a famous Hindu temple in Calcutta, in accordance with Hindu customs and rites, and had thereafter lived as husband and wife. The judge found that under the provisions of the HMA, a Hindu man and a Christian woman could not validly marry, thus the ‘wife’s’ claim to have followed Hindu customary rituals of marriage could not be maintained. The lower court was criticized for overlooking the details regarding the personal law of the parties:

The trial court has merely gone by the registration certificate; but such registration is valid only when it is found that there is a valid marriage. Where the factum itself is disputed, essential ceremony constituting the marriage in the instant case in accordance with Hindu rites must be pleaded and proved and the performance of such rites must be brought on records (p. 58).

(p.306) While it was quite inappropriate to presume in the present case that a *saptapadi* ritual would be an essential element of this Hindu marriage,\(^5\) the decision reached by the court seems correct. The registration document by itself is not sufficient conclusive proof in law that there was a properly solemnized marriage between the parties. The husband’s appeal was therefore allowed, and he managed to extricate himself from his unwanted lover. This case would appear to confirm that if women want to secure their legal position as a Hindu ‘wife’, they would have to ensure that they follow the customary Hindu law on marriage solemnization.\(^4\) Formal recourse to the secular state law on its own, as this case shows, is insufficient.

Thus, despite the prevalence of modernist, positivistic conceptions, modern Indian state law has not asserted itself through abrogation of the traditional Hindu law on marriage solemnization. Derrett (1963c: 137–8) summarized the legal position succinctly, saying that ‘[t]he *sastric* concept of marriage as a *samskara* (‘sacrament’), a union of two persons for all purposes, spiritual and secular, indissoluble even by death, has been trimmed but not destroyed by legislation’. This points to the fact that the modernist reforms of the 1950s were not just an awkward, haphazard compromise. As a method of legal regulation, the legislative non-intervention in Hindu marriage solemnization reflects a recognition that law cannot just be imposed by the state. In this sense, the post-colonial modernist lawmakers already implanted the seeds of a postmodern condition into the regulatory system which they created during the 1950s.

**Postmodern Evolution of Hindu Marriage Law**

The implantation of these postmodern seeds, combined with a growing realization that modernist legal reforms in post-colonial India were not quite what they claimed to be, laid the foundations for the postmodern evolution of Hindu marriage law during the past few decades. Going beyond a mere critique of modernity and its elements, postmodernist
approaches—both in scholarship and in the legal domain of cases and legislation—have searched more critically for appropriate solutions, while recognizing that no perfect simple remedy may be found to govern complex situations.

With specific reference to Hindu marriage law, the realization that Hindu marriage, as a central element of society, cannot be subjected to legislative intervention, forms a major element of Hindu law’s current postmodern condition. This realization has led to legislative inaction, a form of nihilistic refusal by the state law to get involved in regulation of Hindu marriages. It seems to have been realized more recently that the reformist ambitions were too grand and the modernist task is just too enormous. One indication of this is that successive Parliaments have been unwilling to turn a number of statutory proposals by women’s groups, in particular, into formal legislation.

The same scenario motivates the Indian judiciary to devote explicit recognition to traditional Hindu values related to marriage (which may be expressed in secular language about the need for a stable society), a process which has implications beyond the narrow realm of Hindu marriage law. The practical end result is that the rules and concepts of traditional Hindu law have been granted a new lease of life. They now appear within the formal framework of ‘modern’ Hindu law, undermining this modernity, as it were, by exerting traditional sociocultural and legal influence through the formal mechanisms of modern Indian law. The traditional Hindu law of marriage solemnization has steadfastly resisted modernist attempts at its abrogation.

Derrett predicted, throughout his later writings, that despite some evidence of modernization, the dominant view in Hindu society for the foreseeable future would remain that marriage is a form of social obligation. Mitter (1992: 20) notes that, ‘nothing, apparently, can be worse for a woman than to remain unattached, a social pariah. In all the separate and unequal social worlds cohabiting in an Indian city, there is consensus on one point: a woman needs to have married status. At the least, she needs to have had a husband, once’. However, Nair (1978: v) observes significant social change, noting that ‘[m]arriage is perhaps the only institution which has undergone a rapid change’ and even suggests that ‘present-day marriage practices lead one to believe that the institution is becoming an unwelcome affair’. Yet this does not amount to suggesting that the abolition of marriage is viable in Indian society; it reflects at best the possibility of an individual, private choice, which was, after all, familiar to ancient Hindu tradition, too.

Towards a Postmodern Discourse

In this regard it is instructive to refer to the Dowry Prohibition Act of 1961, which is widely seen as an example of the futile attempts by the state law to abolish socio-legal practices in Indian society. Jain (1990: 625–6) argues that ‘[i]t remains very doubtful whether some of the bad social practices which are ingrained deeply in the social psyche can be abolished merely by legislation’. Disgusted with the horrible stalemate over thousands of dowry deaths every year, some women activists began to call for a moral reappraisal (Kishwar 1990). Yet, does this mean that the wheel of history should in fact be turned back to Aśoka’s idealism? Postmodernist analysis recognizes (albeit with
some reluctance) that the old Hindu concepts of ‘examining one’s conscience’ (ātmanastuṣṭi) and ‘model behaviour’ (sadācāra) retain their relevance today. While some modernist commentators have tremendous difficulties with this kind of approach, it cannot be just dismissed out of hand. While it clearly remains politically incorrect and ambivalent to highlight the operation of traditional Hindu concepts in modern India, global comparative jurisprudential theory suggests that all legal systems continuously feed on their particular, culture-specific ‘legal postulates’ (Chiba 1986; Menski 2000a). So, what is wrong with India relying on Hindu concepts to reconstruct its legal system?

Modernist analysis simply presumed that any elements or traces of Hindu law belong to medieval times.59 Warnings from Professor Derrett and a few others that modernizing legal reforms could go too far and would end up producing injustice in the name of the law, were not taken seriously for a long time. While such arguments are more directly relevant for Hindu divorce law, problems have arisen not only at the substantive level of legal rules, but also clearly in the sphere of legal theory. Is state law really able to dictate to society and alleviate social problems in the process?60

However, some recognition of the limits of modernity is now provided by modernist writers such as Agnes (2000: 90), who argues that the new rights given to women in the 1950s ‘are more conceptual than actual. While attempting to resolve some issues, the codification has foregrounded others which have yet to find a satisfactory solution’. Agnes (2000: 211) notes further that the family law debates are only conveniently brought into the public arena ‘in support of other hidden political objectives’. While earlier the uniform civil (p.309) code and increased property rights for women were focal points for debate, Agnes (2000: 177) confirms that women’s groups and feminist activism are now concentrating on legal issues around violence against women. The literature reflects a growing realization that, just as the colonial intervention actually disadvantaged women further, as it imported androcentric Western notions which damaged South Asian women (Chandra 1998), post-colonial modernist reforms were not able to get rid of the patriarchal framework of reference either. In her concluding discussion, Agnes (2000: 203) observes:

While examining the evolution of family laws situated within a patriarchal social structure, discrimination against women is a foregone conclusion. Caste, class and clan purities are maintained through a strict sexual control. Punitive deterrent measures and denial of economic rights are the means through which this control is exercised.

Agnes (id.) also argues that the history of women’s rights is not linear, with religious and customary laws at one extreme end of the scale, and statutory reforms slowly progressing towards the other end, as is popularly believed: ‘The history is complex with various interactive forces constantly at play ... it has been a case of “gain some, lose some”’ (id.). Taking a different approach, but thinking along similar lines, Parashar (1992: 113) asserts that the Indian law reformers were not actually aiming to fundamentally redefine the roles of women. She observes that, in the 1950s, there was no radical break with Hindu traditional law. The Marriage and Divorce Bill prepared by the first Hindu Law
Committee was ostensibly designed to incorporate the ‘best parts of the code of Manu rather than those which fall short of the best’ (id.). In other words, there was no real modernist legal revolution, but rather a slight tinkering of Hindu law at the edges, which is certainly the case in Hindu marriage law.

Feminists have often highlighted that some institutions which are considered necessary are not in fact tested as such (Singh 1989: 23). They thus engage in talk of counter-institutions and the obliteration of patriarchal institutions like family, marriage, and the legal system, aiming for an overthrow of the patriarchized society in toto. Yet dissenting voices, such as Singh (1989: 31), argue that revolution alone is not enough, as shown in the socialist countries: ‘What more is needed is a conscientizing revolution—a phenomenological reality—which would not only emancipate women but also men’. Derrett (1978a) emphasized that point a long time ago. The challenge is huge and largely beyond the ambit of the state law.

From the angle of constitutional law, it has been evident for some time that the project of modern law reforms in India could not meaningfully guarantee and offer to the citizens the ideals that the law promised. Minattur (1980: 165) highlighted that under Article 15(3) of the Constitution, nothing shall prevent the state from making any special provision for women and children. So there was an explicit provision permitting the state to discriminate in favour of women, if such discrimination was found necessary. Minattur (1980: 166) noted that ‘a number of laws were adopted with a view to ensuring equality of status (p.310) and opportunity for women’, while in practice, equality continues to elude women. Minattur (1980: 178) concluded:

... it is clear that something more than legislation is required. Perhaps the first thing to be attempted is to make women aware of their rights, however this is done. It is also necessary to change the attitudes of both men and women, of society in general, to social objectives sought to be achieved by legislation. A radical change in the attitudes of women induced by an awareness of their rights which are constitutionally guaranteed and legally protected will be the first step in the complex process of transforming the social structure so that women may enjoy full equality with men in every sphere of life.

Agnes (2000: 206) also observes that the Constitution with its mandate of equality brought in visions of gender justice:

Restructuring of the feudal family laws to suit the needs of women within a modern democracy was the challenge before the newly independent state. But the much-trumpeted Hindu law reforms of the post-independence period were concerned more with homogenizing the culturally diverse Hindu community through a uniform set of state regulated enactments than widening the scope of women’s rights. Hence crucial women’s rights located within customary laws were compromised. The enactments turned out to be a curious mixture of the English law and the shastric law with the worst biases of both written into them.

In view of such shortcomings of the modernist law reform project, many modernists have
developed cold feet. We saw in the previous section in this chapter how Qureshi (1978) argued vigorously in favour of significant state intervention in marriage law. In his conclusions, Qureshi (1978: 371–2) takes up the issue of marriage registration again, but this articulate Muslim author is now back-pedalling on his earlier reformist zeal, advancing religious arguments:

As regards the essential ceremonies, there is a similarity between all the laws. It is submitted that this is purely a religious matter and the state cannot interfere...

Complete de-emotionalisation in marriage is not a healthy practice and is most unsuitable to Indians who are vibrant with emotion temperamentally. Merely signing the marriage agreement will not satisfy the psychology of Indians. Therefore, all citizens should be allowed to marry according to their own ceremonies. However, these marriages should be got registered. The method of registration should be 30 days from the date of marriage.

Evidence of the actual extent of marriage registration in India contradicts loud modernist assertions that state control would be a viable method of regulating Hindu marriage law. Pujari and Kaushik (1994, III: 305) report statistics of marriage registration under the SMA 1954 for the period 1968–72. In Bombay, (p.311) 601 marriages in 1968 and 816 in 1972 were registered in this manner, no more than thirteen per year in Rajasthan, and not even 250 in Delhi. The figures for registration of marriages solemnized under other laws but registered under the SMA are much lower, with no more than forty-three marriages in 1970 for Bombay as the maximum.

While reformers and modernist academic commentators still push for compulsory registration of marriages, it is quite evident that Indians are not ready to accept such a formal, bureaucratic regime. A postmodern analysis would suggest that, in actual fact, no legal system in the world achieves absolute certainty of marital status. Basu (2001: 36), whose arguments for modern reforms were cited above, also admits that there are limits to what law can achieve:

Attempts to bring about changes in the status of woman either through legislation or judicial activism can achieve little success without a simultaneous movement to transform the social and economic structures and the culture (values, ideologies and attitudes) of society.

Iyer (1993: 1) similarly emphasizes that social justice in India means also gender justice, but notes that no quantum leaps have been made and that this is not just an Indian problem, since the USA has ‘failed to ratify into its constitution equality of the sexes’ (ibid.: 2). Much depends on private and individual initiative, but there is also a role for the state in promoting gender justice. Iyer (1993: 16) advises in this respect that Indian women must demand more economic and social dignity in practical terms. He also suggests that the private sector, like the public sector, shall be bound to respect equality of sexes ‘on pain of the state withdrawing all licences, loans and other facilities. The State shall, through all its processes, compel the private sector to comply with the demands of gender justice’. These are again much wider agenda that have lost sight of marriage law as a key issue.
In an early mixture of modernist and postmodern analysis, Derrett (1978a: 159) noted that the Indian judges eventually underwrote Hindu marriage as a sacrament but were initially unsure:

Judges, confused by the initial error of commentators who neglected the great shift in allegiance which occurred in the élite during those vital years, (p.312) and oblivious of the quaintness of a single marriage law being applied to all Hindus indiscriminately, have come out, almost intuitively, with the suggestion or rather apprehension that marriage is still a *samskara*, as for the vast majority it is.

Derrett (id.) also observes that ‘this is understandably less evident in recent years’, which one may take as a reference to the growing strength of modernist notions. However, the idea that marriage must be upheld, not for the sake of Hindu tradition, but for the good of society and the protection of women themselves, also comes through, at p. 163. While the English courts were not interested in reconciliation, Derrett (1978a: 197) stresses that Indian Hindu law did retain the judicial duty to check whether a marriage could still be rescued. This subject belongs more properly into a discussion on divorce, but the links between marriage and divorce law do not permit watertight segregation. How a state legal system will handle one of these areas of the law will inevitably influence the other.

Another example of links between different areas of law has been identified by Agnes (2000: 180), who challenges the modernist assumption that compulsory registration of Hindu marriages will automatically be beneficial, pointing to a crucial confusion:

If the rights of cohabitees are on par with the rights of spouses then registration serves no purpose at all and there would be no compulsion to register a marriage in a society where marriages are viewed more as social functions than as legal contracts. Also if marriages and informal cohabitations are granted similar weightage and are deemed as offences then the whole premise upon which conviction for bigamy is based collapses. Here the existing law makes a clear distinction between solemn marriages and illegitimate and informal alliances where the ceremony of solemnization and permanency of the relationship is of greatest relevance. The widening of the scope would render adultery an offence rather than bigamy. But in the same stroke, it is recommended that adultery ought not to be deemed as an offence. So there is an ambiguity about whether the focus of the reform is curbing sexual immorality by a penal provision or protecting women’s economic rights through widening the scope of maintenance to include women in informal alliances.

Agnes (2000: 183) observes that many countries in South Asia stipulate compulsory registration, but no country has extended this so far as to invalidate an existing marriage, with adverse implications for women and children. She (p.313) notes that, ‘[i]n fact, the modern trend is towards granting rights and benefits to people in informal relationships’ (id.), while in India the official trend is still tilting towards greater regimentation in family relationships. However, she fails to identify that something must
therefore be wrong with modernist Indian scholarship on family law reforms.

In fact, in moving towards a postmodern discourse, Agnes (2000: 176ff.) has diligently prepared the ground for a critical analysis of Indian family law by producing a detailed modernist discussion of a number of Marriage Bills formulated by legal scholars, women’s organizations, and other bodies. Her stated aim is to test these various reform suggestions for their modernity. In turn, she concludes that the existing suggestions do not go far enough and, above all, do not consider sufficiently well the economic needs and entitlements of women.

Agnes thus finds that in the highly politicized climate of modernist law reform debate, rhetoric dominates over a clear understanding of policy and a sense of realism. The dominant agenda of the uniform civil code have given disproportionate attention to Muslim law, communalizing and thereby blocking any progressive debates. Agnes (2000: 209) is highly critical of the legal reform proposals of various bodies. In her view, suggestions for reform in family laws which set out to redefine gender relations within marriage and the family, would have to take into consideration various social, political, legal, and economic realities. But, as she rightly claims (id.), ‘the drafts for the enactment of a Uniform Civil Code framed by the legal academia, do not seem to have contextualized women’s rights within these diverse complexities. The model for reform is the Hindu Marriage Act which in turn is based on archaic English principles’.

The author therefore seems to have much reason to find fault with everything she sees in modernist debates. For example, Agnes (2000: 182) notes that the Marriage Bill, 1994 as formulated by the National Commission for Women ‘makes sweeping and unrealistic recommendations, throwing all caution to the winds’. Agnes (2000: 182–3) notes:

The primary concern of the Bill seems to be abolition of polygamy by ensuring compulsory registration of marriages. But instead of a facilitating measure (of providing proof in case of dispute), registration becomes an end in itself.

(p.314) The Bill stipulates that a declaration of marriage must be sent to the Registrar of marriages within three days of its performance. A fine of Rs 100 per day is levied for default for a period of one month and thereafter the marriage is deemed void.

Agnes is vocally critical of such proposals and comments in various contexts on the pernicious effects that such formalistic legal regulation would have for women and children, in particular. Apart from warning about an increase in state control over people’s lives (ibid.: 187), an important element of her analysis, Agnes (2000: 183) also notes the resource implications of such reform proposals:

While prescribing such stringent measures of compulsory registration, the fact that the government has not been able to provide bare necessities like clean drinking water, primary education and basic health facilities to a large section of its people has been overlooked. The Bill does not spell out the measures through which the government will make it possible for people to register their marriages within three
days of its performance.

In a consolidated discussion of the main points, Agnes (2000: 186–7) examines the major elements of the various modernist reform proposals. Her first point is focused on the uniform civil code agenda. Agnes (2000: 186) finds that ‘a consensus seems to be steadily, albeit gradually, emerging that the process of family law reform has to be cautious. Enforcing a compulsory uniform civil code from above may not be the best solution’. Significantly, Agnes (2000: 187) opposes the use of the term ‘spouse’ and demands explicit recognition of the specific needs of women. Arguing that any recommendations have to be based on the substantive model of equality, she asks for greater clarity regarding the theoretical framework, particularly for academics. Agnes (2000: 188) does not appear to see much hope for significant legal reforms in the near future and therefore issues a rallying call:

Women’s rights seem to be lost in the larger controversy around Uniform Civil Code which today, has become a political question. Only through a step by step approach to bring in small and specific reform through concentrated campaigns can the rights of women be salvaged from the political entangle within which they are currently enmeshed.

Agnes (2000: 211) concludes that ‘women’s rights is [sic] not a primary concern of the dominant forces’ and argues finally that ‘there is a need to locate property at the centre of matrimonial law reform’ (ibid.: 215). There is much in this rich analysis which can be salvaged for a postmodern analysis of Hindu and Indian family law. With specific reference to marriage law, it is highly significant that Agnes (2000: 210) also notes that the modern state may in fact be as good as irrelevant when it comes to Hindu marriage and divorce:

(p.315) The fact that the Hindu Marriage Act has validated diverse customs of marriage and divorce, seems to have been overlooked by the zealous reformers. Although the Hindu Marriage Act set out to ‘reform’ Hindu law and bring it under the state control and regulations, sufficient scope was provided for Hindu customs and practices. Hence under the present statute, a Hindu need never approach a state functionary or a religious institution either for solemnization of his/her marriage or for its dissolution.

On the ground, it will always remain tempting for some litigants (and their legal advisers) to misuse the state-sanctioned customary flexibility of Hindu marriage traditions for obvious pecuniary benefit, thereby damaging the interests of women, especially widows and remarried women. The case law confirms that problems for the female claimant may be multiplied if she was previously married to someone else.

Many reported cases under Section 7 of the HMA constitute bona fide petitions by Hindu women seeking to assert their rights arising from their marriage to a Hindu male. Still, the argument that any woman who claims to be married to a Hindu male must automatically be believed, does not recommend itself. It would encourage false claims of formal marriage, when in fact there was perhaps only an informal liaison. Actually, this kind of scenario points to unresolved legal problems over the boundaries between polygamy and unmarried cohabitation. The existing academic and legal discussions, while moving
towards a postmodern discourse in studying and understanding Hindu marriage law, have hardly begun to realize that any strictly formal regulation of Hindu marriage would have potentially negative consequences for those many women who are party to a quasi-marital relationship that may not have full social sanction (see Agnes 2000: 180, cited earlier). It is more than clear from the existing case law that such women often need special protection through flexible and situation-specific application of the criteria for Hindu marriage. Thus, while scholarly debates have begun to realize the limits of modernist discourse, this recognition has developed in ignorance of the reality of the postmodern condition that has been evolving and blossoming through the application of Hindu marriage law in the Indian courts.

An Emerging Postmodern Condition: Case Law Evidence

Detailed research on case law shows many reported and unreported disputes in which the strict official legal position on ‘proper ceremonies’ was exploited by ruthless husbands during the 1970s and 1980s to the detriment of women. Looking more closely at the cases, however, I found that the case law under Section 7 of the HMA actually falls into two types, namely appeals by Hindu husbands seeking to avoid a prosecution for polygamy, and cases by Hindu women claiming their entitlements from the marriage. Where Hindu husbands were accused and convicted of bigamy, and went on appeal, the courts tried to assist the man, developing in the process a strictly formal case law that seems to grant only completely ritualized Hindu marriages full legal recognition. This strictness, however, is only partly explained by the evidentiary requirements of the criminal law; it is also based on a pro-men interpretation, simply to avoid that the polygamous husband should be punished or even sent to jail.

By the mid-1980s, the consequences of taking this biased angle in the case law became very bad for women and children and judges realized that there was a second type of case concerning Hindu marriage solemnization. Here the key issue was the entitlements of the wife as a result of the marriage. Some Supreme Court judges began to realize how dangerously easy it had become for Hindu men to divest their wives of rightful claims. Where could they go for help if the courts did not intervene in a balanced manner? This realization apparently went hand in hand with growing judicial activism and awareness about the maintenance rights of divorced wives. However, rather than making a big issue out of this, for example by publicly demasking the old pro-men precedent of Bhaurao Shankar AIR 1965 SC 1564, the Supreme Court chose a more subtle strategy, applying a presumption of marriage instead of demanding strict proof. Because of the subtlety employed here, most legal writers did not notice the second type of Hindu case law on marriage solemnization, while many practising lawyers were only too happy to overlook the emergent postmodern legal position in the case law on Hindu marriage solemnization.

It appears that the subtle transition of the Hindu marriage law into a postmodern condition, under the second type of case law, can be located in Sumitra Devi v Bhikhan Choudhary AIR 1985 SC 765. This was an appeal by a Hindu wife from Bihar against the refusal of her claim to maintenance, resisted by the husband on various grounds,
including the allegation that she was not properly married to him. This brief case report contains an important restatement of the law by the SC, which hardly anybody seems to have picked up at the time.\textsuperscript{72} Ranganath Misra J, criticizing the technical approach taken by the lower court and the HC, held at p. 766:

\textbf{(p.317)} There is no doubt that in order that there may be a valid marriage according to Hindu law, certain religious rites have to be performed. Invoking the fire and performing Saptapadi around the sacred fire have been considered by this Court to be two of the basic requirements for a traditional marriage. It is equally true that there can be a marriage acceptable in law according to customs which do not insist on performance of such rites as referred to above and marriages of this type give rise to legal relationships which law accepts.

We hear not a word about modernism or postmodernism, but the learned judge is in effect deeming postmodern pluralism, laying down that explicit recognition of the facts and circumstances of individual cases is more important than following the Supreme Court’s own precedents in the other line of cases on marriage solemnization. Justice, in other words, is more valuable than the formality of the law. This decision clearly refutes the modernist, uniforming, formally rigid legal position that had built up in the line of cases involving polygamous husbands. The judge avoids further discussion by swiftly remitting the case to the lower court for disposal. In \textit{Sumitra Devi}, the tangible issue was the entitlement of the Hindu wife to recognition of her married status and her financial claims. Here we see postmodern Indian social welfare law in action. But only if we understand the inherent principles of Hindu law are we able to recognize that the SC relied in this otherwise insignificant case not on a state-based modern form of legal regulation, but on the flexible traditional Hindu concepts of self-controlled ordering—if necessary with a little push from the courts. The reason for doing so was again to avoid injustice to women, not glorification of Hindu norms or principles of Hindu law. And yet, in effect, this case strongly upholds the customary diversity of traditional Hindu methods of marriage solemnization. It is, however, not a backward-looking decision that ties Hindu men to religious obligations, but a forward-looking social welfare approach designed to protect the interests of weaker sections in society.

As indicated, this was primarily a maintenance case, so hardly anybody noticed the link with the law of marriage solemnization.\textsuperscript{73} The predicaments of Hindu women in this regard have been complicated when the marriage rituals in question were truncated or in some way modified from earlier customary patterns. As seen in the earlier section on modernist reforms to Hindu marriage law, this was already the case in \textit{Deivaini Achi} AIR 1954 Mad 657, on account of social changes in that particular community of ‘self-respecters’.\textsuperscript{74} Problems have arisen for remarried women, especially widows marrying a widower, who would customarily perform only minimal rituals. The women in such cases should be protected under the wide umbrella of Section 7 of the (p.318) HMA, but the twisted case law on Hindu polygamy has posed considerable risks to many Hindu women.

More detailed research on such cases would show various customary forms of truncated or even totally absent marriage rituals, and the consequent application of a
presumption of marriage. Apart from Sikh marriage customs which have long allowed for remarriage in the *karewa* form, there are cases involving Hindus from Maharashtra, Kerala, and other parts of India, all accepting the legal validity of unusual marriage ceremonies, with some of them concerning widow remarriages.

In contrast, the dreadful case of *Surjit Kaur v Garja Singh* AIR 1994 SC 135 concerned a Sikh widow's claim to a share in the deceased husband's property, which was fiercely resisted by the husband's family. Alleging that the widow was not a decent woman, evident character assassination was employed through the allegation that 'Surjit Kaur was in the habit of changing husbands frequently’ (p. 136). Both the Chandigarh HC and the Supreme Court appear to have been impressed by such anti-women rhetoric and sexual innuendo, thereby overlooking the overall justice involved and its watchdog function. This case provides strong evidence of lack of judicial sensitivity about gender and Hindu marriage solemnization, and is simply a bad case (Menski 1995b; 2001: 33–5). It is of course not unique to Indian law or Hindu law that there should be conflicting legal positions. But in this case something else went seriously wrong: This woman’s claim to property entitlement was treated, in terms of evidence law, like a man's defence against polygamy. As a result, the strict criteria for customary rituals were applied, instead of considering a presumption of marriage, as was done in other cases at the same time, in the same year, and even by the same court.

An easy suitable solution to this kind of legal problem cannot be found, as modernist reformers are always tempted to argue, by removing Hindu marriage traditions and bringing in modern secular state law. Marriage remains a human social institution resistant to totalitarian modernist regimentation. Moreover, the Indian legal system is clearly not in a position, for financial as well as organizational reasons, to introduce a compulsory marriage registration system (p. 319) as a basis for determining the legal validity of all marriages, a prerogative that English law and most Western jurisdictions have claimed, but are evidently failing to maintain.

Therefore, here is another element of postmodern analysis relevant to the present case: Unlike prosperous and fairly small Western countries, a huge nation like India will evidently never be in a position to attach welfare right entitlements to married status. At any rate, the number of potential claimants would be unmanageable. The legal system therefore must continue, of necessity, to rely on the traditional customary patterns of marriage solemnization. Public recognition of marital status through social processes must remain the main criterion. If the aim is to protect women, their position and bargaining power in society has to be strengthened. We do not need new laws for that, but activist engagement for protection of individual rights.

At the same time, there are deeper sociocultural reasons for why Hindu marriage solemnization without duly elaborated ritualization (however diffusely perceived in any particular situation), or simple registration of marriage, will remain widely unacceptable. Firstly, within the *ṛta/dharma* context, an unsolemnized marriage between Hindus is simply not a Hindu marriage, because the invisible links between macrocosmic world and
microcosmic sphere have not been created. It is arguable that for this basic cultural reason alone, and not just out of a fear of ‘illicit sex’, most Hindus find a system of unmarried ‘cohabitation’ deeply unsatisfactory and even offensive. It follows that they would therefore not be satisfied with state-controlled formal registration procedures by themselves. They would treat themselves as married only after the Hindu rituals of solemnization have been completed.81

All of this puts paid to modernist hopes from a ‘law and development’ or ‘social engineering through law’ angle. By the early 1990s, it was becoming increasingly clear all around that Indian law no longer even tries to follow (p.320) such Western models (Menski 1996b; 2001). Then, what would be the point of an elaborate system of marriage registration if the information produced would anyway be of no real use to the state and could not be fully and reliably collected in the first place? The new system would inevitably create more problems than it might ever hope to solve.

Indeed, as seen from the discussion by Agnes (2000) as outlined above, it is more widely recognized today that the formal introduction of compulsory registration of all marriages in India would only create many new socio-legal problems and is not a sensible item of reform programmes for the state.82 Most crucially, it would not be an effective remedy for women who are in danger of being denied marital status. This does not simply mean that India has failed to modernize, therefore, but that this important country and its legal system have consciously chosen not to follow the route of Western modernizing models and are relying instead on indigenous methods of self-controlled ordering. Derrett (1978a: 121) anticipated this long ago, pointing to the fact that the overwhelming majority of Hindus lived in villages and to them, ‘a civil marriage implies a negation of everything that they live by’.83

A combined reading of Sections 7 and 8 of the HMA 1955 confirms that the dominant criterion for legal validity of Hindu marriages in India remains observance of customary marriage rituals, and not—as in most Western countries—compliance with the state’s law on marriage registration. Given that customary norms and conventions are decided by people and at the local level, this constitutes a comprehensive abdication of the Indian state’s claim to regulate marriage law. This is a critical and significant finding which, somehow, modernist scholarship has been reluctant to recognize.

The court system, therefore, remains the only formal element of supervening state control in this field. From a Hindu law perspective, this is little more than a supervisory mechanism, a kind of safety net to prevent blatant injustice, a role that is familiarly known in Hindu legal tradition. It is thus not an institution whose involvement must be sought in every case. In fact, like the ancient Hindu ruler’s court, and in tandem with the principles of vyavahāra, formal recourse to dispute settlement mechanisms should not be made unless attempts at self-controlled ordering have failed. This confirms the finding by several authors that Hindus in India today do not need the state to marry and (p.321) to divorce. Rather than being seen as some deficient aberration, this actually reflects the postmodern condition of Hindu marriage law.
The present analysis, thus, points to a polite refusal on the part of the Indian state to carry any real responsibility for the maintenance of any formal law on marriage solemnization. The Indian postmodern state, in a more or less silent process of surrender, recognizes the internal power and strength of Hindu concepts and customary norms, and thus relies on society to self-regulate, without explicitly using ancient terms like sadācāra. In effect, the state has handed ultimate authority not to some saffron men, but to the people of India, who are after all—at least in constitutional rhetoric—the sovereign authority of the nation. Even from a constitutional angle, thus, this subtle regrouping of legal authorities is beyond reproach. It is about time that anthropological and legal scholarship recognizes this scenario as a postmodern condition and embarks on new critical research that moves beyond modernist paradigms and indoctrination to analyse the resulting legal questions which this postmodern condition poses.

Notes:

(1) Following the sagacious advice of Professor Derrett, I wrote my Ph.D thesis on Hindu marriage concepts and the solemnization of Hindu marriages (Menski 1984).

(2) Derrett himself had long been interested in what types of marital expectations the Hindu wedding rituals dramatized, and he set me on a rich seam of material that still requires exhaustive research. Derrett (1978a: 197–8) contrasted the presuppositions of Western spouses and the trend towards easy remarriage with the observation that Indian spouses ‘have only the most basic and crude expectations. Those who marry with low expectations are seldom disappointed with each other’ (ibid.: 198).

(3) Like everyone else, Hindus have the option to register their marriage under the SMA 1954. In some cases of marriage between spouses of different religious and/or cultural backgrounds it is not only advisable but also required by the legal system to register the marriage formally with the state authorities.

(4) The leading studies in this field have been produced by Sanskritists. See in particular Pandey (1969); Chatterjee (1972–4); Chatterjee (1972); Apte (1978); Chatterjee (1978).

(5) Most recently, Basu (2001) is an example of such writing, while Thomas (2000: 14) takes a dim view of marriage itself, treating it as ‘an institution of sex-slavery’. Here is a modern author who apparently has ideological problems with marriage itself and fumes about all aspects of patriarchy. Such writing does not enlighten readers to understand basic key concepts.

(6) A critique of such works would be long and tedious. One of the most recent examples of such writing is Dogra and Dogra (2000). I have used only some elements from such studies, as indicated in the references later.

(7) Stein (1998: 52–3) points to the role of Agni as chief priest in Hindu marriage rituals. In the present context, it would be useful to perceive this ‘fire god’ as the rtic link for a Hindu marriage, making the role of the state redundant.
In the extreme, it is possible to identify a potential ‘zero-ritual’ as the accepted customary pattern, for example, for the remarriage of a Hindu widow (Menski 2001: 20–4).

Bumiller (1991: 25) emphasizes the costs of weddings: ‘In India, a wedding is a chaotic pageant that can last until six in the morning, and more and more has become a public validation of a family’s status and wealth. If a family is rich, it is not unusual to have a thousand guests. Even a working-class family will put on a feast for two hundred, ensuring crippling debt for the next decade’.

This is a slightly younger text, still belonging to the pre-classical Vedic period, and thus dateable to around 1000 BC or possibly later.

This is in essence, as the name says, a ritual involving seven steps, but there are so many variations of it, and such amazing distortions of theory and practice, that a whole book could be written just on that topic. Some relevant details are discussed later.

Chatterjee et al. (1971: 58) also observe that marriage is a universal phenomenon in South Asia.

Nair (1978: 2) argues that the universality of marriage among the lowest strata of Hindu society is also exemplified by the marriage of prostitutes to mock husbands before initiation into their profession.

Where this leaves the Shudras is an important question that is not properly addressed in the literature, which has an obvious Sanskrit bias. I am less than impressed with the traditional model of the ‘eight forms of marriage’, in which the worst methods of getting married (by rape and pillage, it seems) are simply allocated to Shudras, as though they knew nothing else. The prevalence of local and caste customs of marriage in such communities was confirmed by the Supreme Court of India in M. Govindaraju v K. Munisami Gounder AIR 1997 SC 10. Another recent case stressing the value of oral evidence about a Hindu marriage is Rajan Baboo v UP Public Service Commission (1998) 8 SCC 580.

Feminist interpretations often forget the pressure on Hindu men in this respect and behave as though only women were under such compulsions. The ancient literary evidence on this is clear and strong, because the ‘fashion’ among men of bypassing the stages of life and becoming a renouncer on an accelerated ‘route to salvation’ (mokṣa) was perceived to threaten the future of society as a whole. The work of Patrick Olivelle (1993) is most relevant in this regard, as is Sprockhoff (1976) on the wider phenomenon and its philosophical representations.

Weinberger-Thomas (1999: 128) emphasizes the central role of Hindu marriage (and of women) in Rajasthani society today, showing how this links to concepts of the ‘ideal wife’.
(17) For some misguided positivist efforts to ‘lay down the law’, see further later.

(18) In our time, the aim may be to prevent the abuse of tradition and to increase public awareness of the significance of the Hindu marriage rituals. An interesting recent example comes from South Africa, under the title of ‘Vedic wedding ceremony’ (Vaidik vivāha vidhi), compiled by Rambilass (2001). Dogra and Dogra (2000) aim to provide a general guidebook for modern readers, but are often too prescriptive on ritual details, while also making some efforts to emphasize plurality.


(21) In modern India, Bumiller (1991: 36) observed what looks like a proper traditional saptapadi ritual: ‘The couple took seven steps, each one representing a blessing: food, strength, wealth, happiness, progeny, cattle and devotion. After the seventh step, the marriage was irrevocable. The priest sprinkled holy water on the couple’.

(22) In the context of dowry, Bumiller (1991: 112) states that an unmarried woman in rural India would have been shunned for the rest of her life, hence there is huge pressure on the parents to arrange for her marriage.

(23) For some details on the fascinating case law about this question in postindependence India, see Agnes (2000: 84–5), who notes a change in favour of women’s perspectives from about 1975 onwards. Arguments that women have no rights in this field overlook various traditional patterns of post-marital residence in which the husband, often for sound economic reasons, agrees to move to the wife’s family and works with (and often for) them.

(24) Derrett (1968b: 558) rightly warned that ‘[t]he differences between Hinduism and Christianity and Islam as known in India have been exaggerated’.

(25) According to Derrett (1968b: 89), Manu developed the one-flesh doctrine of marriage.

(26) The language of this author reflects to some extent that this was originally written in 1918.

(27) See in particular Pandey (1969: 158–170). Also useful are Nair (1978: 16); Mitra (1965: 30–43); Sharma (1993: 21–32) and Desai (1998: 651–53). Derrett (1963c: 147) writes that it used to be important to know in what form a woman was married, but does not go into detail on this point.

(28) However, this is not correct, since Section 7(1) specifies ‘either party’, not both.

(29) At least nine editions of this book have appeared. See Diwan and Diwan (1993) and
their later works under different titles.

(30) In Ch. 8.3 later, we return to the question of essential ceremonies under the modern Hindu law. It will become apparent there that Diwan’s obfuscating stance actually protected Hindu polygamists from criminal prosecutions (see Ch. 10), which may be taken as evidence of collusion among male lawyers.

(31) In this case, Rukhmabai (who had been married at the age of eleven) opposed the legal claim of her husband to restitution of conjugal rights eleven years after the marriage. The British Indian courts ultimately held that the Hindu husband was entitled to the company of his wife, but did not enforce the decision.

(32) These efforts were socially not effective, as Weinberger-Thomas (1999: 146) demonstrates with reference to a case in the 1920s from Rajasthan.

(33) There were earlier Sati Regulations from 1813 onwards, as Weinberger-Thomas (1999) stresses.

(34) However, pre-1955 case law confirms that recognition of customary patterns remained a grave problem, as shown in Deivaini Achi v Chitambaram Chettiar AIR 1954 Mad 657.

(35) Minority laws, everywhere, are seen to be under siege. While Indian Muslim law is often portrayed as being threatened by modernist reforms (Mahmood 1986), in Pakistan and Bangladesh the Hindu law remains an unwanted and unreformed colonial relic (see Menski and Rahman 1988 for Bangladesh).

(36) Mahmood (1981: 4) writes that ‘[t]oday, Hindus, Buddhists, Sikhs and Jains— all four compendiously known by the legal term “Hindu”—are the proud possessor of the most progressive marriage law of India … There has thus been a real upheaval … The Hindu marriage law … has travelled a long way from where it stood in 1856’. The Anand Marriage Act of 1909 had earlier legalized Sikh marriage rites known as anand karaj.

(37) On similar policy aims of nation building for Tanzania and their limited social impact, see Moore (1986). Jain (1990: 601—2) shows that a different strategy than bringing these groups under Hindu law would have made them subject to the secular general law.

(38) See also Desai (1998: 650), which creates a total legal fiction and is quite misleading in view of the wording of Section 7 of the HMA, cited later.

(39) In Partap Singh v Union of India AIR 1985 SC 1695, a Sikh Don Quixote managed to come all the way to the Supreme Court of India, challenging the claims to a share in the family property by his father’s two widows, to be told that he definitely could not lawfully assert his patriarchal claims to the exclusion of the women. On Jaina law, see Menski (1993b).

(40) On various aspects of legal debates relating to social norms and the extent of their

(41) In a subsequent section dealing with postmodern evolution of Hindu marriage law, another passage from the conclusions by the same writer will be cited to show that he eventually reconsidered his suggestions.

(42) Tiwari (1991: 44) also argues avidly for registration of marriage. See also Shams (1991).

(43) This is an old issue in debates about Hindu marriage solemnization; see Jain (1961) and Mathur (1962). Derrett (1963c: 137) noted that ‘the formation of intention is somewhat handicapped in the majority of Hindu communities’ because marriages tend to be arranged.

(44) The country reports in Bainham (1998) confirm that there is no such international agreement or system, and in legal practice many problems occur.

(45) This argument relies on Towards Equality (1974), which appears to have inspired a lot of reformist writing. Similarly, Singh (1989: 65–6) claims that compulsory registration serves as an effective check on child marriage and polygamy and offers reliable proof of marriage.

(46) Weinberger-Thomas (1999: 188) reports from her fieldwork in Rajasthan that ‘many villagers do not know their exact date of birth; and not so many years ago, the registration of births and deaths was regarded as a British eccentricity’. In a footnote to this point she adds: ‘It is still common today not to register births and deaths, a fact that 1991 census procedures acknowledge. As for marriages and divorces, these are never registered’ (ibid.: 264 n. 31).

(47) Pandey (1969: 200) himself states that he followed the fuller model of the Atharvaveda sequence, but from what he tells us about the gṛhyasūtras, it is evident that there is no one customary or textual pattern.

(48) In the context of sati rituals, Weinberger-Thomas (1999: 141) finds a similar picture, arguing (much more elegantly than lawyers) that ‘[t]radition reinvents itself by drawing on the bric-a-brac of cultural artifacts at hand’.

(49) Singh (1989: 59) also indicates that the major concerns relating to marriage have been polygamy and its effective abolition, age of marriage, compulsory registration of marriages, and dowry.

(50) The important case of Baby v Jayant Mahadeo Jagtap AIR 1981 Bom 283 reduced this period to some twenty years, given that a large community of people, in this case neo-Buddhists, had followed those ‘new customs’.

(51) The eventual result was the Hindu Marriage (Madras Amendment) Act of 1967,
which modifies Section 7 of the HMA for the state of Tamil Nadu (then Madras) only, inserting a new Section 7-A after Section 7 in the main Act. For details of the original text see Menski (2001: 14–15).

(52) Such cases also come up in the UK nowadays. While it is difficult to defend the position of custom in this field, some English judges are willing to recognize that Hindu law may have different methods of dealing with marriage solemnization compared to English law.

(53) The relevant details are found under paragraph 23 at p.58 of the judgment.

(54) A useful authority for this position is Sumitra Devi v Bhikhan Choudhary AIR 1985 SC 765.

(55) One must be conscious of the fact that the language could also be criticized as being too positivist. Is it really the case that the modern law has granted tradition a new lease of life, or does the law just have to admit defeat? This will always remain a contested issue.

(56) As we saw, Derrett (1957: 276–7) earlier envisaged virtually unlimited progress for Hindu society in the direction of modernization, but later reconsidered his modernist enthusiasm.

(57) On details regarding renouncers and ascetics, see Sprockhoff (1976); Olivelle (1993).

(58) The Dowry Prohibition Act of 1961, too, with a series of important amendments during the 1980s, illustrates that the threat of state-imposed legal sanctions alone does not induce desired behaviour in society. It has been estimated that more than 25,000 women die or are seriously maimed in India every year as a result of dowry-related domestic violence, while it is evident that attempts to control the so-called dowry problem through the state’s legal framework have remained largely ineffective. On this problem and its various dimensions, see Menski (1998b).

(59) Banerjee (1984: 281–2) speaks of ‘our medieval inheritance’ and roundly criticizes ‘conservatives’ like Warren Hastings and others after him who had suggested that Indian civilization was different from European civilization, though not necessarily inferior. His final concluding paragraph at p. 288 roundly and pompously dismisses the notion that Hindu traditions contain anything useful for constructing modern democratic values and systems. Such views are strongly reflected in modernist feminist literature (e.g. Sarkar and Butalia 1995; Rajan 1998).

(60) Seeking to improve on H.L.A. Hart’s theoretical model of law, Tamanaha (2001) challenges the ‘mirror thesis’ of law and society, and begins to write about ‘order’ as a coordination of behaviour in society, which comes rather close to the concept of sadācāra in traditional Hindu law (last section of Chapter 3).

(61) Earlier, Derrett (1963c: 139) had argued that this secular law was still virtually irrelevant in practice.

(63) Evidence from fieldwork among Hindus in Britain confirms, in addition, that even in a legal system that officially insists on registration of all marriages, Hindus (and other ‘ethnic minorities’) tend to give more importance to the socio-religious solemnization of the marriage than to the formal registration with the state (for details see Menski 1987; 1991a; 1993a).

(64) Significant evidence of non-registration of marriages in England is discussed by Allott (1980: 259–86).

(65) Agnes (2000: 195–6) wrongly assumes that Pakistan has reformed its traditional Muslim law through modernist legislative interventions by the Muslim Family Laws Ordinance in 1961. In reality, these are merely reformative ‘paper’ statements that have little practical impact. Pakistan neither requires compulsory marriage registration nor has it controlled polygamy or abolished the ‘triple talaq’, as Agnes (2000: 196) claims. Such mistakes confirm that there is an urgent need for Indian legal scholarship on Pakistan to be updated.

(66) In two appendices, Agnes (2000: 216–21) reprints and discusses the Domestic Violence to Women (Prevention) Bill, 1994, and the Married Women (Protection of Rights) Bill, 1994. None of these became official law, they were clearly too radical, especially in terms of financial implications for married men.

(67) Agnes (2000: 209) again overstates the English influence when she claims that ‘all statutory matrimonial laws in India, except the Muslim law, are based on English laws of marriage’. Such assumptions seem to be uncritically copied from Banerjee (1984).

(68) In this context, she is extremely critical of the fact that Hindu men are able to claim maintenance from their wives under certain provisions of the HMA 1955.

(69) Bibbe v Ram Kali AIR 1982 All 248. In Surjit Kaur v Garja Singh AIR 1994 SC 135, discussed further later, the SC deprived a twice-widowed Sikh woman of her due share on the ground that she was not validly married under Hindu law, even though she also produced a marriage certificate. For details and a critique, see Menski (1995b and 2001: 33–5).

(70) The relevant legal principle here is that an accused should be presumed innocent until proven guilty, since in a criminal prosecution, proof ‘beyond reasonable doubt’ has to be adduced.

(71) An influential early case on Hindu women’s maintenance is Soundarammal v Sundara Mahalinga Nadar AIR 1980 Mad 294. After 1985, the discussions about the Shah Bano case obviously had an impact, too.
(72) For example, the normally quite comprehensive *Annual Survey of Indian Law* for 1986 does not mention this case, and it was also overlooked or purposely ignored by other commentators. Diwan and Diwan (1990: 100–1) discuss this case in the context of maintenance.

(73) The headnote of the case only mentions maintenance, so time-pressed lawyers would not easily find this case if they were looking for material on marriage solemnization.

(74) On this particular community and the agenda of its leaders, see Subramanian (1999).

(75) On presumption of marriage see Desai (1990: 639), a leading practitioners’ handbook.

(76) *Ningu Vithu Bamane v Sadashiv Ningu Bamane* AIR 1987 Bom 27 recognizes a *pat* marriage as an approved, customary form of marriage among Hindus in Maharashtra and followed an earlier case to that effect.

(77) *Narayanan Namboodiri v Bhargavi Amma* 1989(1) KLT 547 explicitly relies on *Sumitra Devi* AIR 1985 SC 765 holding that the customary local form of marriage known in Kerala as *sambandam* was fully recognized by the law.

(78) The case of *S.P.S. Balasubramanyam v Sutturayan* AIR 1994 SC 133 arose from Madras, but that itself should not have made a significant difference. In this case, remarkably, a presumption of marriage was applied by the same judges who refused its operation in *Surjit Kaur*.

(79) In modern English law, ‘cohabitation’ has become increasingly equated with formal marriage, at least as far as property and succession law, and the rights of any children are concerned (Allott 1980: 259–86). More recent evidence from England shows that the state will eventually have to grant formal legal recognition to all kinds of marriages (including Hindu marriages) which did not, at their inception, follow the prescribed legal pattern. See *Gereis v Yagoub* [1997] 1 FLR 854 and particularly *Chief Adjudication Officer v Bath* 2000 [1] FLR 8 (CA), a Sikh case in which the couple had married only in a gurudwara in London thirty-five years ago, but the English Court of Appeal had to recognize the widow’s pension claims.

(80) Most modernists would now not venture to suggest that Muslims should abandon their contract of marriage before God, the *nikah*, while members of other religions are somehow still expected to shed their sociocultural and religious traditions more easily.

(81) Indeed, Asians in Britain do not, with few exceptions, follow a pattern of cohabitation. In effect they end up ‘marrying twice’ (Menski 1987; 1991a; 1993a). For similar evidence regarding Muslims in Britain, see Pearl and Menski (1998: 73–7).

(82) Corbridge and Harriss (2000: 167) rightly point to the violence of cutting primary education in India to the bone. So where and how would money for marriage registration systems be found?
Similarly, Kishwar and Vanita (1991: 15) criticize the misguided modernist assumption that urban models have become dominant for the rural masses of India, arguing that ‘in reality it is the family structure of the dominant peasant castes and their forms of property organization that act as the norm in India ... Most urban centres in India are like islands intimately influenced by the vast ocean of the countryside’. 

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