# Religious Elements in a Secular Marriage Law : A Critique*

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THE SPECIAL MARRIAGE ACT, 1954[1] serves us in two different ways. To a person who wishes to marry within his or her own religious community it is available as an alternative to his or her religion-based personal laws of marriages—the discretion of opting between the two laws being entirely of the persons concerned. On the other hand to a person who desires a marital relationship outside his or her religious community, the Act furnishes a law under which he or she can freely fulfil the desire, irrespective of the restrictions on such a marriage under his or her personal law. Thus, both intra-communal as well as inter-communal marriages are possible under the Act. This is so since the religion of the parties intending to marry is absolutely irrelevant in regard to the application of the Act. The law of marriage and divorce contained in the Act is a secular law enacted by the legislature of secular India. As such it need not, and in fact must not, take notice for any purpose whatsoever of the religious affiliations of those who avail its provisions.

The Act was put on the statute book in the background and light of some of the newly adopted constitutional ideals, *viz.*, secularism, equality before law, equal protection of laws and uniformity in the civil laws. Moving the Special Marriage Bill, 1952 in Parliament, C. C. Biswas, the then Law Minister, described it as "a great step forward in social legislation" and "the first step towards the attainment of the objective of a uniform civil code contemplated in article 44 of the Constitution".[1a] In the fitness of things the Act should have been kept away from the religious habits, superstitions and beliefs, recognized by various personal laws. Unfortunately, overlooking the secular nature of the law, this was not done in respect of at least two aspects of the Act: (*i*) the net of "prohibited relationship" in marriage ;

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*This paper was written before the enforcement of the Marriage Laws (Amendment) Act, 1976 and has not been updated.

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1. Hereinafter referred to as the Act.

1a. Law Minister's statement on the Bill made in the Rajya Sabha on 28 July, 1952.

and (*ii*) the treatment of the rights to inheritance and succession in regard to the parties to and issues of marriages governed by the Act. The provisions of the Act relating to both these aspects of civil marriages are far from being secular. As regards the first of them, namely, the net of "prohibited relationships", the Act was amended in 1963 ; but even this amendment failed to remove the non-secular elements from the said net. In respect of the non-secular provisions of the Act relating to inheritance and succession there has been no amendment till this day. The Law Commission of India has now proposed some amendments in these provisions which, if accepted, will in the opinion of the author make the Act even more non-secular than it already is. What follows here is a humble presentation of this author's viewpoint, regarding the existing provisions of the Act and their amendments now proposed by the Law Commission, both examined in the context aforementioned.

## II

One of the basic conditions for the solemnization of a marriage under the Act,[2] and also for the registration of a marriage under its provisions subsequent to its solemnization under any personal law,[3] is the absence of "prohibited relationship" between the parties. Degrees of prohibited relationship are defined in section 2, clause (*b*) of the Act which only refers to the first schedule to the Act containing the details of such "relationships". This schedule in two different parts lists all those relations who are in law deemed to be within the "degrees of prohibited relationships." The last four entries in part I read : father's brother's daughter, father's sister's daughter, mother's brother's daughter and mother's sister's daughter.[4] The corresponding enteries in part II read : father's brother's son, father's sister's son, mother's sister's son and mother's brother's son.[5] In other words a person and all his or her first cousins will be, under the Act, within "prohibited degrees." The cousin relationship between two persons of different sex which is, one of the "prohibited relationships" in regard to marriage under the Act is subject to statutory explanations applicable to all "degrees of prohibited relationships". According to one explanation relationship includes "by adoption as well as by blood".[6] Accordingly, for a woman, not only the natural but also the adopted sons of her

2. S. 4 (*d*).
3. S. 15 (*e*).
4. Schedule I, part I, entries 34-37.
5. Schedule I, part II, entries 34-37.
6. S. 2 (*b*) *Explanation* I (*c*).

uncles and aunts (both paternal as well as maternal) will be within "prohibited relationship". Conversely, for a man adopted daughters of his uncle and aunt (again both paternal and maternal) will, like their natural sons, be within prohibited degrees. This is where the net of prohibited relationship in regard to the marriages to be solemnized under the Act stood up to its amendment in 1963.

The professedly secular marriage law of 1954, thus, leaned towards the dominant Hindu culture. In so doing the Act overlooked the religious beliefs and social habits of all other religious communities of India as well of the various minority groups among the Hindus themselves who did not share the beliefs and habits of their numerically dominant co-religionist. By omitting any reference to the classical Hindu legal concept of *sapinda* relationship, the Act avoided a ban on marriage with a distant cousin (which, subject to the force of contrary custom, is prohibited on the paternal side even under the modern Hindu law[7]). However, in regard to first cousins the Act imposed an absolute ban on both the paternal as well the maternal side. This was in conformity with the dominant Hindu culture which recognized brother-sister relationship between the issues of two brothers, or of two sisters or of a brother and sister. To the Muslim culture this principle was quite repugnant, since no variant of Islamic law ever imposed any restriction on marriage with a first cousin on either the paternal or the maternal side. Any restriction on marrying a first cousin is entirely foreign to Muslim law and culture. On the contrary, marriage with a first cousin is a very common phenomenon among the Muslims all over the world, including India. As a matter of fact Islamic marriage law has no recognition whatsoever for cousin relationship and a Muslim can lawfully marry not only his or her own cousin but also a cousin of either of his or her parents.[8]

There is no legal or customary ban on marriage with a first cousin among the Christians, Jews and Parsis of India. The Christian Marriage Act, 1872 insists on the absence of prohibited relationship between the parties but does not define "prohibited degrees," it leaves it to be determined by the personal law that may be otherwise applicable to the parties in a particular case.[9] None of the Christian churches, however, prohibits or even discourages marriage with a cousin. The long list of "prohibited degrees of consanguinity and affinity" under the Parsi Marriage and Divorce

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7. See the Hindu Marriage Act, 1955, ss. 5 (*iv*), 11 and 18.

8. It may be noted here that the Prophet of Islam gave his own daughter, Fatima, in marriage to his cousin Ali, son of Abu Talib, a brother of Prophet's father Abdullah.

9. See the Christian Marriage Act, 1872, ss. 18 (a) and 88.

Act, 1936[10] has no reference to a cousin either on the paternal or on maternal side. Amongst the Jews, marriage with a cousin is no less common than amongst the Muslims. Moreover, within the Hindu community local or family custom here and there permits marriage with a cousin. In some South Indian territories a Hindu girl can marry even her maternal uncle himself.[11]

Ignoring the permission for marriage with a first cousin under various religious and customary laws of India and the prevalence of such marriages among many communities of the country, the Act, however, provided (before the amendment of 1963) that a marriage could not be solemnized under its provisions in any case if the parties were first cousins. Sidestepping many laws and usages forming constituents of the composite cultural heritage of India, the Act thus leaned towards the beliefs and habits of the dominant element inside the majority community.

Another instance of the net of "prohibited relationship" under the Act being tilted towards the Hindu culture, perhaps unnoticed by the law makers, was the treatment of adoption in regard to such relationship. In absolutely equating relationship by adoption with blood relationship,[12] the Act agreed with the theory of Hindu family law but completely overlooked the fact that according to a general consensus (right or wrong, but fully established) the fiction of adoption has no recognition in Islamic law. In the first place, a Muslim according to the said consensus is not expected to adopt a child or be adopted.[13] Secondly, even if a Muslim has adopted a son, he can later lawfully marry the latter's widow or divorced wife; and this was specifically sanctioned by the Qur'an.[14] The recent controversy on the Adoption of Children Bill, 1972 has clearly established the fact that

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10. See schedule I to the Act.

11. J.D.M. Derrett, *An Introduction to Modern Hindu Law*, 161 (1963).

12. *Supra* note 6.

13. This author, however, personally believes that adoption is not absolutely prohibited in Islam; at the most it can be said that Islamic law is *indifferent* to adoption. Details will be found in the chapter on adoption in T. Mahmood, *Indian Civil Code and Islamic Law* (1976).

14. *Qur'an* XXIII, 4:37. By this verse the *Qur'an* had specifically sanctioned the marriage of the Prophet with the former (divorced) wife of Zayd who had the reputation of being the Prophet's adopted son. This Qur'anic rule was given a statutory form in Turkey when with some necessary adaptations the Swiss Civil Code, 1912, was adopted in that country. See the Turkish Civil Code, 1926, art. 72. Details will be found in the chapter on Turkey in T. Mahmood, *Family Law Reform in the Muslim World* (1972).

an overwhelming majority of Muslims in India are not willing to accept the legal fiction of adoption.[15] The marriage laws applicable to Christians and Parsis of India, too, are silent over the question if adoption would constitute a bar for marital relationship.[16] Further, among Muslims, though adoption does not prevail, another fictitious relationship, namely, fosterage (*rada'a*) enjoys full legal recognition. Students of Indian family law know that fosterage is a bar to marriage in Muslim law in the same way as adoption is in Hindu law. The Act, however, while recognising the bar of adoption in absolute terms, makes no reference whatsoever to fosterage. Consequently, two Muslims who cannot marry under Muslim law on account of the relationship of fosterage existing between them can lawfully become man and wife under the Special Marriage Act. On the other hand, two Hindus who cannot marry under Hindu law because of the presence of the bar of adoption cannot do so under the Act either. In this respect also, thus, the secular marriage law of India takes specific notice only of the Hindu usage, while it overlooks similar concepts in the laws of other communities.

What we have said above applies to marriages directly solemnized under the Act as well as to those which are registered under the Act subsequent to their solemnization under a personal law. However, in regard to the second category of marriages a relaxation of the aforementioned rules relating to "prohibited relationship" was considered inevitable. Hence, though "that the parties are not within the degrees of prohibited relationship" (of course, as defined in the Act and extending to cousin relationship both by blood as well as by adoption) was made a condition for the subsequent registration of a religious marriage,[17] it was subjected to the following rider :

> Provided that in the case of a marriage celebrated before the commencement of this Act this condition shall be subject to any law, custom or usage having the force of law *governing each of them* which permits a marriage between the two.[18]

The effect of the aforementioned condition read with the proviso (the date of the commencement of the Act being 1st January, 1955) would lead to the following situations :

(*a*) Two Muslims (or Christians, Jews or Parsis) who were each other's cousin but married before 1.1.1955 can register their marriage under the Act.

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15. The author personally does not agree with them ; *supra* note 13.
16. *Supra* note 9-10.
17. *See* s. 15 (*e*).
18. See the proviso to s. 15 (e) (italics supplied).

(*b*) If the same persons married on or after 1.1.1955, the doors of the Special Marriage Act are closed to them for ever.

(*c*) Two Hindu cousins married under a custom applicable to one of them only can never register their marriage, whatever be its date, under the Special Marriage Act.

While the provisions of the Act relating to "prohibited relationship" as applicable to the registration of religious marriages—as analysed above—remain unaltered till this day, in the net of "prohibited relationship" for the solemnization of marriages directly under the Act was modified in 1963.[19] The amendment subjected the net to the force of contrary custom "governing at least one of the parties".[20] As a result of this relaxation, marriage with a first cousin can now be allowed provided that the parties to the intended marriage can, to the satisfaction of the marriage officers, establish a "custom" in that behalf governing at least one of them.

The word "custom" has been explained in the Act as follows :

> "custom" in relation to a person belonging to any tribe, community, group or family, mean any *rule* which the State Government may, by notification in the official Gazette, specify in this behalf as applicable to members of that tribe, community, group, family.[21]

The Act further directs state governments not to issue such a notification if the *rule* (*i*) has not been continuously and uniformly observed for a long time ; (*ii*) has been discontinued (in the case of a family custom) or (*iii*) is uncertain, unreasonable or opposed to public policy.[22]

Now, therefore, two Muslim (or Christian, Parsi or Jew) cousins who wish to contract a civil marriage will have to beg the government of their state to issue a gazette notification recognising the existence of a "rule" permitting the desired marriage, and to wait till such a notification is actually issued. The government may eventually refuse to issue the desired notification on the plea that "custom" does not include personal law or that marriage with a cousin (who, it is notable, may be a cousin by adoption) is "unreasonable" or opposed to public policy. Even if it is certain that the government will issue the necessary notification, since it

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19. See the Special Marriage (Amendment) Act, 1963 (Act XXXII of 1963).
20. See the proviso added in 1963 to s. 4 (*d*).
21. See Explanation to s. 4, appended in 1963 (italics supplied).
22. See the proviso to the explanation cited above.

may take ages to do so, the parties may in despair go in for a religious marriage which—as explained above—can never be subsequently registered as a civil marriage.

This author has a convinced opinion that the provisions of the Act relating to "prohibited degrees" (those applicable to marriages directly solemnized under the Act as well as those governing registration of religious marriages) are marked by discrimination on the basis of religion only. They cannot, therefore, stand the test of validity as laid down by the Constitution of India.[23]

What, then, is the remedy ? The answer is that the Act should not stretch out too far its description of "prohibited relationships". This may be confined to those relationships in regard to which there is a complete uniformity in the laws and usages adhered to by different sections of the Indian people. The rest of them may be treated in the Act by a brief residual clause saying that usage of the families involved in each intended marriage would be the deciding factor. This will leave diversity intact in respect of prohibited degrees in marriage. Nevertheless, prohibited degrees are different from polygamy and divorce. While uniformity must be achieved in respect of the laws relating to the latter, it is neither necessary nor feasible to effect uniform practices in regard to prohibited degrees, which would mean keeping away the secular marriage law from some constituent units of the great Indian fraternity. That will, indeed, be something not at all warranted by the call of the Constitution for a uniform civil code.

## III

Section 20 of the Act protects parties to a civil marriage from the operation of those rules of the Hindu and Muslim personal laws which inflict forfeiture of property and proprietary rights on "apostates". This has been done by extending to such parties application of the Caste Disabilities Removal Act, 1850 which in general protects property rights of those renouncing a particular religion or being excommunicated.[24] Such a statutory

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23. While this paper was yet to be published Mrs. Deena Ahmedullah wrote an excellent article on the same theme as covered in this part of the present paper. It will be found in T. Mahmood (ed.), *Family Law and Social Change*, 61-68 (1975).

24. Section 1 of the Act says, "so much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion or being deprived of caste, shall cease to be enforced as law in any court."

protection was considered necessary by the framers of the late Special Marriage Act, 1872 since under that Act, as originally enforced, anyone professing a religion could marry only by renouncing that religion.[25] They, therefore, extended the application of the Act of 1850 to the parties to civil marriages. At the same time the then legislators subjected the protective umbrella of the Act of 1850 to an exceptional principle, contained in section 22 of the Special Marriage Act of 1872, to the effect that the civil marriage by a Hindu, Sikh, Jaina or Buddhist would effect his severance from the joint family if he was a member of one at the time of marriage.[26] There is evidence on record that the exception was pressed by Hindu opponents of the Act of 1872 as a "deterrent" against civil marriages.[27] In 1954 the legislature, while enacting the new Special Marriage Act, borrowed from the late Act the general protection in regard to persons contracting a civil marriage,[28] as well as the special provision applicable to Hindu, Sikh Jain or Buddhist coparceners contracting a civil marriage.[29]

Much water has flowed down the Ganges since 1872. In order to contract a civil marriage now, one need not renounce one's religion at all; nor can a person lose his or her right to inheritance on account of being "excommunicated". Therefore, when a person now contracts a civil marriage, whether in his/her own community or outside it, there is no room for applying rules of Hindu and Islamic religion depriving the "apostate" of the right to inherit property from other members of the family—since the person concerned neither becomes an "apostate" nor is liable to be excommunicated. Section 20 of the Act, thus, remedies a situation which does not exist and redresses a presumptive disability which as a matter of fact is no more attached to persons opting for a civil marriage.

Section 19 of the Act confers a disability on a Hindu (Sikh, Jain or Buddhist) male contracting a civil marriage inasmuch as it operates to effect his immediate severance from the joint family of which he may be a member, whether he marries in his own community or outside it. On the other hand, religion would not require his severance from the joint family just because he has married a girl (who herself may belong to his own religion) according to the procedure prescribed by a man-made law. So, the secular law of 1954 creates a disability which the Hindu (or Sikh, Buddhist-

25. See the preamble and s. 1 of the Special Marriage Act, 1872.
26. See s. 21 of the Act of 1872.
27. H. S. Gour, *Hindu Code*, 1199 (1938).
28. The old Act (1872), s. 21, the new Act (1954) s. 20.
29. The old Act (1872) s 22, the new Act (1954) s. 19.

Jain) religion itself would not. So long as a Hindu (Sikh, Buddhist or Jain) remains a Hindu (Sikh, Buddhist or Jain), no forfeiture of property rights is inflicted on him by his religious law irrespective of the form of marriage chosen by him (and also, perhaps, regardless of the religion of his bride).

On the contrary, as soon as a Hindu coparcener opts for a civil marriage, by virtue of section 19 of the Act he stands exiled from his joint family (even if he and his bride belong strictly to the same branch of the same religion).

What could be the place and purpose of such a "penalty" under a secular marriage law (which the Special Marriage Act is meant to be) ? The only possible answer to this question is found in section 21 of the Act which says that succession to the property of persons married under the Act and of their issues will be regulated by the Indian Succession Act, 1925. Under the late Special Marriage Act of 1872, succession to property of the parties was to be regulated by the late Indian Succession Act, 1865 to begin with and, after 1925, by the Indian Succession Act, 1925.[30] This provision has been retained in the Special Marriage Act, 1954. In order to apply the scheme of succession as laid down in the Act of 1925, the properties of the parties to a civil marriage must necessarily be well defined and independent of other's properties. It is for this purpose that a forced "partition" will have to be accepted by the Hindu (Sikh, Buddhist or Jain) coparcener contracting a civil marriage.

Whether the Indian Succession Act should invariably be applied to the properties of persons governed by the Special Marriage Act—this itself is a controversial question. A study of the attitudes to and opinions about the Act recently made by this author,[31] has revealed that many would like to go in for a civil marriage (of course, intra-religious) if by doing so they are not compulsorily to be deprived of their religious law of succession. This is specially true about certain sections of Muslims.[32] On the other hand many persons (including some Muslims) have contracted or registered civil marriages only because they wanted to take the benefit of the Indian Succession Act. There is, thus, no uniformity of views amongst those favouring civil marriages as to the application of the Indian Succession Act. It is significant to note that

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30. After 1925 all references in the Special Marriage Act, 1872 to the Indian Succession Act. 1865 were to be construed as references to the (new) Indian Succession Act, 1925.

31. See infra note 40.

32. The reason is that the Islamic law of succession is much more religion-based and Qur'anic than the marriage law which is rather of a secular nature.

a great majority of marriages solemnized under the late Special Marriage Act, 1872 used to be inter-communal. In those cases, as application of the religious laws of the parties to succession to their properties would create conflict of laws, it was necessary to apply to them a common law of succession which could be no other law than the Indian Succession Act. Under the present Special Marriage Act, however, the situation is entirely different. Now the majority of marriages solemnized or registered under this Act are intra-communal. In such cases if the parties want to retain their religious law of succession (being, of course, the same and creating no conflict of law), the Act will not allow it. The present legal position is that one who wants to opt for a civil marriage must accept also the Indian Succession Act and one who wishes to adopt the Indian Succession Act must first subject himself to the Special Marriage Act.

In view of the conflicting attitudes, and opinions in this regard recorded in the aforementioned study,[33] this author has suggested that :

(1) the Special Marriage Act, 1954 should be amended to the effet that where parties to a marriage solemnized or registered under its provisions are otherwise governed by the same personal law, it will be for them to chose between their personal law of succession and the Indian Succession Act for the regulation of succession to their property.

*(ii)* the Indian Succession Act should be amended enabling any person to adopt that Act, irrespective of his marital status.

## IV

On January 17, 1974 the Union Law Minister forwarded to the Law Commission a draft Bill prepared by his ministry proposing some amendments in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 asking the commission to examine the Bill and to report thereon. The commission worked on the draft Bill with an astonishing speed and in less than two months returned it to the ministry along with a 120 page report.[35] In this paper we are not concerned with the commission's recommendations and observations regarding the Hindu Marriage Act, or even with all of its suggestions regarding the Special Marriage Act. We shall comment here

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33. *Infra* note 40.
34. *Ibid.*
35. The Law Commission of India, *Fifty-ninth Report* (1974), the Hindu Marriage Act, 1955 and Special Marriage Act, 1954) (hereinafter referred to as the report).

only on those parts of the report which, in our humble opinion, strengthen what we have described as "religious elements" in this secular law.

A perusal of the report shows that the commission was obsessed by the ideas regarding the Hindu marriage law, for which reason in its references to the Special Marriage Act it completely forgot that it was dealing with a secular law the (optional) application of which was not confined to Hindus. At the outset the commission observed that it wished to propose the following kinds of amendments in the Act:[36]

(a) amendments needed in order to introduce uniformity wherever necessary and reasonable between the provisions of the two Acts (Special Marriage Act, 1954 and Hindu Marriage Act, 1955) ;

(*b*) amendments needed by way of additional provisions similar to the additional provisions proposed to be inserted in the Hindu Marriage Act;

(*c*) amendments needed in other provisions of the Act (Special Marriage Act, 1954) on its merits.

As a matter of principle this author objects to categories (*a*) and (*b*) above. The Hindu Marriage Act is a law applicable exclusively to members of particular religious communities (*i.e.*, those other than Muslims, Christians, Parsis and Jews). On the other hand the Special Marriage Act undoubtedly stands for an entirely non-communal, secular law which could be availed by any Indian irrespective of his or her religion. What is, then, the justification of making efforts to effect "necessary" and "reasonable" "uniformity" between the two Acts ; and why should amendments "similar" to the additional provisions proposed to be inserted in the Hindu Marriage Act be pressed in regard to the Special Marriage Act ? Such measures are bound to strengthen the apprehension of the minorities that the much talked about uniform civil code will only be a camouflage for imposing Hindu law on all Indians.[37] These are, thus, prejudicial to the letter and spirit of article 44 directive in the Constitution. In the fitness of things, necessary amendments of the Act should be considered only, to use the terminology of the commission, "on the merits", and not with a view to making it conform to the provisions of any other law having essentially a communal nature and scope.

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36. *Id.* at 91.

37. This has been expressly said by several Muslims and Christians.

As regards the ban on marriage with cousins as imposed by the Act—which we have discussed in the first part of this paper—the commission's report is wholly silent. Nor was there any reference to it in the proposals of the Ministry of Law which the commission was asked to examine. In view of the fact that dissatisfaction, rather resentment, about this wholly non-secular aspect of the civil marriage law has been repeatedly expressed by many, both in as well outside Parliament, the silence of the ministry and the attitude of indifference adopted by the commission are inexplicable.

In respect of section 21 of the Act (attracting application of the Indian Succession Act to the property of the parties and issues of all civil marriages) the commission has recommended in its report that where both parties to a marriage are Hindu (or Sikh, Jain or Buddhist) the Indian Succession Act need not be applied to their property and that succession to their property in such cases should continue to be regulated by the Hindu law of succession[38] (now the Hindu Succession Act, 1956). The recommendation follows a rather long review, in historical retrospect, of sections 19, 20 and 21 of the Special Marriage Act. If this recommendation of the commission is accepted, the following will become the legal position :

(*i*) where both parties to a civil marriage are Hindu, Buddhist, Sikh or Jain, the Hindu Succession Act, 1956 shall apply—even if they want to opt for the Indian Succession Act;

(ii) where both parties to a civil marriage are Muslim, Christian, Parsi or Jew, the Indian Succession Act shall apply even if they have a strong desire to retain their religious law of succession.

We have a convinced opinion, that this position will be clearly *ultra vires* the Constitution. It is indeed strange how and why the learned members of the Law Commission presumed that intra-communal marriages solemnized or registered under the Act are confined to Hindu, Sikh, Jain and Buddhist communities. As a matter of fact many Muslims and Christians have gone in, or would like to go in, for civil marriages. If Hindus, Sikhs, Buddhists and Jains marrying within their own communities are to be given the freedom to retain their religious law of succession the same cannot lawfully be denied to other communities. Also, how can those Hindus, Buddhists, Sikhs and Jains who, in spite of contracting a civil marriage within their own community, wish to adopt the Indian Successian Act as well,

38. *Supra* note 35 at 94-95.

be compelled to stick to their religious law of succession ? (This would, as explained above, be the effect of the commission's proposal if accepted).

Section 20 of the Act should, in the opinion of the commission be retained. We disagree since, as we have explained above, renunciation of religion now being unnecessary for contracting a civil marriage, the protection accorded by section 20 has become superfluous.

In regard to section 19 of the Act, which imposes severance from joint family on Hindu, Sikh, Buddhist or Jain, coparceners opting for civil marriages—the commission has recommended that it should be limited in its operation to inter-communal marriages in which case the Indian Succession Act would apply. It need not effect those cases where, according to its recommendation, the Hindu law of succession will continue to be applicable. Since, as we have explained above, the only permissible rationale of section 19 could be to facilitate application of the Indian Succession Act (by making the rights and interests of the persons concerned definite, independent and separate), it will not be necessary, we agree, to apply section 19 unless the Indian Succession Act has to be applied.

## V

The discussion of the religious elements which have crept in the secular marriage law of 1954—or which are now sought to be introduced into some of its provisions—leads, to the following conclusions.

(*i*) The ban on marriage with a cousin as well as the provision absolutely equating relationships by adoption and blood, both are derogatory to the secular and all-embracive character of the Special Marriage Act.

(*ii*) Section 20 of the Special Marriage Act, 1954—extending the protective umbrella of the Caste Disabilities Removal Act, 1850 to persons going in for civil marriages—contains what is called a "spent" provision. It has outlived its utility and has become redundant.

(*iii*) Section 19—inflicting an instant severance from joint family on Hindu, Sikh, Buddhist and Jain coparceners contracting or registering a civil marriage—in its present form fails to consider its own true rationale and logic.

(*iv*) Section 21—attracting compulsory application of the Indian

Succession Act, 1925 to the properties of couples whose marriage is governed by the Special Marriage Act—needs a reconsideration so as to confine its application to cases where either retention of the religious laws of succession will create conflict of laws or where the parties otherwise wish to adopt the Indian Succession Act.

(*v*) The recommendation of the Law Commission in regard to section 19 if accepted will, instead of removing its rigidity as explained in item (*iii*) above, will make it an ugly, communal provision which as a matter of fact, should have no place in a secular law.

In the light of the above discussion the following suggestions are made :

(*a*) The provisions of the Special Marriage Act defining or explaining the extent of "prohibited degrees in marriage" should be re-drafted so as to purge them of their non-secular elements now leaning towards the dominant culture of the majority community.

(*b*) Sections 19 and 20 of the Act may be wholly repealed.

(*c*) Section 21 of the Act may be replaced by the following provision.

Succession to the property of the persons as well as succession to the property of the issues of such persons, solemnized or registered under this Act, shall be regulated according to the following rule:

(*i*) where the parties are at the time of the solemnization or registration of their marriage under this Act governed by different personal laws—the Indian Succession Act shall apply.

(*ii*) where the parties are at the time of the solemnization or registration of their marriage under this Act governed by the same personal law—the parties will have a choice between their personal law of succession and the Indian Succession Act. They must declare this choice at the time of the solemnization or registration of their marriage under this Act according to the procedure prescribed for this purpose under the rules.

Explanation : Where the Indian Succession Act, 1925 is to be applied in accordance with the above principles and it is found that either party to the marriage has an undivided share in a property jointly held by his or her family, the said share, ascertained on the basis of a presumptive partition,[39] will be treated as the separate property of that party and governed, along with other property, if any, which that party may own, by the Indian Succession Act.

The Special Marriage Act, 1954 is our first and only secular law of marriage and divorce. The religious or communal elements found in it are ugly spots on its face. They must be removed, not aggravated.[40]

39. As uuder s. 6 of the Hindu Succession Act, 1956.

40 A detailed sludy of the Special Marriage Act, 1954 (as amended in 1976), including its history, a comparison of its provisions with various personal laws, an analysis of the attitudes to the principles contained in it and an appraisal of its working in U.P. and Delhi, will be found in this author's forthcoming work, being published by the Indian Law Institute