The Special Marriage Act, 1954 Goes Awry

*B. Sivaramayya**

THE SPECIAL Marriage Act, 1954 is an important landmark in the secularization of the laws in India. While introducing the Bill in the Lok Sabha the Hon'ble Mr. C.C. Biswas stated : "It is an attempt to lay down a uniform territorial law of marriage for the whole of India."[1]

The Act constitutes the first and the only step taken towards the goal of a uniform civil code envisaged under article 44 of the Indian Constitution. Alas, in the course of two decades the government has not mustered sufficient courage and political will to take further steps towards that goal. The reasons are not far to seek. The first is surrender of the political process to forces of conservatism and reaction under the pretext of "pragmatic approach"[2] or worse still, ostensible concern for the feelings of minorities. The second is the fear that issues like social justice to women and consequent changes in personal laws will result in loss of votes than a gain in votes. No wonder that in the last two decades even modest measures suggested by the Law Commissions in their reports on the Converts' Marriage Dissolution Act, 1866 and the Christian matrimonial causes have been gathering dust on the shelves.

Surprisingly, in the march towards the goal of a uniform civil code the Indian judiciary has fared no better. Accustomed to follow the path of English judicial institutions and thought faithfully for well over a century, it has failed to evolve creative rules of interpretation in tune with the aspirations contained in the directive principles of the Constitution. An exception to this trend has been provided by the judgment of Dhawan, J., in *Balwant Raj* v. *Union of India*,[3] where he rightly and boldly asserted:

---

* M.L. (Andhra), L.L.M. (Yale), D.C.L. (McGill), Reader, Faculty of Law, University of Delhi.

1. V *Parliamentary Debates*, House of the People, 7797 Pt. II (1954).

2. K. Subba Rao, Foreword in Devadason, *Christian Law in India*, (1974). He says: "Its (State's) neglect of this constitutional duty is hailed as a democratic approach. At best it is only a pragmatic approach, at the worst it has political overtones"

3. A.I.R. 1968 All. 14.

> The rights enshrined in the directive principles are not justiciable but these principles have been made "fundamental in the governance of the country" under Article 37 which provides that it shall be the duty of the state to apply them in making laws. The phrase "making of laws" is wide enough to include their interpretation and therefore the courts must interpret the laws in the 'light of the Directive Principles'.[4]

The decisions of the courts during the past two decades are conspicuous for their failure to grasp the above principle and penumbras of articles 14 and 44 of the Constitution when interpreting the statutes.[5]

The forces of conservatism succeeded remarkably in stalling the advance towards a uniform civil code. Criticism was not wanting on the lone specimen of a projected uniform civil code. Communal organizations in Hyderabad and elsewhere demanded that the Act should not be made applicable to specific communities. But curiously the process of erosion of the ideals behind the Act started not because of the efforts of the opponents of the Act but because of the legislative ambush initiated by the government itself.

The Special Marriage (Amendment) Act, 1963[6] is a misguided measure calculated to subvert the Special Marriage Act, 1954. The Amending Act introduced the following proviso to the requirement in section 4 clause (*d*) that the parties to the marriage should not be within the prohibited degrees :

> Provided that where a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the prohibited degrees of relationship.

The explanation to the section provides that custom in relation to a person means any rule which the state Government may, by notification in the Official Gazette specify as applicable to members of a tribe, community, group or family.

---

4. *Id.* at 17. Referred to with approval by Beg, J., in *Kesavananda Bharati* v. *State of Kerala and Another*, (1973) Supp. S.C.R. 865.

5. For example, see the decisions in *Devassy Ally* v. *Augustine*, A.I.R. 1956 T.C. 1 and *Rangu Bai* v. *Laxman Lalji*, A.I.R. 1966 Bom. 169, where the courts preferred a construction which will lead towards a diversity in the personal laws than a uniformity.

6. Act. 32 of 1963.

II

The retrograde feature of the amendment from the perspective of a uniform civil code may be noted. Prior to the amendment, the Special Marriage Act subordinated the personal laws to the provisions of the Act and its policies on matters relating to marriage, divorce and succession. The amendment on the other hand introduced the pernicious principle of subordinating the Act to the personal laws in respect of prohibited degrees.

On merits the amendment of 1963 is even less defensible. Reasons discernible the statement of Objects and Reasons appended to the Bill and the statements of the minister who moved the Bill in the House are :

(*i*) It is well known that in South India marriage between close relations is permitted under the personal law. The marriages take place under the Hindu Marriage Act. But supposing the parties thereto want to marry under the provisions of the Special Marriage Act, such a marriage will not be permitted because they could fall within the prohibited degree of relationship. To avoid such difficulties, it is proposed to bring custom also under section 4 of the Special Marriage Act.[7]

(*ii*) It is one of the revered leaders of this country Rajagopalachari, who raised this question and wanted the Government to consider it and incorporate it in this Bill.[8]

The marriages within the prohibited degrees among the Hindus which the legislature had in mind are generally marriages with sister's daughter, maternal uncle's daughter and father's sister's daughter. From the standpoint of policy, the amendment permits the parties to blow hot and cold, to accept the personal law that suits them and to reject that portion of personal law that does not suit them. According to eugenics, the marriages noted above do not deserve to be encouraged. U. M. Trivedi rightly pointed out during the debates : "And, here we are saying that we want to perpetuate a scientifically wrong process and a morally wrong approach.[9]"

L.M. Singhvi, the then member from Jodhpur, was equally critical :

---

7. Speech of Deputy Minister, Bibhudhendra Mishra XX No. 12, Lok Sabha Debates, col. 3228.
8. *Id.* at col. 3268.
9. XX No. 12, Lok Sabha Debates, col. 3234.

This Bill is an example of the pointless, ill-considered proliferation of legislative enactments in our country and of legislative amendments. The legislative brains trust which appears to advise the Law Ministry in bringing forth this proliferic progeny before us seems to be habituated to a sort of aimless wandering. It stumbles every once in a while on what it considers as a bright new idea, and this precocious brains trust presents to us the fruit and the result of what I may be permitted to call regretfully a child of legislative adventurism. It is a pity and we have every right to resent the fact that legislations such as this are conceived in haste and are not aided by the necessary back ground of research and investigation into social processes and social institutions.... Legislation after all must subserve a social policy.[10]

The second justification *viz.*, that the late Rajagopalachari had suggested the amendment, is based on an equally flimsy ground. Beyond doubt the late Rajaji had a razor-edge intellect and had expressed his views on a variety of topics like the B.C.G. vaccination, birth control, economic policies, state capitalism, communists, *etc.*, which were often controversial. Rajaji's view notwithstanding the amendment is not a step in the right direction.

As Derrett pointed out the amendment de-codified the general law :

It is surprising to note that by the Special Marriage (Amendment) Act, Act No. 32 of 1963, Parliament de-codified the general law, to the extent that marriages may be valid if performed under this statute although they are within the prohibited degrees, provided that a custom governing at least one of the parties permits of a marriage between them ; and 'custom' is specially defined for the purpose of the Act as a '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 or family.' ...The oddity of this statute and its provisions needs no under lining, and imagination cannot conceive how it came to be passed except to satisfy some influential individuals. One may conjecture some cause as bizarre as the results, e.g. a family in which one member changed his or her religion, and members including this member wished to marry whilst within the customary degrees for marriage

10. *Id.* at col. 3250.

in the caste, but by reason of the change of religion they were unable to marry at Hindu law.[11]

III

The decodification of the Special Marriage Act or the process of subversion of the Act to the personal laws, initiated by the Amending Act of 1963 is sought to be enlarged under the recommendations of the Law Commission on sections 19 to 21.

Before dealing with these recommendations we wish to underline a point made by the Deputy Minister for Law during the Debates on the desirability of the amendment of 1963.

> There is a difference between a marriage under the Hindu law and a marriage under the Special Marriage Act. The relationship with the joint family is completely severed if one marries under the Special Marriage Act. There is also a difference so far as succession is concerned.
>
> So it must be left to the person concerned to choose whether he would marry under the Hindu law or the Special Marriage Act.[12]

The Law Commission now comes to an exactly opposite conclusion. Dealing with section 21 of the Special Marriage Act[13] it observed :

> In our opinion, it is desirable to exclude from the scope of this section cases where both the parties are Hindus. In such cases, the law of succession otherwise applicable should continue to apply. We see no reason why the fact that the parties choose to marry under the Special Marriage Act should make a difference in such cases i.e. where both are Hindus. We recommend that such cases should be excluded from section 21.[14]

---

11. J.D.M. Derrett, *Religion, Law and the State in India* 327-28, f.n. 2 (1968).

12. *Supra* note 9 at col. 3268.

13. S. 21 reads: : "Notwithstanding any restrictions contained in the Indian Succession Act (XXXIX of 1925), with respect to its application to members of certain communities, succession to the property of any person whose marriage is solemnized under this Act, and to the property of the issue of such marriage shall be regulated by the provisions of the said Act, and for the purposes of this section that Act shall have effect as if chapter III of part V (Special Rules for Parsi Intestates) had been omitted therefrom."

14. The Law Commission of India, *Fifty ninth Report* 98 (1974). Hereinafter cited as the *Fifty-ninth Report.*

The *Fifty-ninth Report* has also recommended[15] that where both parties are Hindus, section 19[16] which provides for the severance from the joint-family should be over-ridden. In coming to this conclusion they relied perhaps on the over-emphasized view of the orthodox sections of the community as revealed in Gour's statement (who sponsored the amendment of 1923 to the Special Marriage Act, 1872) and the view of the joint committee on the Special Marriage Bill which led to the Act of 1954. The orthodox sections wanted such a provision as a deterrent against special marriages. The Joint committee justified the provision on the grounds: (*i*) that otherwise the daughters would be deprived of the rights of inheritance, and (*ii*) that "it would be extremely inconvenient to have different laws of succession applicable to different types of property."

The *Fifty-ninth Report* states :

> We have carefully considered the matter, and we think that no "deterrent" is required against special marriages. A provision of the nature contained in section 219 is not required where both the parties are Hindus, Budhists, Sikhs or Jains.
>
> So far as the desire to protect the position of daughters is concerned, the passing of the Hindu Succession Act removes the difficulty, because they are given the right to succeed under that Act, and where the female is alive, property does not pass by survivorship, but it passes by succession. Secondly, so far as the desire to maintain one system of succession for all properties is concerned, we are not disturbing that principle, as we propose to exclude, from section 21, Special Marriage Act, marriages where both parties are Hindus.[17]

Consequently the Law Commission recommended the insertion of the following section 21A in the Special Marriage Act :

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

---

15. *Id.* at 95.

16. S. 19 : "The Marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from the joint family."

17. *Supra* note 14 at 94 (footnotes omitted).

The recommendation of the Law Commission will give rise to the following questions : Why is the scope of the proposed section restricted to Hindus only ? Cannot the rationale of the recommendation be extended, though not suggested by the commission, when two Parsis or Muslims marry under the Act ? Is such infiltration of personal laws desirable ? What will be the future repercussions ?

At the outset a passing thought will occur to the mind : Is this special provision in respect of Hindus alone, constitutionally valid ? The commission consists of eminent jurists on constitutional law. Therefore, we can assume that in the view of the commission there is a nexus between the object of the Act and the classification drawn by section 21A—even if it be baffling.

Is the reasoning of the commission applicable to Christians who are governed by the Hindu law ? For example, in *Anthony Swami* v. *M.R. Chinna Swami*,[18] the Supreme Court held that Vanniya Tamil Christians of Chittor Taluk of Cochin were governed by the Mitakshara law and the doctrine of pious obligation. The native Christians in Pondicherry, who have not renounced their personal law in favour of the French Civil Code (*renoncants*) and to whom the Indian Succession Act does not apply, are governed by Hindu customary law.[19] The Indian Succession Act has not been extended to Pondicherry and the Christian women suffer the same disabilities as women under the customary Hindu law in regard to succession. The Indian Christians in Pondicherry who are not *renoncants*, are governed by the French Civil Code or the Special Marriage Act at their choice with respect to marriage.[20] The Christians in Nagaland and other parts of the North-Eastern region of India and the Christians in the states of Punjab, Haryana and Himachal Pradesh[21] are governed by the customary laws which may or may not include the features of Mitakshara law.

A plausible argument is that in these cases the successional rights of daughters are not substantial and, therefore, the better rights that accrue to

18. A.I R. 1970 S.C. 223.

19. Subhash C. Jain, *The French Legal System in Pondicherry : An Introduction*, 12 *J.I.L.I.* 507, 601 (1970); David Annoussamy, *Pondicherry : Babel of Personal Laws*, 14 *J.I.L.I.* 420, 423 (1972).

20. David Annoussamy, *ibid.*

21. *Premchand* v. *Lilawati*, A.I.R. 1956 H.P. 17.

them by the application of the Indian Succession Act should be preserved. But this arguments loses its force because under section 6 of the Hindu Succession Act, 1956 the rights of female heirs are inferior when compared to coparceners as the Hindu Succession Act preserves the right by birth.

The commission does not give any specific reason as to why they prefer the applicability of Hindu law to that of the Indian Succession Act, 1925 except that they impliedly accept the statement of Gour that the provision relating to separation from the joint family is a deterrent to special marriages. The recommendation has the effect of enlarging the applicability of Hindu law and restricting the scope of the Special Marriage Act. The solicitude for the Mitakshara joint family in present times is understandable. By far the most serious objection to the recommendation is that while it gives no special advantages it will generate a demand from other communities for similar application of personal laws.[22] The recommendation may well serve as a prelude for the abrogation of the provisions relating to succession in the Special Marriage Act.

Does it matter ? In my opinion it does, because it cuts the escape route from the oppressive personal laws. Specially the Muslim law has become the "Holy Cow" for the government and reforms in Mulim law at the initiative of the government stand ruled out. At present a Muslim can get over the anachronisms of his personal law by resorting to the registration of his marriage under the provisions of the Special Marriage Act. In such cases, the Muslim law ceases to apply, and the provisions contained in part V, chapters 1 and 2 of the Indian Succession Act, 1925 would become applicable. To illustrate, under the Muslim law as it stands in India today, the orphaned grandchildren of a Muslim are not entitled to inherit the property of their grandparents in the presence of the sons and daughters of the grandparent. In other words they are not entitled to the right of representation. If the grandparent wants to make a provision in favour af his orphaned grandchildren the only way open to him is to make a bequest. But here the Muslim law limits the testamentary capacity of an individual to one-third of the estate. If he wants to leave to his orphaned grandchildren more than one-third of his estate after his death, his intention cannot be given effect to under the Muslim law. He can achieve this object

---

22. It may be pointed that views were expressed that a marriage between a Christian and a non-Christian should be permitted under the Indian Christian Marriage Act. See, the Law Commission, *Fifteenth Report* 3 and *Twenty-second Report* 4. Muslim organizations passed resolutions to the effect that the Special Marriage Act should not be applied to Muslims.

by registering his marriage under the Special Marriage Act, as under this Act, he has unlimited testamentary power. The second line of cases relate to the share of a wife under the Muslim law of inheritance. The share of a widow in her husband's estate under Muslim law is one-eighth if she has issue, and one-fourth if she is childless. Thus, if a Muslim dies leaving a widow and a father's brother (a male agnate) as heirs, the widow takes one-fourth and the father's brother takes the residue. Fyzee says :

> To my own knowledge a number of older couples are registering their marriages in order to be governed by the provisions of the Indian Succession Act whereby they can dispose of their property in accordance with their own wishes, so that it does not go after them to persons for whom they have no regard or affection, by the letter of the Shariat or the dharma the (the religions laws of the Muslims and Hindus respectively).[23]

In conclusion it is submitted, with respect, that the recommendation of the Law Commission in its *Fifty-ninth Report* to exclude from the operation of section 21 of the Special Marriage Act, marriages where both parties are Hindus is *prima facie* discriminatory, and if the recommendation is made applicable to all communities it will annihilate the progressive spirit behind that legislation.

23. Fyzee, *Major Developments in Muhammadan Law in India, 1850-1950*, 2, Seminer paper in the Institute of Islamic Studies, McGill University, Nov, 1958.