

6 Epilogue

In the preceding chapters of this study we have peeped into the history and development of the Special Marriage Act, analysed its nature and scope, compared its provisions with the parallel principles of the various religion-based personal laws prevailing in the country and examined at length the responses and attitudes of various communities to the law contained in the Act. Our study leads to the conclusion that the Special Marriage Act suffers from certain flaws of a fundamental nature, which have not been removed even by the drastic changes, based on the recommendations of the Law Commission of India, introduced into the Act in 1976. In the interest of a speedier transition to modernity and secularism and in order to enforce the constitutional guarantee regarding equal protection of laws, it is necessary, we submit, to give a new look to the Act as a whole and to modify some of its objectionable provisions in particular.

From the very beginning, the legislators, the legal reformers, the critics and the laymen, all have had a misconception that the civil marriage legislation was meant to facilitate inter-religious or inter-caste marriages. This has been quite contrary to the concept and intention of Sir Henry Maine who was the first to have thought of such legislation. Maine wanted to put on the statute book an "Indian Marriage Act" which in the course of time could take the place of various religion-based personal laws. Unfortunately we have failed to live up to his expectations even after the expiry of more than a hundred years. The reason is: the failure of our law-makers and reformers to appreciate the true purpose and nature of the legislation which Henry Maine planned.

As regards inter-religious marriages, India has had an impressive record. The noble example set by Mahabali Akbar and Maharani Jodhabai more than three hundred years ago has been followed by Indians, belonging to various walks of life, in all periods of history that followed. The family laws derived from the ancient religions of India were believed to be wholly against inter-religious and even inter-caste marriages. Islam made a remarkable improvement by allowing its followers to seek their marriage partners among the scriptural (*kitabiyah*) communities. However, this noble law was badly affected by the traditional interpretation under which the concept of *kitabiyah* was greatly restricted and women were denied the freedom to

marry even those men whose religions were recognized as *kitabī*.¹ However, in spite of this interpretation settled by the custodians of Islamic law, and irrespective of the belief of the *pandits* that the *Dharmshastras* prohibited inter-caste marriages, Hindus and Muslims have been marrying in each other's community, ignoring the traditionalists who always frown on such alliances. There was, thus, hardly any need for Henry Maine to have thought of means to legalise inter-religious marriages. The theme of his legislative plan was, in fact, unification and secularization of the matrimonial law—on the pattern of the unification and secularization of penal and commercial laws, then in progress.

The age of Henry Maine was different from ours; and we can understand why in 1872 the legislators failed to translate his idea into action and, instead, came out with a law which appeared to be an umbrella for inter-religious marriages.² However, even the 1954 version of the Act made no distinct improvement though much water had since flown from the Ganges. The architects of the Special Marriage Act, 1954 were, it seems, obsessed with the idea of inter-religious marriages. This was evidenced by the many provisions which they newly included, or allowed to remain intact, in the Act. Illustrative of these were:

- (i) The word "special" was retained in the title of the Act, presuming that "ordinary" or "normal" marriages would continue to be solemnised under the various personal laws.
- (ii) It was provided that even if two persons belonging to the same religion contracted a civil marriage, they would lose their personal law of succession.³
- (iii) As regards Hindus, Buddhists, Jains or Sikhs, it was laid down that if they contracted a civil marriage even within their own community, it would effect their severance from their undivided families.⁴
- (iv) First cousins were not allowed to contract a civil marriage.⁵ As the personal law of Hindus prohibited such marriages, attempt was made to discourage change of religion by the Hindus for the sake of such a marriage.⁶

1. See, generally, T. Mahmood, The Place of Indian Scriptures in Islam, *The National Herald*, Delhi-Lucknow, May 1 (1973).

2. *Supra*, chapter I.

3. See the Special Marriage Act, 1954, s.21 (before amendment of 1976).

4. S.19 (before the insertion of s. 21-A).

5. S.4 (d) and schedule I, part I entries 34-37, part II, entries 34-37.

6. In the opinion of this author there could have been no other rationale of the general restriction on marrying a cousin imposed under the Act of 1954.

The architects of the 1954 Act, thus, forgot that they were not enacting a 'Law of Inter-Religious Marriages'. Such a law was not even called for. People had not stopped marrying outside their own religion. Within the current century there had been innumerable cases of inter-religious marriages—some of them quite prominent. Several eminent public men had married outside their respective communities. Mohammad Ali Jinnah (later the founder of Pakistan) had, for instance, married a Parsi lady. An eminent Muslim judge who, much after 1954, retired as Chief Justice of India, had married in a Jain family. An equally eminent Hindu judge (who, by a strange co-incidence succeeded the former as Chief Justice) had taken a Muslim wife. The family of Jawahar Lal Nehru had set notable examples of several inter-religious marriages. And one may go on adding instance after instance.

The legislators had, therefore, little need in 1954 to enact a new law only for facilitating inter-religious marriages. Of course, such marriages were still frowned upon; but social taboo could not have been removed by fresh legislation. The task of the law-makers, now, was to revive Henry Maine's original idea of an "Indian Marriage Act" which could furnish an alternative to each of the heterogeneous personal laws prevailing in the country—under which people could marry within their respective religions but under uniform legal provisions. The law-makers, unfortunately, failed in 1954 to perform this important, though stupendous, task.

The Special Marriage Act was amended in 1963, in 1970 and then finally in 1976—this last dose of amendments being quite drastic and comprehensive. The first and the last of these amendments,⁷ specially the latter, however, created more flaws than they removed.

The 1963 amendment laid down, in effect, that marriage with a first cousin would henceforth be permissible if a "custom" governing at least one of the parties and permitting the marriage was specified by the state government through a gazette notification.⁸ This did not solve the problem as the personal laws of Muslims and other communities, which permitted marriage with a cousin, could not be regarded as "custom"—that being a concept different from personal law. The architects of the 1976 amendment did not reconsider this issue; and Muslims and other non-Hindus, desiring to contract civil marriages with first cousins, have yet to stay away from the Special Marriage Act.⁹ The discrimination made in this connection between Hindus and non-Hindus seems unconstitutional as it violates the right to equal protection of laws.

7. The amendment of 1970 had no relevance to the present discussion. See for that, *supra*, chapter IV.

8. See *supra*, chapter III.

9. *Ibid.*

In 1976 another discriminatory feature, the unconstitutionality of which is indeed more pronounced than that of the provision mentioned above, has been added to the Act—surprisingly, on the recommendation of the Law Commission. Now, if both the parties contracting or registering a civil marriage are Hindu (within the legal meaning of the term¹⁰) their property will continue to be governed by the Hindu Succession Act, 1956, and will not be subjected to the Indian Succession Act, 1925.¹¹ On the contrary, if they are Muslim, Parsi or Tranancore-Cochin Christians,¹² they will (as before) still lose their personal law of inheritance and wills, and succession to their properties will be compulsorily regulated by the Indian Succession Act. There is, we feel, no reasonable ground for this discrimination between Hindus and non-Hindus. The new provision impliedly recognizes the superiority of the law of succession of Hindus to those of all other communities—and so long as the system of separate personal laws is allowed to exist, such a ‘recognition’ is *prima facie* unconstitutional. The Law Commission, whose recommendation formed the basis of the new provision, did not even give any reasons in support of its proposal.

The Law Commission was asked by the Ministry of Law to consider the draft of the Marriage Laws (Amendment) Bill which the latter had prepared for the modification of the Hindu Marriage Act, and the Special Marriage Act. It seems that the ministry and the commission both were pre-occupied with their ideas about the former Act while considering reform of the latter. In its report the commission expressly said that besides the amendments proposed in the Special Marriage Act “on its merit”, it was suggesting changes in order to introduce “uniformity” and “similarity” between the Hindu Marriage Act and the Special Marriage Act.¹³ In this context, the commission, evidently, forgot that the latter Act was not meant only for those governed by the Hindu Marriage Act. This can be the only explanation of how it ignored the unconstitutional discrimination underlying its proposal which formed the basis of section 21A added to the Special Marriage Act in 1976.

Other substantive and procedural changes made in the Special Marriage Act in 1976¹⁴ have improved the law contained in its provisions. However, in spite of these changes many provisions of the Act continue to

10. *Viz.* Hindu, Buddhist, Jain or Sikh.

11. Special Marriage Act, s. 21A.

12. Other Christians are even generally governed by the Indian Succession Act. See *supra*, chapter II.

13. The Law Commission of India, *Fifty-Ninth Report* 91 (1974).

14. *Supra*, chapters II and III. This author had suggested most of these changes as early as 1973. See T. Mahmood, Some Lacunae in the Divorce Law, *The Motherland*, 13 March, 1973.

be discriminatory and, on the whole, the Act is neither all-embracing nor wholly impartial. Certain steps detailed below can, we submit, make it more comprehensive, more acceptable and more popular.

1. The Act should be titled as the "Indian Marriage and Divorce Act"—and not the Special Marriage Act.¹⁵ There is, indeed, nothing "special" in this law—it is meant for all Indians alike and its purpose is to furnish to the entire Indian fraternity a matrimonial law with basically uniform provisions. This step will help remove the impression, now prevailing, that the Act is an extraordinary measure.

2. There must be uniformity in the basic provisions of the Act. For instance, polygamy and extrajudicial divorce need not be allowed to any person; marriage-age rules should apply to all; no insane may be allowed to contract a marriage; and the same grounds of divorce should be available to everybody. However, there should be latitude in the Act to accommodate different customs and usages in respect of minor details, for instance, marriage ceremonies,¹⁶ prohibited degrees and special terms to be mutually agreed upon by the parties. Such a latitude will not affect the uniform character of the Act which may be confined to the major and fundamental aspects of matrimonial matters.

3. As regards prohibited degrees in marriage, the Act need not furnish an exhaustive list, as it now does.¹⁷ It may specify, in general terms, those relationships which are considered "prohibited" by all the communities of India. To that it may add a residual clause that in regard to other situations the usage of the families in a particular case will be decisive. The requirement of official recognition of any such usage, now found,¹⁸ must be abolished. Also, it should be clarified that "usage" would cover rules of both personal and customary laws. This step will automatically solve the existing problem of civil marriages between cousins.

4. The parties to a civil marriage should be allowed to include in the marriage-contract any "special terms" which are reasonable and do not contravene, directly or indirectly, any specific provision of the Act. If this is done, Muslims will be able to retain their legal concept of dower (*mahr*)—which is the only genuine concept of Islamic matrimonial law non-availability of which in the case of a civil marriage makes the Muslims ambivalent in the matter of adopting the Special Marriage Act. The condition regarding "reasonableness" of "special terms" must, however, be strictly

15. The Indian Divorce Act, 1869, which applies to Christians, may simultaneously be renamed as the Christian Divorce Act.

16. The Act at present does say that a marriage may be solemnized in any form. This provision may be made more elaborate.

17. Schedule I.

18. See proviso to s. 4 (d)

enforced so that things like excessive dower,¹⁹ extrajudicial divorce, denial of cohabitation, restrictions on each other's personal freedom and the like, are never allowed as "special terms".

The "special terms" which may be allowed in a particular case may be entered into the marriage certificate and should be enforceable by the courts.

5. As regards decrees for judicial separation and restitution of conjugal rights, under the existing provision non-resumption of cohabitation for one year or more following the passing of such a decree creates a ground for divorce available to either party.²⁰ This principle, we are convinced, needs further improvement. Perhaps the Act may provide that in every decree for restitution of conjugal rights or judicial separation the court should specify a definite period within which cohabitation must be resumed and that after the expiry of the period so specified (if cohabitation has not been resumed), unless the court extends the period on the application of either party, the marriage will be automatically dissolved. The Act may further lay down that this automatic dissolution of the marriage will be confirmed by the court on the application of either party; there will be no need for fresh divorce proceedings.

6. Among the grounds for judicial separation and divorce may be included "irretrievable breakdown" of marriage which (without prejudice to the generality of the provision) might have resulted, in the case of an intra-religious marriage, from conversion to another religion by either party.²¹ We are of the opinion that in the present social conditions of India it is not desirable to strictly deny conversion as a ground for divorce in each and every case. Millions of our people will take a long time to learn how to share the matrimonial home with a person belonging to a different faith. The benefits of the civil marriage law need not, for the time being, be denied to them.

7. All references to succession, property and joint family, *etc.*, should, we have a considered opinion, be wholly eliminated from the Special Marriage Act.²² Under the first Special Marriage Act (of 1872), since a civil marriage would mean severance of both the parties from their religions, it was necessary to provide an alternative to the personal law of succession which would automatically cease to apply. However, the 1954 Act was meant to be availed by persons desiring to contract a civil marriage without abandoning their faith. There was, then, hardly any need to displace the

19. Under Islamic law dower is only a token of respect for the wife and so excessive dower is always discouraged.

20. Special Marriage Act, s. 25(2).

21. At present conversion is not a ground for divorce under the Act.

22. This would mean repeal of the existing ss. 19, 20, 21, and 21A.

personal law of succession. There is no such need even now.

8. Where the parties contracting a civil marriage belong to the same religion, succession to their property should be governed by their common personal law;²³ where they differ in religion, the property of the husband should be governed by his and that of wife by her personal law. Neither of these propositions need be specified in the Special Marriage Act. If the provisions now existing in the Act, relating to succession, are repealed, the succession laws originally applicable to the parties—whether same or different—will automatically continue to apply. Since in this country there is no concept of matrimonial property, even an inter-religious civil marriage will not give rise to any interpersonal conflict of laws. The rules of various personal laws depriving heirs professing alien faiths of inheritance-rights will also cause no problem, since all these rules already stand abrogated by virtue of the Caste Disabilities Removal Act, 1850. Those provisions of the Hindu Succession Act, 1956 which undermine the ideal of the Act of 1850²⁴ constitute a retrograde step. They must be repealed forthwith.

9. There is no reason why it should be mentioned in the Special Marriage Act that the 'rights' and 'disabilities' (in regard to the right of succession) of persons contracting a civil marriage would be governed by the Caste Disabilities Removal Act.²⁵ After the 1976 amendment this provision remains applicable only to those civil marriages both parties to which are not Hindu, Buddhists, Sikhs or Jains.²⁶ This change is, however, more redundant than the original provision made in 1954. The provision was, in 1954, borrowed from the former Special Marriage Act, 1872, overlooking the fact that a civil marriage no more involved change of religion by either party. Being a 'spent' provision it should have been wholly repealed during the 1976 amendments.

10. What we have said about the provision (in the Special Marriage Act) referring to the Caste Disabilities Removal Act is also true of section 19 of the Act which says that where a Hindu, Buddhist, Sikh or Jain contracts a civil marriage, this will effect his severance from his joint family. In 1976 this provision was made inapplicable to the cases in which the other party is also a Hindu, Buddhist, Sikh or Jain.²⁷ Here again, one of the vestiges of the Act of 1872 has been unnecessarily retained. On a Hindu (or Buddhist, Jain or Sikh) marrying outside his community, this provision inflicts a penalty which is wholly unwarranted and which Hindu law itself would

23. This, in effect, would mean extension of the principle contained in s. 21A to all communities.

24. See Hindu Succession Act, 1956, s. 26.

25. S. 20.

26. See s. 21A.

27. *Ibid.*

not impose. He should, in all fairness, be allowed to continue as a member of his joint family; and his interest in the joint family property should continue to be regulated by the law of survivorship or succession, as the case may be, in accordance with the Hindu Succession Act, 1956.²⁸

11. We appreciate the anxiety of the legislators to see that more and more people should, in the interest of uniformity of law, subject themselves to the Indian Succession Act. However, provision made for this purpose in the Special Marriage Act—specially after its 1976 amendment which introduced a Hindu non-Hindu classification in this regard—adversely affects the acceptability of the Act. The Act should be wholly delinked from the issue of succession. At the same time in the Indian Succession Act, 1925 a provision may be made enabling any person, whether single or married (and, if married, whether the marriage is civil or religious), to declare before a prescribed authority that, instead of his personal law, he or she wants the Indian Succession Act to regulate succession to his or her property.

12. At present, as we have explained in detail in chapters III and IV of this study, the Special Marriage Act is nearest to the law of Hindus, Buddhists, Jains and Sikhs as contained in the Hindu Marriage Act (though it is very different from their traditional laws). No wonder an overwhelming number of civil marriages on record in different parts of the country belong to these communities. The Law Commission made special efforts, in 1976, to approximate it further to the Hindu Marriage Act. On the contrary, the suggestions which we have made above will, if translated into action, make the Special Marriage Act readily acceptable also to Muslims, Christians, Parsis and Jews, besides Hindus, Buddhists, Sikhs and Jains. Of course, the Act was never meant to be just another alternative law for the last four communities. Its purpose was to pave the way for the unification of the matrimonial law by furnishing a common alternative to each of the varying personal laws. The lines along which the Act has so far been developed has, unfortunately, been frustrating this purpose. There is a pressing national need to divert it from this misdirected development to its true, noble ends.

28. In the case of disagreement with other members of the joint family, the person concerned can easily claim partition under Hindu law, which under our suggestions will remain applicable.

