

# 1 Civil Marriage Law : Origin and Development

## *Retrospect*

BRITISH RULERS of India had, from the very beginning of their rule, adopted the policy of retaining and protecting the traditional personal laws of the various religious communities. Warren Hastings' Judicial Plan of 1772,<sup>1</sup> Impey's Code of 1781<sup>2</sup>, Bengal Regulation IV of 1793,<sup>3</sup> Benaras Regulation VII of 1775<sup>4</sup> and Madras Regulation II of 1802,<sup>5</sup> all had recognized the existence, and guaranteed continued application, of the Hindu and Muslim personal laws. While criminal law and civil laws (other than family law and succession) were gradually secularised, it was decided that in the field of matrimonial law and inheritance the religion-based laws of the two major communities of India would be maintained. However, at a later time the Bombay Elphinstone Code, 1827,<sup>6</sup> as well as the civil court laws enforced in the other parts of British India,<sup>7</sup> expressly recognized the legislature's power to make laws affecting the various personal laws.

It appears that though the early British rulers armed their law-making bodies with the authority to reform the family laws applicable in India, they did not want that authority ordinarily to be exercised. This is evident from what Warren Hastings said at the time of introducing his Judicial Plan of 1772. In an official letter<sup>8</sup> he had stated that the idea of preparing an Indian civil code "agreeable to the laws and tenets of Mohammedans and Gentoos" was desirable but was, then, much ahead of time.

The policy of the British not to replace the then prevailing religious

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1. S. 23.

2. S. 27.

3. S. 15.

4. S. 26.

5. S. 26.

6. S. 26.

7. See, for instance, Punjab Laws Act, 1872, s. 5; Madras Civil Courts Act, 1873, s. 16; Bengal, Agra and Assam Civil Courts Act, 1887, s. 37.

8. Dated January 6, 1773, addressed to Josiah Dupre.

family laws by a secular and uniform code was restated in the *Lex Loci Report* prepared by the First Law Commission in 1837. The report envisaged a two-tier system of family law and succession—Hindu and Muslim (and Parsi)<sup>9</sup> personal laws for these communities, and a *lex loci* applicable to other citizens of India.<sup>10</sup> In pursuance of this recommendation of the First Law Commission, the traditional laws of Hindus, Muslims and Parsis were left undisturbed.

The *Lex Loci* Bill drafted by the First Law Commission in 1841 did not, however, rule out the government's power to reform by legislation and to codify the various personal laws. On the contrary, the Bill itself included among its provisions a significant reform affecting the personal laws of Hindus and Muslims, which is detailed below.

In Bengal province section 9 of Regulation VII of 1832 had abrogated, in an indirect way, those rules of the Hindu and Muslim personal laws under which an apostate heir would lose all rights to inheritance. The motive behind this was not, however, secularisation of the law on the subject. In its background there were the activities of the Christian missionaries under whose influence many low-caste Hindus wished to get converted to Christianity but were scared of the loss of property which, under Hindu law, would follow their conversion. The First Law Commission recommended extension of the Bengal legal provision to the whole of British India and also incorporated the same into the *Lex Loci* Bill. Accordingly, in 1850 to give effect to this recommendation a separate law was enacted in the form of the Caste Disabilities Removal Act, 1850 (also known as the Freedom of Religion Act). The Act abrogated so much of all laws and usages prevailing in India as inflicted on any person forfeiture of rights or property or impaired or affected 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".<sup>11</sup>

The First Law Commission had, as stated above, recommended the enactment of an Indian code of marriage and succession to be applied, under the two-tier legal system planned by it, to the citizens not professing the Hindu or Muslim (or Parsi) religion. In pursuance of this recommendation, the Third Law Commission later drafted an Indian Succession Bill patterned, with certain deviations, after the English law of testamentary and intestate succession. Introduced in the Legislative Council by Sir Henry Maine, it was enacted in 1865. While stating that its provisions would constitute "the law of British India applicable to all cases of intestate and testamentary succession",<sup>12</sup> the Act declared that it would

9. Though no reference was made to Parsi law, in practice Parsi law was always treated on par with the Hindu and Muslim personal laws.

10. See M.P. Jain, *Outlines of Indian Legal History* 519-520 (1972).

11. The Caste Disabilities Removal Act, 1850, s. 1.

12. The Indian Succession Act, 1865, s. 2.

not apply to cases of succession to the properties of Hindus, Muslims and Buddhists.<sup>13</sup> The word "Hindu" used in the Act was interpreted by the courts as a comprehensive term covering not only all forms of Hinduism but also Jains and Sikhs,<sup>14</sup> so as to exclude all these communities from the application of the Act. As regards Parsis, since their personal law of intestate succession was separately enacted in the same year,<sup>15</sup> they too were not to be governed by the Indian Succession Act of 1865 except in respect of wills.

The First Law Commission's recommendation in respect of a *lex loci* was, thus, translated into action in the area of succession. In the field of marriage law, the first step in this direction was taken in 1869 when the Indian Divorce Act was enacted. This Act was, however, then applied only to the Christians of India and its contents were confined to dissolution of marriage. As regards marriage, no *lex loci* was put on the statute book. Instead, the central legislature later enacted (in 1872) for the Christians a separate law of marriage, namely, the Christian Marriage Act, 1872. The marriage and divorce laws of Hindus and Muslims were left intact, though certain aspects of the former were directly or indirectly reformed.<sup>16</sup>

By the middle of the nineteenth century the Brahmosamaj had fully established itself as a progressive religious sect not agreeing with certain aspects of the orthodox Hinduism. In the area of matrimony, its ideology rejected caste distinctions and cumbersome rituals. Its members launched a movement for the enactment of a progressive law of marriage not based on the traditional matrimonial concepts of Hindus. This Brahmosamaji movement gave momentum to the feeling already cherished in certain sections of people that India was in need of a secular marriage law. On the other hand the First Law Commission's recommendation regarding a *lex loci* was yet to be given effect in the field of marriage law.

#### *The first law of civil marriage*

It was in the above circumstances that Sir Henry Maine introduced in the central legislature the draft of a secular marriage law, in the form of the Special Marriage Bill. The Bill envisaged a law of marriage based on secular principles. It was proposed by its architect, Sir Henry Maine, that any two citizens of India should have the freedom of adopting the proposed secular law in the place of their respective personal laws.<sup>17</sup> Had his ideas been accepted, in 1872 itself India would have possessed a national and secularised marriage law by which individual citizens in

13. *Ibid.*

14. See *Doe v. Baidam Beebee*, 2 Morl. Dig. 22 (1849).

15. The Parsi Succession Act, 1865.

16. See, for instance, the Hindu Widows Remarriage Act, 1856.

17. *Gazette of India* 1403-04 (1868).

their discretion could have replaced the personal laws. Unfortunately the Bill met vehement opposition both on the floor of the legislature as well as outside it. Cries of 'religion in danger' were raised and the government was accused of gross interference in the religious affairs of the natives. Henry Maine, however, firmly stood by the First Law Commission's *Lex Loci Report* and made strenuous efforts to muster support for the Bill.

While the Bill was still pending in the legislature, Sir Henry Maine left India and was succeeded by James Stephens. The latter succumbed to obscurantist forces and agreed to restrict the application of the Bill only to those Indians who were not Hindu, Buddhist, Sikh, Jain, Muslim, Christian or Parsi. In this mutilated form the Bill was enacted and enforced on March 22, 1872. Under its provisions only those two persons could marry who declared that they did not profess Hindu, Buddhist, Jain, Sikh, Muslim, Christian or Parsi religion.<sup>18</sup>

It will, thus, be seen that marriage of a couple professing any of the traditional religions prevailing in the country, if solemnized under the Act, would lead to a self-imposed exclusion from the communion of the religion or religions to which the parties belonged. A Hindu, while remaining a Hindu, could marry under the Act neither a Hindu nor a non-Hindu. The same was true of the followers of other religions to whom the benefit of the Act was denied as a consideration to the feelings and sentiments expressed by the orthodox sections of the society.

The Act of 1872 did not include any provision relating to the dissolution of marriages. It only laid down that any marriage solemnized under its provisions could be declared null or dissolved under the Indian Divorce Act enacted earlier in 1869.<sup>19</sup> As regards succession to the properties of the persons marrying under the Special Marriage Act, 1872 there was no specific provision in the Act itself. However, as for the sake of getting married under the Act the parties were required to renounce their religion, they would automatically be subjected to the Indian Succession Act, 1865 mentioned above.

In practice, the Special Marriage Act of 1872 furnished a law under which two persons belonging to different religions could marry by declaring their complete severance from their respective faiths. On such severance, it may be noted, their succession rights would remain unaffected, as the Caste Disabilities Removal Act, 1850, mentioned above, would come to their rescue.

Forty years after the enforcement of the Special Marriage Act, 1872 an effort was made in the legislature to restore Henry Maine's idea of the secular marriage law. On February 26, 1912 Bhupendra Nath Basu introduced a Bill seeking an amendment in the Act of 1872 in order to

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18. The Special Marriage Act, 1872, s. 2.

19. S. 17.

make its provision available to any two Indians intending to marry, irrespective of their religion or faith. The then law member of Viceroy's Council, Ali Imam, representing the views of orthodox Muslims, argued<sup>20</sup> that the proposed amendment would furnish to Muslims occasions for freely marrying non-Muslims, whereas their personal law provided that a Muslim man could marry either a Muslim or a "scriptural" (*kitabiyah*)<sup>21</sup> woman, and that a Muslim woman could wed none but a Muslim man. On the other hand, another Muslim member of the legislature, Mohammad Ali Jinnah, strongly supported the amendment.<sup>22</sup> It is worthwhile to quote here at some length from his speech in the legislature. Speaking on B.N. Basu's Bill he said:

The Honourable Law Member has said that so long as Muslims are concerned, there are express injunctions in the *Qur'an* that a Muslim man cannot marry a woman other than a Muslim or a *Kitabiya*. I may admit that his statement is correct. But, may I ask the Honourable Member if in the history of legislation in this country this is the first occasion when this Council has to overlook Islamic law or affect a change into it so that it is adapted to the needs of the time? This Council has ignored or amended Islamic law in many respects. For instance, Islamic law of contract is no more applicable. Islamic criminal law which remained applicable even during the British period now stands wholly repealed. The Islamic law of evidence is nowhere found in this country any more. Over and above, there is the recently enacted Caste Disabilities Removal Act, 1850 which has the effect of abrogating the Qur'anic provision under which an apostate is deprived of his right to inheritance. I submit, these are the examples which we have to follow so that we may keep pace with the present social needs and requirements of the time, for which many precedents are found in the Islamic legal history itself. There is no denying the fact that if a Hindu marries a non-Hindu or a Muslim marries a non-Muslim, many problems arise which personal laws cannot solve. Can not these difficulties be removed by legislation? Don't we have enough authority for legislative intervention in this matter? As said earlier, this is an entirely optional and obligatory law. It does not say that a Muslim must marry a non-Muslim or a Hindu must wed a non-Hindu. But, if there is a good number of pro-

20. Government of India, *Legislative Gazette* 60-61 (1912).

21. Literally 'follower of a scriptural religion' this term is generally applied in Islamic law to Christian and Jewish women.

22. Jinnah had surprisingly secular views in the matter of family law. See, in general, Tahir Mahmood, *An Indian Civil Code and Islamic Law* 111-114 (1976).

gressive, educated and enlightened Indians, whether Hindu, Muslim or Parsi, who want to adopt such laws which conform to modern trends, why should they be deprived of justice; more so since it is not prejudicial to the interests of either the Hindus or the Muslims?<sup>23</sup>

The views expressed by B.N. Basu and Jinnah, however, met with strong disfavour among the Muslim as well as the Hindu masses. Eventually, the amending Bill was rejected by the legislature. The Special Marriage Act as enacted in 1872 remained in force till 1923.

#### *The amending law of 1923*

In 1921 another attempt was made, now by Hari Singh Gaur, for the removal of the condition of renunciation of religion impliedly imposed under the Special Marriage Act, 1872. The Bill which he moved for that purpose, however, met the same fate as that of B.N. Basu in 1912, in spite of the fact that this time Sir Yamin Khan of the Muslim League openly supported the proposed amendment. In the next session he once again pressed for the enactment of his Bill assuring that religious communities other than Hindus would be excluded from its purview.<sup>24</sup> The Bill was referred to a select committee which gave its report in 1923.<sup>25</sup> The measure was then adopted as the Special Marriage (Amendment) Act, 1923.

After the 1923 amendment it became possible for Hindus to marry under the Special Marriage Act, 1872, instead of their personal law, without renouncing their religion. The same position became operative in the case of Buddhists, Sikhs and Jains. Further, two persons belonging to different religions from amongst these four could now freely inter-marry without giving up allegiance to their respective faiths.

The 1923 amendment specifically stated that succession rights of the parties marrying under the Act, whether they were Hindus, Sikhs, Jains or Buddhists, would be protected in the same way in which an apostate would retain such rights by virtue of the Caste Disabilities Removal Act, 1850<sup>26</sup> However, protecting the traditions of the coparcenary system, the amending Act laid down that where a Hindu, Buddhist, Jain or Sikh, who was a member of an undivided family at the time of marriage, married under the Act of 1872, his connection therewith would

23. Translated by the author from Urdu as quoted in Muhammad Mian, *Jamiat al-Ulamā Kyā Hay* 11-12 (1946).

24. For objects and reasons of Hari Singh Gaur's amendment Bill see, V *Gazette of India* 114 (1921).

25. V *Gazette of India* 133 (1923).

26. The Special Marriage Act, 1872, s. 23 (inserted by the amendment Act of 1923).

stand automatically severed.<sup>27</sup>

*Succession laws, 1865-1925*

Succession to the properties of the couple professing the Hindu, Buddhist, Jain or Sikh religion, married under the Special Marriage Act, 1872 would, according to a newly inserted statutory provision,<sup>28</sup> be regulated by the Indian Succession Act, 1865, the clause in that Act exempting those communities notwithstanding.

At about the time when the Special Marriage (Amendment) Act, 1923 was enacted, a Bill was introduced in the legislature seeking replacement of the Indian Succession Act, 1865 by a new comprehensive law. The purpose of the proposed new legislation was to consolidate the several enactments relating to succession then existing, namely, the Indian Succession Act, 1865, the Parsi Intestate Succession Act, 1865, the Hindu Wills Act, 1870 and the Probate and Administration Act, 1881 dealing with procedural aspects of inheritance and bequests.<sup>29</sup> It was said in the Statement of Objects and Reasons:

The object of this Bill is to consolidate the Indian law relating to succession. The separate existence on the statute book of a number of large and important enactments renders the present law difficult of ascertainment and there is, therefore, every justification for an attempt to consolidate it. The Bill has been prepared by the Statute Law Revision Committee as a purely consolidating measure. No intentional change of the law has therefore been made.<sup>30</sup>

The Bill was eventually enacted in the form of the Indian Succession Act, 1925. The rules of exemption of various religious communities from different provisions of the Act, included in it, were quite complicated. In a nutshell the position was as follows:

- (a) Hindus, Muslims, Buddhists, Jains and Sikhs were exempted from the application of the following provisions of the Act :
  - (i) questions of domicile (sections 4-19);<sup>31</sup>
  - (ii) succession-rights acquired or lost by reason of

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27. S. 22.

28. S. 24.

29. It was suggested that some other enactments, *e.g.*, the Hindu Disposition of Property Act, 1916 and the Malabar Wills Act, 1888, also be incorporated into the new legislation. But the select committee did not agree to the suggestion. See *Gazette of India*, part v, p. 103(1925).

30. *Gazette of India*, part V, p. 401 (1923).

31. Indian Succession Act, 1825, s. 4.

- marriage (sections 20-22);<sup>32</sup>
- (iii) principles of consanguinity (sections 23-28);<sup>33</sup>
- (iv) intestate succession (sections 29-49);<sup>34</sup> and
- (v) the requirement regarding the grant of letters of administration (sections 212-13).<sup>35</sup>
- (b) Entire part II (sections 57-191), relating to testamentary succession, was declared to be inapplicable to Muslims.<sup>36</sup> To Hindus, Sikhs, Jains and Buddhists these provisions would apply with certain modifications meant to protect the classical Hindu law.<sup>37</sup>
- (c) For the Parsi community, their personal law of inheritance contained in the Parsi Intestate Succession Act, 1865 was turned into chapter III in part V (relating to intestate succession) of the Indian Succession Act, 1925. They were, thus, exempted from the general provisions relating to consanguinity.<sup>38</sup> As regards the requirement as to the grant of letter of administration Parsis as well as Indian Christians were, like Hindus and Muslims, exempted from its application.<sup>39</sup>

No changes were made in the substantive law contained in the Indian Succession Act, 1865. It was only restated, along with a number of procedural legal principles, in the new Act of 1925.

After the enactment of the Indian Succession Act, 1925 all references (found in various laws) to the old Succession Act, 1865 were to be construed as references to the (new) Succession Act of 1925. Accordingly, succession to the properties of persons marrying under the Special Marriage Act, 1872 (after 1925) were henceforth to be regulated by the Indian Succession Act, 1925.

### *The second law of civil marriage*

The Special Marriage Act, 1872, as amended by the Special Marriage (Amendment) Act, 1923, along with the Indian Succession Act, 1925 remained in force during the first eight years of independence. In January, 1955 it was replaced by a new progressive law.

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32. *Id.*, s.20(2)(b).

33. *Id.*, s.23.

34. *Id.*, s.29(1).

35. *Id.*, s.212.

36. *Id.*, s.58(1).

37. *Id.*, s. 57 and Schedule III.

38. *Supra* note 33.

39. *Supra* note 35.



After the promulgation of the Constitution in January, 1950 the conditions prevailing in the country underwent a momentous change. The state was given wide powers to introduce law reforms and regulate secular practices associated with religion. Constitutional provisions relating to secularism, equality before law, equal protection of laws and uniform civil code, were the newly adopted ideals which revolutionized the thinking of the political leaders and legislators. Time was now considered to be ripe enough to implement the proposal regarding the extension of the secular laws of marriage and succession which Henry Maine in 1868, B.N. Basu and Jinnah in 1912 and Hari Singh Gaur and Yamin Khan in 1921, had failed to push through. An early implementation of the directive on uniform civil code was not in sight. Nevertheless, it was not possible to wholly overlook it either. One or the other step had to be taken in that direction, in partial compliance with the mandate of article 44 of the Constitution.

It was in these circumstances that in 1952 a new Marriage Bill was introduced in Parliament. The then law minister, C.C. Biswas, 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."<sup>40</sup> The provisions of the Bill were patterned mainly after the Special Marriage Act, 1872, but its scope and extent of application were greatly widened. Any two Indians, whether living in India or in a foreign country, and whether professing the same or different religions (or no religion at all), could contract a marriage under the new law when enacted. Even an existing marriage, under whatever law it was originally solemnized, could be turned into a secular marriage by registration under the new law, if it fulfilled the conditions laid down in the Act.

Obscurantist forces once again went into action. Opposition was now not as vehement among Hindus as in the Muslim community. At about the same time the Hindu Code Bill was under the consideration of Parliament, and the Hindu public opinion was focussed thereon. On the other hand, Muslims had felt disappointed by the refusal of the Constituent Assembly to favour them with a constitutional provision protecting their distinct personal law.<sup>41</sup> With the migration of most of the socially progressive leaders to Pakistan, the political leadership of the community was left in the hands of religious leaders. All the Muslim political parties and religious organizations made a plea that no Muslim should be allowed to marry under the new Special Marriage Act. The Muslim League, whose former leader, Jinnah, had an extremely secular attitude to family law

40. Law minister's statement on the Bill given in the *Rajya Sabha* on July 28, 1952.

41. See, for details, T. Mahmood, *Muslim Personal Law : Role of the State in the Subcontinent*, chapter V (1977).

reform, now opposed the Special Marriage Bill with all its might. The Congress-backed Jamiat-ul-Ulama Hind also bitterly criticised the Bill. Mohammed Ismail and Khwaja Inayatullah were in the forefront to oppose the Bill as its provisions, according to them, were derogatory of the Muslim personal law. The 1952 Bill could, nevertheless, muster the necessary support in Parliament and was enacted in 1954 in the form of the new Special Marriage Act, which replaced the old Special Marriage Act of 1872.

The Special Marriage Act, 1954 came in force on the first day of January, 1955. While embodying a secular law of marriage which any two Indians married to, or intending to marry, each other could adopt, the Act retained the old legal provision attracting the application of the Indian Succession Act, 1925 (as amended up to date) to regulate succession to the properties of a couple opting for a civil marriage. Unlike the old Act of 1872 (which only extended the application of the Indian Divorce Act, 1869 to civil marriages) the Act of 1954 laid down detailed rules also for the dissolution of marriages solemnized under its provisions. The provisions of the new Act were made applicable also to Indians living in foreign countries. Detailed provisions of an administrative nature were, for that purpose, incorporated in the Act.

#### *Further amendments : 1963-1976*

In 1963 the Special Marriage Act, 1954 was amended in order to protect customs and usages conflicting with its rules relating to prohibited degrees in marriage.<sup>42</sup> Six years later, the Foreign Marriage Act, 1969 took away the extra-territorial application of the Special Marriage Act. Since then its provisions have been applicable only to marriages solemnized in India.<sup>43</sup> The law relating to petitions for divorce grounded on earlier judicial proceedings, viz, judicial separation and restitution of conjugal rights, was amended in 1970.<sup>44</sup> After another six year the Marriage Laws (Amendment) Act, 1976<sup>45</sup> drastically amended several important provisions of the Special Marriage Act, 1954. These amendments were based mostly on the proposals made by the Law Commission of India which was asked by the government to review the Act along with the Hindu Marriage Act, 1955. Many of these amendments are highly significant; some have attracted severe criticism. In the following chapters of the present study we shall critically discuss the Special Marriage Act as it stands after the changes made up to the end of 1976.

42. Act XXXII of 1963.

43. A study of the Foreign Marriage Act, 1969 and its effect on foreign marriages solemnized before 1969 under the Special Marriage Act, 1954 is outside the scope of this study.

44. Under Act XXIX of 1970.

45. Act LXVIII of 1976.