

### 3. Civil Marriage Law Compared with Personal Laws—I [Marriage]

Before proceeding to probe into the working of the Special Marriage Act and make an assessment of the public opinion on it, we give below an appraisal of the common features as well as the contrasting points between this Act and the major personal laws of the country.

#### *Nature of marriage*

The most striking feature of the Special Marriage Act is, of course, that its provisions are not based on religion. It treats marriage as a solemn social contract based on secular principles. No religious ceremonies or theological rituals are, therefore, required for the solemnization of a marriage under its provisions. Under Hindu law, traditionally, marriage has the status of a sacrament, though the Hindu Marriage Act, 1955 has introduced many contractual elements into the concept of marriage. The requirement of a ceremony conferring on the contract of marriage a sacramental colour is, however, retained under the Act of 1955;<sup>1</sup> and a customary, if not the true Shastric, ceremony is still necessary. The Parsi law, too, insists on a religious ceremony—*ashirvad*—in respect of a marital union.<sup>2</sup> Among the Christians, church marriages are more common than those solemnized by marriage-officials under the Christian Marriage Act, 1872. In Muslim law marriage is a civil contract not requiring any religious ceremony for its solemnization. Nevertheless, though not necessary under the law, intervention of a religious functionary and recitation from the Qur'an are in vogue among the Muslims of India. These are, however, extra-legal customs. In this respect thus, the Special Marriage Act, 1954 does not conflict with Muslim law. The concept of marriage under both is wholly secular.

Under the personal laws of Hindus and Parsis religious significance is attached to marriage rituals. However, the Act of 1954 does not prohibit holding of any ceremony, though it requires none. On the contrary the Act clearly says that a civil marriage “may be solemnized in any form which the

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1. Hindu Marriage Act, 1955, s. 7. As to the importance of ceremonies, see *Bhaurao v. State of Maharashtra*, A.I.R. 1965 S.C. 1564.

2. Parsi Marriage and Divorce Act, 1936, s.3(b)

parties may choose to adopt", the only statutory requirement being the declaration by the parties that they take one another as their lawful spouse.<sup>3</sup> This eminently conforms to the Islamic form of marriage. Where registration of an existing religious marriage under the Act is desired, the law insists on the production of proof of a ceremony having been performed.<sup>3a</sup>

### *Monogamy*

The Muslim personal law, according to its traditional interpretation, allows polygamous marriages. The Indian brand of Muslim law differs on this point from the shape which this law has assumed in a large number of Muslim countries.<sup>4</sup> In Turkey and Tunisia a bigamous marriage is void and penal. In Syria, Iran, Iraq, Morocco, Pakistan and Bangladesh, polygamy is subject to strict judicial or administrative control. It is not allowed to be practised arbitrarily also in Indonesia, Sri Lanka and some parts of Malaysia. The personal laws of Hindus, Parsis and Christians of India, as they stand today, absolutely prohibit polygamy. Sections 494-95 of the Indian Penal Code, 1861 penalising bigamy are applicable to all these communities. The Special Marriage Act, enforces strict monogamy. In that respect the Act conforms to the existing personal laws of the Hindus, Parsis and Christians of India and to those of the Muslims of Turkey and Tunisia. With the traditional law of the Muslims of India the Act does not agree.

However, bigamy is neither enjoined nor encouraged in Islam; it is only permitted, subject to certain difficult conditions. The Special Marriage Act, therefore, in not allowing bigamy does not violate any fundamental principle or obligatory tenet of the religion of the Muslims.

It is notable that a bigamous marriage lawfully solemnized under Muslim law cannot, afterwards, be turned into a civil marriage by registration under the Special Marriage Act, unless at the time of registration the bigamous party has only one spouse living.<sup>4a</sup> So, where a Muslim marries two women one after another, he cannot register either of his marriages under the Act of 1954. However, if one of his wives dies or is lawfully divorced, registration of the other marriage under the Act will be permissible.

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3. Special Marriage Act, 1954, s.12(2).

3a. S.15(a)

4. See, generally, Tahir Mahmood, *Family Law Reform in the Muslim World* 274-78 (1972).

4a. Special Marriage Act, 1954, s. 15(b).

*Marriage-age*

As regards marriage-age, the requirement under the Special Marriage Act is completion of twenty-one years and eighteen years by men and women respectively.<sup>5</sup> Violation of this requirement makes the marriage null and void.<sup>6</sup> Where an existing marriage is to be registered under the Act, both the parties must have completed the age of twenty-one years. Under the Hindu Marriage Act, a man of eighteen years and a girl of fifteen years (with the guardians' consent till she is below eighteen years) can lawfully marry.<sup>7</sup> The violation of these specifications, however, does not invalidate a marriage; it results only in penal consequences.<sup>8</sup> The recent introduction of the rule of 'Option of Puberty' in the Hindu Marriage Act<sup>9</sup> has put an end to the doubts regarding the validity of a minor's marriage and confirmed impliedly that such a marriage will not be void *ab initio*. In Parsi law marriage of a person below twenty-one years without the consent of guardian is invalid.<sup>9a</sup> Indian Christians marrying under the Christian Marriage Act, 1872 have to comply with certain age requirements under which completion of eighteen and fifteen years is necessary for men and women respectively.<sup>10</sup> Under Muslim law as applicable in India attainment of 'puberty' is the only requirement in regard to marriage-age. In various Muslim countries marriage-age for men and women has, in recent years, been raised by law, without violating any of the basic principles of Muslim law.<sup>11</sup> In none of the Muslim countries, however, a minor's marriage is void.

In India all the religious communities are subject to the provisions of the Child Marriage Restraint Act, 1929 (also known as the Sharda Act) which prohibits marriages of men below eighteen years and of girls below fifteen years of age. This is, however, a piece of penal legislation and casts no reflection on the legal status of a minor's marriage, which question is still to be decided with reference to the family law applicable to a particular case. The invalidity of a minor's marriage, envisaged in the Special Marriage Act, thus, seems to be opposed to the personal laws of all the

5. S. 4(c).

6. S. 24.

7. S. 5.

8. S. 18. Cf. *Smt. Naumi v. Narotam*, A.I.R. 1963 H.P. 15. The Andhra Pradesh High Court held, in a case decided in 1975 (*Ponchireddi Appala v. Gadela Ganapatlu* A.I.R. 1975 A.P. 193) that a Hindu marriage in violation of statutory requirements regarding age would be void; and this raised many difficult problems. See T. Mahmood, *Marriage-Age in Hindu Law: A Remarkable Decision from Andhra Pradesh*, 2 *Kurukshetra Law Journal*, 165-168(1976). The 1976 amendment of the Hindu Marriage Act, however, rendered that decision invalid and later in *Konda Reddy v. Lakshamma*, A.I.R. 1977 A.P. 43 the same High Court itself expressed a contrary opinion.

9. See the Hindu Marriage Act, 1955, s. 13 (xii) inserted in 1976.

9a. Parsi Marriage and Divorce Act, 1936, s. 3(c).

10. S. 60(1).

11. *Supra* note 4 at 274.

religious communities of India.

### *Sanity*

The Special Marriage Act insists on the sanity of parties at the time of marriage.<sup>12</sup> A marriage in violation of this condition will be null and void.<sup>13</sup> Under the Hindu Marriage Act, 1955 too sanity of the parties is a condition for marriage.<sup>14</sup> After the 1976 amendments the concept of sanity as a condition of marriage is exactly the same under the Special Marriage Act and the Hindu Marriage Act. Under both Acts persons suffering from unsoundness of mind, mental disorder or recurrent attacks of epilepsy, are not permitted to marry.<sup>15</sup> However, under the Hindu Marriage Act the marriage of an insane is not void, it is only voidable at the option of the aggrieved party.<sup>16</sup>

There is nothing in the laws of the Christians and Parsis expressly prohibiting the marriage of an insane. In Muslim law an insane can be lawfully given in marriage by the guardian. Thus, in regard to the condition of sanity the civil marriage law contained in the Special Marriage Act does not wholly agree with any of the various personal laws.

### *Prohibited relationship*

The last condition for a lawful marriage under the Special Marriage Act is absence of "prohibited relationship" between the parties. The personal laws of all religious communities impose restrictions on marrying within certain degrees of relationship; but these restrictions are not identical. As regards the general principles relating to prohibited degrees in marriage, the following points are notable:

- (i) The Special Marriage Act conforms to all the personal laws in equating half blood and the uterine blood with full blood.<sup>17</sup>
- (ii) In equating relationship by adoption with blood relationship,<sup>18</sup> the Act fully agrees with Hindu law. As in Muslim law adoption has no recognition, the provision of the Act in this regard has no relevance for Muslims.

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12. S. 4(b).

13. S. 24.

14. S. 5(b).

15. Cf. Hindu Marriage Act, 1955, s. 5(b), Special Marriage Act, 1954, s. 4(b)—both as amended by the Marriage Laws (Amendment) Act, 1976.

16. S. 12(1)(b).

17. S. 2(b), explanation 1(a).

18. S. 2(b), explanation 1(c).

- (iii) Fosterage, which is recognised in Muslim law as a bar to marriage, has no place in the Special Marriage Act.
- (iv) *Sapinda* relationship, which is a speciality of Hindu law recognised in a modified form under the Hindu Marriage Act, 1955,<sup>18a</sup> does not find any place in the Special Marriage Act except, indirectly, to the extent of cousin relationship confined to the first degree.
- (v) The Special Marriage Act agrees with Hindu law in making no distinction between legitimate and illegitimate blood for the purposes of determining prohibited degrees in marriage.<sup>19</sup>

Unlike the Hindu and Muslim personal laws which describe prohibited relations in an abstract manner, the Special Marriage Act specifies all those relations whom a man and a woman cannot lawfully marry.<sup>20</sup> The corresponding position of these relations under Hindu and Muslim laws have to be worked out. The Parsi law, like our Act, clearly specifies all those relations whom one cannot marry.<sup>21</sup> The Christian Marriage Act, 1872 speaks only of the "impediment" of "kindred or affinity" without specifying the details of this impediment.<sup>22</sup>

Most of the relationships described as "prohibited" in the Special Marriage Act are not "allowed" relationships in any of the personal laws either. Clear instances are: parents, lineal ascendants and descendants and their former spouses, brothers and sisters and their descendants. Some of the prohibited relationships are too hypothetical to merit a consideration of difference, if any, between the various laws in their treatment. For instance, there will be hardly any case in which a man would wish to marry his "mother's mother's mother", "step great grandmother" "daughter's son's daughter", "daughter's daughter's son's widow". Similarly, no woman would intend marrying her "father's father's father", "step grandfather", "son's son's daughter's husband" or "daughter's daughter's son".<sup>23</sup> Side-stepping these hypothetical cases, we will discuss here only those conflicts between the civil marriage law and the various personal laws in respect of prohibited relationships which actually arise in life. Some of these, detailed below, do need a thorough consideration.

- (i) (Former) wives of brothers and (former) wives of paternal and maternal uncles are "prohibited degrees" under Hindu law,<sup>24</sup> but

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18a. Ss. 3(f)(i) & 5(v).

19. S. 2(b) explanation 1(b).

20. Schedule I, parts I-II.

21. Parsi Marriage and Divorce Act, 1936, Schedule I.

22. Ss. 18(a), 42(a).

23. All these relations, both male and female, are actually mentioned as "Prohibited Relationships" in the First Schedule to the Special Marriage Act.

24. Hindu Marriage Act, 1955, s. 2(g)(iii).

not so under the Special Marriage Act. Marriage with former wives of uncles is not allowed also in Parsi law.<sup>25</sup>

- (ii) All first cousins (both paternal and maternal) are within "prohibited relationship" under the Special Marriage Act. This is in strict conformity with Hindu law but is wholly opposed to other personal laws, specially Muslim law, which allows marriage with all first cousins on the paternal as well as on the maternal side. Among the Muslims of India, it may be noted, such marriages are very common. On this point, thus, there is a clear conflict between the Special Marriage Act and the Muslim personal law.
- (iii) Marriage between persons related to one another as second or third cousins (related through their fathers) will not in most cases be allowed under the rule of *sapinda* relationship in Hindu law;<sup>26</sup> but these are not "prohibited relations" under the Special Marriage Act.
- (iv) "In-laws", or persons related through a spouse, are not mentioned among "prohibited relations" under the Special Marriage Act. On the other hand Parsi law prohibits marriage with relations like "wife's mother", "brother's son's wife" "husband's brother's son", *etc.*<sup>27</sup> In Muslim law, too, marriage with relations like wife's mother and son's wife are prohibited.

The above illustrations show that a particular "prohibited" relationship under the civil marriage law may be found to be an "allowed" relationship under a personal law or custom, and *vice versa*.

As regards customary law, the Special Marriage Act was amended in 1963 in order to provide that the rules of "prohibited" relationship laid down under the Act would be subject to "custom governing at least one of the parties."<sup>28</sup> The new provision defines "custom" as a rule "continuously and uniformly observed for a long time", provided that it is "not unreasonable or opposed to public policy" and is specified by the state government in a gazette notification.<sup>29</sup> This provision does not protect those personal laws which permit marriage with a first cousin, since "custom" and "personal law" are not the same. Moreover, the requirement of a gazette notification is mandatory. Consequently, two Muslim cousins, who can lawfully marry under their personal laws, will not be allowed to contract a civil marriage. If they are desirous of a marriage

25. Parsi Marriage and Divorce Act, 1936, schedule I.

26. Hindu Marriage Act, 1955, s. 2(f).

27. *Supra* note 20.

28. See the proviso to cl. (d) in s. 4 of the Special Marriage Act, 1954, added by the amendment Act of 1963.

29. *Id.*, explanation.

they will be compelled to marry under their personal law. They cannot also get their religious marriage later registered under the Special Marriage Act. This latter course would be possible only in regard to marriages solemnized under Muslim law before 1954, since in the cases of registration of marriages then existing, the provisions of the Act relating to prohibited degrees are "subject to any law, custom or usage having the force of law governing each of them which permits a marriage between the two".<sup>30</sup>

The Special Marriage Act, thus, leans towards the traditional Hindu law in putting restrictions on marriage with a first cousin, while it contravenes the same in allowing free marital relationship with all second cousins. It seems rather funny that whereas a Hindu man who cannot lawfully marry his second (paternal) cousin under the Hindu Marriage Act—as this will be barred by the rule of *sapinda* relationship—can straight away take the same girl as his wife under the Special Marriage Act, a Muslim whose personal law allows him to marry his first cousin (paternal or maternal) is denied the facility of contracting a civil marriage with her.

It is notable that the bar to marriage with a first cousin found a place in the Special Marriage Act without regard to any personal law allowing such a marriage, in spite of the protests made against it by Khwaja Inayatullah and some other Muslim legislators during the discussion of the Special Marriage Bill, 1952 in Parliament. When the joint committee to which the Bill was referred gave its report, some of its members, including late Sucheta Kripalani, wanted the net of prohibited relationships included in the Bill to be subjected to the "contrary rules of personal law applicable to the parties".<sup>30a</sup> Their views too were, however, wholly ignored.

It is further notable that the Foreign Marriage Act, 1969, which took away the extra-territorial extent of the Special Marriage Act, does subject its net of prohibited relationship (which it shares with the Special Marriage Act) to the contrary rules of both personal as well as customary laws. Consequently, two Muslim cousins of India can contract a civil marriage in England, Australia, Kenya, Fiji or, for that matter, anywhere else on the globe, but not in their home country.

#### *Dowry and dower*

The personal-law concepts of 'dowry' and 'dower' are wholly irrelevant under the provisions of the Special Marriage Act. The practice of dowry, though prevailing in the society, is not recognised by the modern Hindu law either; the Hindu Marriage Act makes no reference to it. To the Muslim personal law (though not to the Muslims of India) the concept is wholly unknown. The Dowry Prohibition Act, 1961, which is applicable

30. Proviso to s. 15(e).

30a. See D. Ahmadullah, Prohibited Relationship under the Special Marriage Act: A Lacuna, in T. Mahmood (ed), *Family Law and Social Change* 64-68 (1975).

to all Indians irrespective of religion, penalises both giving and taking dowry. Thus, the Special Marriage Act does not disturb the present situation of dowry under either of the two major personal laws.

Difficulty, however, arises in respect of the Muslim legal concept of dower (*mahr*), which is distinct from dowry and has been specifically protected by the Dowry Prohibition Act, 1961. In Muslim law dower is an essential ingredient of marriage and cannot be dispensed with even by an express contrary provision in the marriage contract. There are meticulous rules for ascertaining the amount of *mahr* and the time for its payment. In the Indian sub-continent, as a general practice, the dower (whatever its amount might be)<sup>31</sup> is made payable on the dissolution of marriage either by divorce or by husband's death. Thus, in the case of divorce it serves as an alimony to the divorcee; and after the husband's death it supplements the widow's share in his property which she is entitled to under the Islamic law of inheritance.<sup>32</sup> However, under the legal theory, dower can be claimed also during the subsistence of the marriage and is in some cases payable even before the marriage is consummated. The Special Marriage Act makes provision for nothing which can take the place of dower in such cases.

#### *Nullity of marriage*

Under the Special Marriage Act a marriage which contravenes any of the conditions for a lawful marriage, namely, (i) monogamy, (ii) sanity, (iii) prescribed age and (iv) absence of prohibited relationship, is null and void.<sup>33</sup> Before the 1976 amendment of the Act the right to seek declaration of nullity in respect of a void marriage was not confined to the parties. Now, however, only either of the parties to such a marriage can present a petition in order to obtain a declaration of nullity.<sup>34</sup> Either spouse can also present a petition for nullity on the ground that the respondent was at the time of marriage, and still is, impotent.<sup>34a</sup>

A marriage is, under the Act, "voidable" at the option of the aggrieved party on the grounds of (i) wilful non-consummation of marriage, (ii) girl's pregnancy by another man at the time of marriage and (iii) want of free

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31. It can be fixed in the marriage-deed (it is then called *mahr musamma*), or left undecided in which case custom in the girl's family is the guide (in the latter case it is called *mahr mithl*). In Jammu and Kashmir state and in Oudh the amount of fixed dower can be reduced by the courts with regard to the husband's means. See Oudh Laws Act, 1876, s. 6; J. & K. State Dower Act, 1920, s. 2.

32. 1/4th of the property in the absence of children and 1/8th of it if the deceased is survived by a child.

33. S. 24.

34. S. 24 (1) as amended in 1976.

34a. *Ibid.*



consent, resulting from coercion or fraud.<sup>35</sup> Such a marriage may be annulled by the court by a decree of nullity.

Under Hindu law, a marriage is void if it is bigamous or is within the prohibited degrees (including *sapinda* relationship);<sup>36</sup> if it violates the condition of sanity it is only voidable.<sup>37</sup> In both cases a decree of nullity can be obtained from the court. But if rules relating to age (including guardian's consent) are violated, the status of marriage remains unaffected; the violation only attracts penal provisions of the law.<sup>37a</sup> Want of free consent and girl's pregnancy on the marriage-date (by a man other than husband) make the marriage voidable also in Hindu law.<sup>38</sup> However, the Special Marriage Act and the Hindu Marriage Act differ from one another in their concept of "free consent". While the former speaks of "coercion or fraud as defined in the Indian Contract Act", the Hindu Marriage Act (as amended in 1976) mentions "force or fraud as to the nature of the ceremony or as to any material fact or circumstance". In respect of non-consummation of marriage, while the Special Marriage Act makes it a ground for the annulment of marriage if it is "wilful", under the Hindu Marriage Act only non-consummation of marriage resulting from impotency of the respondent makes the marriage voidable at the option of the petitioner.<sup>39</sup>

In Parsi law a bigamous marriage, a marriage within prohibited relationships and the marriage of a minor (a person below twenty-one years) without the guardian's consent, are invalid.<sup>40</sup> In addition, non-consummation of a marriage on account of "natural causes" also makes the marriage null and void.<sup>41</sup> Wilful non-consummation of marriage, as also the girl's pregnancy by another man at the time of marriage, do not make a Parsi marriage voidable; these are grounds for divorce in Parsi law.<sup>41a</sup>

Under the Indian Divorce Act, 1869 a marriage can be declared null and void on the grounds of (i) impotency at the time of marriage, (ii) existence of prohibited relationship between the parties, (iii) insanity of either party at the time of marriage and (iv) bigamy.<sup>42</sup>

In Muslim law monogamy, majority and sanity are not conditions for the validity of a marriage. The grounds making a marriage void

35. S. 25.

36. Hindu Marriage Act, 1955, s. 11.

37. S. 12 (1) (b). This position remains unaffected by the 1976 amendment of the Hindu Marriage Act.

37a. S. 18. See also *supra* note 8.

38. S. 12 (1) (d).

39. Special Marriage Act, 1954, s. 25 (1); Hindu Marriage Act, 1955, s. 12 (1) (a).

40. Parsi Marriage and Divorce Act, 1936, ss. 3-4.

41. S. 30.

41a. S. 32 (a) (c).

42. Ss. 18-19.

(*batil*),<sup>43</sup> which the Special Marriage Act shares with Muslim law are :  
 (i) existence of a major prohibited relationship between the parties and  
 (ii) husband's impotency since the time of marriage.<sup>43a</sup>

It will, thus, be seen that the provisions relating to nullity of marriage under the Special Marriage Act find least number of parallel provisions in Muslim law. On the contrary the points of difference in this regard between the Act and the Parsi, Christian and Hindu laws, are not much significant.

#### *Children of void and voidable marriages*

Since the enactment of the Marriage Laws (Amendment) Act, 1976, both the Special Marriage Act and the Hindu Marriage Act share identical provisions relating to the legal status of children of void and voidable marriages, which are summarised below.<sup>44</sup>

1. Children of those marriages which are void under express provisions of the Act concerned, who would have been legitimate but for such provisions, would be deemed legitimate, irrespective of the nullity of the marriage, whether declared or not.
2. Children of voidable marriages born or conceived before their annulment will be legitimate, if they would have enjoyed that status had their parents' marriage been dissolved by a decree of divorce, not annulled.
3. Children of void and voidable marriages, deemed in law as legitimate, will not get any right in the property of a person other than their parents.

Under the *Hanafi* school of Islamic law children of "irregular" (*fāsid*) marriages are legitimate but those of a void (*bātil*) marital alliance are illegitimate. In very few circumstances, however, a marriage is void. In Shia law all unlawful marriages are void and their children are illegitimate. However, with the exception of those which are barred by prohibited-relationship rules, marriages void under the Special Marriage Act will be valid in Muslim law and, therefore, the statutory conferment of the status of legitimacy on the children of such marriages would not conflict with the law of Islam.

43. The Muslim law concept of irregular (*fāsid*) marriages has no relevance to the present discussion. Irregular marriages are not null and void as the "irregularity" affecting the legality of a marriage can be removed. See Mulla, *Muhammadan Law* 261-62 (1977).

43a. Dissolution of Muslim Marriage Act, 1939, s. 2 (v)

44. Special Marriage Act, 1954, s. 26; Hindu Marriage Act, 1955, s. 16—both as amended in 1976.