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**Laws of Civil Marriages in India –
A Proposal to Resolve Certain Conflicts**

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**LAW COMMISSION OF INDIA
(REPORT NO. 212)**

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A Proposal to Resolve Certain Conflicts**

**Forwarded to Dr. H. R. Bhardwaj, Union Minister for
Law and Justice, Ministry of Law and Justice,
Government of India by Dr. Justice AR. Lakshmanan,
Chairman, Law Commission of India, on 17th day of
October, 2008.**

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17 October, 2008

Dear Dr. Bhardwaj Ji,

Sub: Laws of Civil Marriages in India –
A Proposal to Resolve Certain Conflicts

I have great pleasure in forwarding herewith the 212th Report of the Law Commission of India on the above subject.

The subject has been taken up *suo motu* for a pressing need to amend the Special Marriage Act, 1954 and the Foreign Marriage Act, 1969. Numerous marriages take place within India and in foreign countries which are outside the ambit of various personal laws as well as they cannot be governed by the general and common law of civil marriages for the reason of not having been formally solemnized or registered under it. Though these enactments are meant equally for all communities of India, yet they contain few provisions which greatly inhibit people of certain communities to avail them. For the Hindus, Buddhists, Jainas and Sikhs marrying within these four communities the Special Marriage Act, 1954 is an alternative to the Hindu Marriage Act. The Muslims too have choice between their uncodified personal law and the Special Marriage Act, 1954. But the issue of availability of the Special Marriage Act, 1954 for a marriage, both parties to which are Christians, remains unresolved.

In view of the conflicts of various personal laws, all equally recognized in India, it will be in the fitness of things that all inter-religious marriages (except those within the Hindu, Buddhist, Sikh and Jaina communities) be required to be held only under the Special marriage Act, 1954. Even if such a marriage has been solemnized under any other law, for the purpose of matrimonial causes and remedies the Special Marriage Act, 1954 can be made applicable to them. Such a move will bring all inter-religious marriages in the country under uniform law. This will be in accordance with the underlying principle of Article 44 of the Constitution of India relating to uniform civil code.

The present linkage between civil marriages and the applicable law of succession greatly inhibits or discourages certain communities for opting for a civil marriage under the Special Marriage Act, 1954 as it would deprive them of their laws of succession. The Muslims and Parsis give utmost importance to their personal laws of succession and they do not make use of the Special Marriage Act, 1954. There seems to be no reason why the Special Marriage Act, 1954 should have a provision regarding succession law to be applied in case of civil marriages.

Keeping this in mind, the Law Commission has suggested certain amendments in both the Special Marriage Act, 1954 and the Foreign Marriage Act, 1969 so that their provisions become uniformly available to a larger number of marriages of all Indian communities. If accepted and implemented, the recommendations will go a long way in popularizing civil marriages.

I acknowledge the extensive contribution made by Prof. Dr. Tahir Mahmood, Full-time Member, in preparing this Report.

With warm regards,

Yours sincerely,

(Dr. Justice AR. Lakshmanan)

Dr. H. R. Bhardwaj,
Union Minister for Law and Justice,
Government of India,
Shastri Bhavan,
New Delhi-110 001.

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CHAPTER I

Introduction

Under the present legal system of India citizens have a choice between their respective religion-based and community-specific marriage laws on the one hand and, on the other hand, the general and common law of civil marriages. While the laws of the first of these categories are generally described by the compendious expression “personal laws”, the latter law is found in the following two enactments:

- (i) Special Marriage Act 1954; and
- (ii) Foreign Marriage Act 1969.

The first of these Acts is meant for those getting married within the country and the latter for those Indian citizens who may marry in a foreign country.

The Special Marriage Act 1954 is not concerned with the religion of the parties to an intended marriage. Any person, whichever religion he or she professes, may marry under its provisions either within his or her community or in a community other than his or her own, provided that the intended marriage in either case is in accord with the conditions for marriage laid down in this Act [Section 4].

The Special Marriage Act 1954 also provides the facility of turning an existing religious marriage into a civil marriage by registering it under its provisions, provided that it is in accord with the condition for marriage laid down under this Act [Section 15].

The Act provides for the appointment of Marriage Officers who can both solemnize an intended marriage and register a pre-existing marriage governed by any other law [Section 3].

The Foreign Marriage Act 1969 facilitates solemnization of civil marriages by Indian citizens outside the country, with another citizen or with a foreigner. This Act also is not concerned with the religion of the parties to an intended marriage; any person can marry under its provisions either within his or her own community or in a different community.

For carrying its purposes the Foreign Marriage Act empowers the Central Government to designate Marriage Officers in all its diplomatic missions abroad.

Numerous marriages take place in India which are outside the ambit of various personal laws but cannot be governed by the Special Marriage Act either for the reason of not having been formally solemnized or registered under it. The question which law would then apply to such marriages remains unresolved.

Both the Special Marriage Act 1954 and the Foreign Marriage Act 1969 are meant equally for all Indian communities. Yet they contain some provisions which greatly inhibit members of certain communities to avail their provisions.

To meet these concerns the present report seeks to suggest certain amendments in both the Special Marriage Act 1954 and the Foreign Marriage Act 1969. The purpose of these suggestions is to make the two Acts available to a larger number of marriages than they now are and to make them widely acceptable to all communities of India.

CHAPTER II

The Special Marriage Act 1954

A. Old Special Marriage Act 1872

The first law of civil marriages in India was the Special Marriage Act 1872 enacted during the British rule on the recommendation of the first Law Commission of pre-independence era. It was an optional law initially made available only to those who did not profess any of the various faith traditions of India. The Hindus, Muslims, Christians, Sikhs, Buddhists, Jains and Parsis were all outside its ambit. So, those belonging to any of these communities but wanting to marry under this Act had to renounce whatever religion they were following. The main purpose of the Act was to facilitate inter-religious marriages.

The Special Marriage Act 1872 contained no provision for dissolution or nullification of marriage. For these matrimonial remedies it only made the Indian Divorce Act 1869 applicable to the marriages governed by it.

In 1922 the Special Marriage Act 1872 was amended to make it available to Hindus, Sikhs, Buddhists and Jains for marrying within these four communities without renouncing their religion. As so amended, the Act remained in force until after independence.

B. *New Special Marriage Act 1954*

In 1954 the first Special Marriage Act of 1872 was repealed by and replaced with a new law bearing the same title. This is an optional law, an alternative to each of the various personal laws, available to all citizens in all those areas where it is in force. Religion of the parties to an intended marriage is immaterial under this Act; one can marry under its provisions both within and outside one's community.

The Special Marriage Act does not by itself or automatically apply to any marriage; it can be voluntarily opted for by the parties to an intended marriage in preference to their personal laws. It contains its own elaborate provisions on divorce, nullity and other matrimonial causes and, unlike the first Special Marriage Act of 1872, does not make the Divorce Act 1869 applicable to marriages governed by its provisions.

For the Hindus, Buddhists, Jains and Sikhs marrying within these four communities the Special Marriage Act 1954 is an alternative to the Hindu Marriage Act 1955. The Muslims marrying a Muslim have a choice between their uncodified personal law and the Special Marriage Act.

The Indian Christian Marriage Act 1872, however, says that all Christian marriages shall be solemnized under its own provisions [Section 4]. The issue of availability of the Special Marriage Act for a marriage both parties to which are Christians thus remains unresolved.

C. *Inter-Religious Civil Marriages*

The Special Marriage Act is available also for inter-religious marriages and does not exempt any community from its provisions in this respect.

The Hindu Marriage Act 1955 applicable to the Hindus, Buddhists, Jains and Sikhs does not allow them to marry outside these four communities. So, if any member of these communities wishes to marry a person not belonging to these communities, the only choice available would be the Special Marriage Act 1954.

The Muslim law allows certain inter-religious marriages to be governed by its own provisions. Under this law a man can marry a woman of the communities believed by it to be *Ahl-e-Kitab* (People of Book) – an expression which includes Christians and Jews and may include followers of any other monotheistic faith. Since Muslim law only permits an inter-religious marriage and does not require that such a marriage must take place under its own provisions, it does not come in conflict with the Special Marriage Act 1954.

The Indian Christian Marriage Act 1872 says that apart from Christian-Christian marriages the marriage of a Christian with a non-Christian must also be solemnized under this Act (Section 4). The Special Marriage Act on the other hand says that any two persons (whatever be their religion) can marry in accordance with its provisions. There is, thus, a conflict-of-law situation in respect of marriage of a Christian with a non-Christian.

Unlike the first Special Marriage Act of 1872 the 1954 Act contains its own elaborate provisions on divorce, nullity and other matrimonial remedies. The Indian Divorce Act 1869 would therefore not apply to marriages governed by it.

The Indian Divorce Act, however, says that it will apply even if only one party is a Christian. This is another conflict-of-law situation.

In view of these conflicts of various personal laws, all equally recognized in India, it will be in the fitness of things that all inter-religious marriages [except those within the Hindu, Buddhist, Sikh and Jain communities] be required to be held only under the Special Marriage Act 1954. Even if such a marriage has been solemnized under any other law, for the purposes of matrimonial causes and remedies the Special Marriage Act can be made applicable to them. Such a move will bring all inter-religious marriages in the country under uniform law. This will be in accordance with the underlying principle of Article 44 of the Constitution of India relating to uniform civil code.

The word “Special” in the caption of the Act needs reconsideration. In 1872 when the first law of civil marriages was enacted a non-religious marriage could be regarded as “special” as the parties to such a marriage had to denounce their religion. Marriage by religious rites was then the rule and a civil marriage could be only an exception. Now in the twenty-first century calling non-religious civil marriages “special” has little justification. Being a uniform law which the parties to any intended marriage can opt for irrespective of their religion or personal law, it need not be described as a law providing for a “special” form of marriage. It projects such marriages as unusual and extra-ordinary and creates misgivings in the minds of the general public.

CHAPTER III

The Foreign Marriage Act 1969

A. Solemnization of New Marriages

A Foreign Marriage Act was first enacted in India in 1903 during the British rule. It remained in force till 1969 when a new Foreign Marriage Act was enacted on the pattern of the new Special Marriage Act 1954.

Under this Act a marriage may be solemnized, in a foreign country, between two Indians or an Indian and a foreigner, irrespective in either case of the religion and personal law of the parties, if the conditions for marriage laid down in the Act are fulfilled (Section 4).

The Government of India is empowered by this Act to appoint Marriage Officers in foreign countries from amongst its diplomatic and consular staff in those countries (Section 3).

The Act does not have any provision relating to divorce, nullity or any other matrimonial remedy or relief. For this purpose the Act makes the relevant provisions of the Special Marriage Act 1954 applicable, *mutatis mutandis*, also to all marriages solemnized or registered under its provisions (Section 18).

The Act is entirely optional and its provisions do not adversely affect the validity of a marriage solemnized in a foreign country otherwise than under its provisions (Section 27).

B. Registration of Existing Marriages

A marriage solemnized in a foreign country under any other law including the local law of that country can be registered under the Foreign Marriage Act 1969 if it fulfils the conditions for validity of marriages laid down in this Act [Section 17 (1) to (3)].

The procedure for registration of pre-existing marriages under the Act is same as for solemnization of new marriages.

CHAPTER IV

The Prohibited Degrees in Marriage

A. *Special Marriage Act 1872*

The concept of “prohibited degrees in marriage” is recognized by all systems of family law and generally every family law has its own list of relatives with whom one cannot marry. The Special Marriage Act 1872 did not contain any such list and only laid down that:

“The parties must not be related to each other in any degree of consanguinity or affinity which would, according to any law to which either of them is subject, render a marriage between them illegal.”

Thus, in respect to prohibited degrees in marriage in an intended civil marriage to be regulated by the Special Marriage Act 1872 personal laws of the parties, common or different, remained in force.

B. *Special Marriage Act 1954*

The new Special Marriage Act 1954 wholly changes the situation in respect of prohibited degrees in marriage. One of the conditions for an intended civil marriage to be solemnized under this Act is that “the parties are not within the degrees of prohibited relationship” [Section 4 (d)]. The expression “degrees of prohibited relationship” is defined in Section 2 (b) of the Act as “a man and any of the persons mentioned in Part I of the First Schedule and a woman and any of the persons mentioned in Part II of the said Schedule.” Thus, unlike the first Special Marriage Act 1872 this Act incorporates its own list of prohibited degrees in marriage, separate for men and women.

In each of the two lists of prohibited degrees there are 37 entries. The relations mentioned in the first 33 entries in each list are regarded as prohibited degrees in marriage under all other laws, both codified and uncodified. These entries, therefore, do not inhibit any person of whatever religion from opting for a civil marriage. The last four entries in the two lists mentioned below, however, pose a problem for certain communities:

(a) *List I (for men)*

- 34. Father's brother's son
- 35. Father's sister's son
- 36. Mother's sister's son
- 37. Mother's brother's son

(b) *List II (for women)*

- 34. Father's brother's daughter
- 35. Father's sister's daughter
- 36. Mother's sister's daughter
- 37. Mother's brother's daughter

Thus all first cousins – paternal and maternal, parallel and cross – are placed by the Special Marriage Act in the category of prohibited marital relationship.

The Special Marriage Act 1954 makes a provision for relaxation of the rule of prohibited degrees in marriage. To the condition that parties to an intended civil marriage must not be within prohibited degrees of marriage the Act adds the following proviso:

“Provided that where a custom governing at least one of the parties permits a marriage between them, such marriage may be solemnized notwithstanding that they are within the degrees of prohibited relationship.” [clause (d) of Section 4]

The word “custom” as used in this Proviso is defined by the Act in the following terms:

“In this section ‘custom’ in relation to a person belonging to any tribe community, group or family, means any rule which the State Government may, by notification in the Official Gazette, specify in this behalf as applicable to members of that tribe, community, group or family.” [Explanation to Section 4].

The position of first cousins under the Special Marriage Act 1954 is in accord with the Hindu Marriage Act 1955 which also does not allow marriage with any first cousin. Relaxation of the net of prohibited degrees on the ground of custom is also permissible under that Act, but it does not require a gazette notification by the State Government in this regard.

In Muslim law all first cousins both on the paternal and maternal sides are outside the ambit of prohibited degrees in marriage. Personal law of the Jewish and Bahai communities also permit marriage with a cousin. Under Christian law marriage with a cousin may be permitted by a special dispensation by the Church. It is doubtful if the expression “custom” as defined in the Special Marriage Act would include also personal law of the parties. And even if it does, the condition of recognition by the State Government through a gazette notification would have to be satisfied.

Another important point worth noting here is that under the Hindu Marriage Act 1955 marriage with second cousins (father’s first cousin’s children) is also not allowed due to the restriction known as “*sapinda*” relationship [Section 5(v)]. The

Special Marriage Act 1954, however, does not place any second cousin in its two lists of prohibited degrees in marriage.

The consequence of these legal provisions is that if a Hindu, Sikh, Buddhist or Jain wants to marry a second cousin he can do so under the Special Marriage Act, though his personal law (now contained in the Hindu Marriage Act 1955) does not permit it. On the contrary, if a Muslim wants to marry a first cousin he cannot do so under the Special Marriage Act 1954 although the Muslim personal law unconditionally permits such a marriage. Members of all those other communities whose law allows, or may allow, marriage with a first cousin are also in the same position as the Muslims. The discrimination between various Indian communities inherent in this legal situation is too clear to be ignored.

C. Foreign Marriage Act 1969

The Foreign Marriage Act 1969 says that the parties to an intended marriage to be solemnized under it must not be within prohibited degrees of marital relationship. It does not, however, incorporate any list of such prohibited degrees and only says that the expression “degrees of prohibited relationship” as used under it will have the same meaning as under the Special Marriage Act 1954. Therefore, under the Foreign Marriage Act too all first cousins are deemed to be within the prohibited degrees of marriage.

The Foreign Marriage Act, however, specifically mentions both custom and personal law of the parties as grounds for relaxation of the rule of prohibited degrees in marriage. Also, there is no condition under this provision for recognition of the rule of personal law or custom in this respect by the Government through a gazette notification.

CHAPTER V

The Applicable Law of Succession

A. Under the Special Marriage Act 1872

As has been stated above, the first Special Marriage Act 1872 could initially be availed only by those who did not claim to be Hindu, Muslim, Christian, Sikh, Buddhist, Jain or Parsi. This posed a question as to which law of succession would apply to the parties to such a marriage and their offspring. Seven years before the enactment of this law a general law of succession had been enacted under the caption Indian Succession Act 1865. This Act was at the time of its enactment applicable to Christians and Jews but not to Hindus, Muslims, Sikhs, Buddhists, Jains and Parsis. It was now laid down in the Special Marriage Act 1872 that:

- (i) A Hindu, Sikh, Buddhist or Jain who is a member of a joint family marries under this Act it would effect his severance from such family.
- (ii) Succession to the property of any such person and of any issue of such marriage would be governed by the Indian Succession Act 1865.
- (iii) Protection of the Caste Disabilities Removal Act 1850 will be available to the Hindus, Sikhs, Buddhists and Jains marrying under the Special Marriage Act 1872.
- (iv) If a Hindu, Sikh, Buddhist or Jain marrying under the Special Marriage Act 1872 is the only son of his parents, his father can adopt a son notwithstanding the prohibition in Hindu law on adopting a son in the presence of a natural son.

In 1925 all succession laws then existing were incorporated into a new and comprehensive Indian Succession Act. Among the laws merged into this consolidating law were the old Indian Succession of 1865, the Parsi Succession Act 1865 and the Hindu Wills Act 1870. The chapter on inheritance under the old Indian Succession Act 1865 became Chapter II, and the Parsi Succession Act Chapter III, of Part V of the new Act. Provisions of the Hindu Wills Act 1870 were incorporated into Schedule III of the new Act.

Since 1925 the reference to Indian Succession Act 1865 under the Special Marriage Act 1872 was to be deemed to be a reference to Chapter II in Part V of the new Indian Succession Act 1925.

B. Under the Special Marriage Act 1954

Under the new Special Marriage Act 1954 the provision regarding severance from joint family in the case of a Hindu, Sikh, Buddhist or Jain opting for a civil marriage was retained (Section 19). The provision for the availability of the Caste Disabilities Removal Act 1850 was extended to everybody opting for a civil marriage (Section 20). As regards inheritance, Section 21 of the Act provided as follows:

“Notwithstanding any restrictions contained in the Indian Succession Act 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.”

This provision was uniformly applicable to whoever opted for a civil marriage, whether within or outside one's community. As a result, all personal laws of succession ceased to apply in the cases of civil marriages. .

C. Effect of the Amendment of 1976

On the recommendation of the Law Commission of India (59th Report, 1974) Parliament enacted the Marriage Laws (Amendment) Act 1976. This Act added Section 21-A to the Special Marriage Act 1954, which reads as follows:

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

Since 1976, therefore, the position of succession in the case of civil marriages is as follows:

- (i) Where both parties to a civil marriage are Hindu, Buddhist, Sikh or Jain the Hindu Succession Act will apply.
- (ii) Where only one party is a Hindu, Buddhist, Sikh or Jain and the other party belongs to any other religion the Indian Succession Act will apply.
- (iii) Where a Muslim opts for a civil marriage, whether within or outside the Muslim community the Indian Succession Act will apply.

- (iv) Where a Parsi opts for a civil marriage, whether within or outside his community the general inheritance law under the Indian Succession Act will apply -- not the Parsi succession law as incorporated in that Act.
- (v) Where a Christian opts for a civil marriage, whether within or outside the Christian community, the Indian Succession Act will apply.

Under the impact of the Marriage Laws (Amendment) Act 1976, thus, citizens of India opting for a civil marriage are classified into three categories, viz.:

- (a) Hindus, Buddhists, Sikhs and Jains marrying within these four communities;
- (b) Hindus, Buddhists, Sikhs and Jains marrying outside these four communities; and
- (c) All other citizens marrying either within or outside their respective communities.

This seems to be an unreasonable classification as all personal laws have the same legal status in the country.

The Muslims and Parsis give utmost importance to their personal laws of succession. The Muslim law of inheritance is drawn direct from the Holy Quran and therefore a predominant section of Muslims wants to adhere to it. The prospect of losing it in case they go in for a civil marriage greatly inhibits them and compels them to remain away from the Special Marriage Act 1954. The Parsis had got their religion-

based law of inheritance codified in the form of the Parsi Succession Act 1865 which was, on their demand, preserved even under the new consolidating law called the Indian Succession Act 1925. For this reason no Parsi wants to make use of the Special Marriage Act 1954 as it would deprive them of their law of succession.

There seems to be no reason why the Special Marriage Act 1954 should at all make a provision regarding succession law to be applied in case of civil marriages. Under the old Special Marriage Act 1872 parties to a civil marriage had to dissociate themselves from religion and so any community-specific law of succession could not apply in any such case. As this would create a vacuum, it was unavoidable to make the Indian Succession Act 1865 applicable to them. But, this is not the case under the new Special Marriage Act 1954 under which there is no need to renounce religion in any case of a civil marriage. So, succession to the properties of the parties may well continue to be governed by their respective personal laws, whether they belong to the same community or to two different communities – especially since in this country there is no concept of a married couple's joint property.

It may, of course, be made possible for any individual to opt for the Indian Succession Act 1925 irrespective of whether his or her marriage is a civil marriage or a religious marriage governed by a personal law. But the present linkage between civil marriages and the applicable law of succession serves no purpose. On the contrary, for certain communities it is a discouragement and a serious inhibition against opting for a civil marriage.

D. *Under the Foreign Marriage Act 1969*

None of the provisions relating to joint family status, inheritance rights of parties to a civil marriage and the succession law applicable to the parties and their minor children and their future descendants found in the Special Marriage Act 1954 finds a place in the Foreign Marriage Act 1969 which is silent on these issues.

Thus, despite solemnization or registration of a marriage under the Foreign Marriage Act 1969 the parties, their issues and future descendants remain subject to the same law of succession which would apply otherwise.

CHAPTER VI

Recommendations

In the light of all that has been said above we find that there is a pressing need to amend the Special Marriage Act 1954 and the Foreign Marriage Act 1969. With a view to addressing this need we make the following recommendations:

1. The word “Special” be dropped from the title of the Special Marriage Act 1954 and it be simply called “The Marriage Act 1954” or “The Marriage and Divorce Act 1954.” The suggested change will create a desirable feeling that this is the general law of India on marriage and divorce and that there is nothing “special” about a marriage solemnized under its provisions. It is in fact marriages solemnized under the community-specific laws which should be regarded as “special.”
2. A provision be added to the application clause in the Special Marriage Act 1954 that all inter-religious marriages except those within the Hindu, Buddhist, Sikh and Jain communities, whether solemnized or registered under this Act or not shall be governed by this Act.
3. The definition of “degrees of prohibited relationship” given in Section 2 (b) in the Special Marriage Act 1954 and the First Schedule detailing such degrees appended to the Act be omitted. Instead, it should be provided in Section 4 of the Act that prohibited degrees in marriage in any case of an intended civil marriage shall be regulated by the marriage law (or laws) otherwise applicable to the parties.
4. The requirement of a gazette notification for recognition of custom relating to prohibited degrees in marriage found in the Explanation to Section 4 of the Special Marriage Act 1954 be deleted.
5. The same provision in respect of prohibited degrees in marriage (as suggested in paragraph 3 above) be incorporated also into Section 4 of the Foreign Marriage Act 1969. The proviso to clause (d) of that Section and clause (a) of Section 2 of the Act be deleted.

6. All references to succession and joint family be removed from the Special Marriage Act 1954 and Sections 19, 20, 21 and 21-A of the Special Marriage Act 1954, dealing with succession and membership of joint family, be repealed.
7. A provision be inserted into the Indian Succession Act 1925 that any person whichever community he or she belongs to may, by a declaration on affidavit or by a written and duly attested will, opt for the application of this Act instead of the law of succession otherwise applicable to him or her.

We have a considered opinion that these recommendations, if accepted and implemented, will go a long way in popularizing civil marriages and since all such marriages would be governed by the same law it will be a mighty step towards translating into action the ideal of uniformity in civil laws envisaged by Article 44 of the Constitution of India.

(Dr. Justice AR. Lakshmanan)
Chairman

(Prof. Dr. Tahir Mahmood)
Member

(Dr. Brahm A. Agrawal)
Member-Secretary