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Inter-religious Marriage in Bangladesh: An Analysis of the Existing Legal Framework

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1. Introduction

Inter-religious, inter-faith or mixed marriage---call it by any name--- a cross-religion marriage is a reality of life across the globe. With an opening world and ever-expanding liberal views regarding religious injunctions, the number of such marriages is growing fast. Removal of long-standing legal barriers and acceptance of formal validity of such marriages by many countries of the world have, perhaps, contributed to the rise of such marriages[1]. In Bangladesh, although growth of inter-religious marriages is not high, such marriages are not insignificant in number either. Couples contracting inter-religious marriage can be found in our neighborhood, among friends, relatives or acquaintances. Surprisingly, they contract such marriages in a state of legal vacuum.

We know that a marriage is, *inter alia*, a legal bond, giving rise to significant rights and duties. Although traditionally marital rights and obligations are regulated by personal laws in Bangladesh, inter-religious marriages (Later on referred to as IRMs) are not, because IRM is mostly disapproved in traditional personal laws. So, IRMs warrant alternative arrangements, and

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[1] In a study of Georgetown University conducted by Berkley Centre's Undergraduate Fellows under the direction of theology professor Chester Gillis, the research notes that changing immigration patterns, wider social boundaries and greater knowledge of different religions and social tolerance have led to increasing numbers of interreligious marriages. See, http://explore.georgetown.edu/news/?ID=39813 (Last visited: August 15, 2010).

have been, in fact, governed by some special laws in the past. In undivided India, British rulers enacted a law, namely, the Special Marriages Act of 1872, conditionally allowing inter-religious marriage. One of the serious conditions of this law was that the parties to an IRM must renounce their religion before contracting such a marriage. Moreover, this law is unclear, inadequate and full of ambiguity, leaving many of the important legal questions relating to IRM unanswered. Surprisingly, judicial decisions are also scanty in this matter. Thus, legal issues involving IRM are left in a convoluted and grey state in spite of its wider legal ramifications, not only for the parties to such marriage but also for their issues, successors, families, near relatives and the community at large.

Being an iconoclastic affair, IRM parties suffer from some inherent difficulties in Bangladesh, such as, social barriers, cultural disfavors and religious restrictions. The legal vacuum in this respect exacerbates the situation for the parties, and keeps them in constant uncertainty about their status and entitlements. It would not be irrelevant to note here that although India was also following the same laws on IRM as ours, it changed its IRM laws in 1954 by enacting a new legislation, namely, the Special Marriages Act, 1954.

This paper attempts to explicate the existing legal provisions on IRM in Bangladesh and claims that the Special Marriages Act (SMA) of 1872 is not enough at present time in dealing with the rights and duties of the parties to an IRM. On the one hand, this hundred year old law has already become out-dated; on the other hand, it contains "not enough" provisions covering all necessary issues on IRM. Moreover, the SMA 1872 is ambiguous. Ergo, it needs to be changed. Keeping above claims in mind, this article analyses the traditional and special laws on IRM, and tries to explore what changes and improvements are indispensable in case of IRM laws in Bangladesh.

2. What is Inter-religious Marriage (IRM)?

Generally, Inter-religious marriage [IRM] is a marriage between two persons professing two different religions; for example, a marriage between a Muslim and a Hindu. When a person, formerly professing a different religion, converts to the religion of his/her partner before marriage, the after-conversion marriage is not an IRM. For example, a Hindu woman who has converted to Islam before marriage is a Muslim by profession, and her marriage with a Muslim man is perfectly a Muslim marriage.

Sometimes, IRM is referred to mean a marriage between two persons from two different traditions of the same religion; for example, a marriage between a Catholic and a Methodist Christian, or a marriage between a Sunni and a Shia Muslim. This second category of IRM, which should preferably be referred to as "Inter-denominational marriage" [IDM], is not an IRM proper, and therefore, this paper does not discuss about such marriages.

3. Problems of IRM

Contracting an IRM is not an easy decision in Bangladesh. There are multi-faceted barriers before the parties to an IRM; it ranges from religious to social to legal. They are briefly discussed below:

3.1 Religious Reservations

Historically, marriage is a religious institution as much as it is a social and legal institution. Every religion regards marriage as ordained by God, and prescribes detailed provisions on the institution of marriage. One common feature of the marriage-related provisions of major religions is that it makes "compatibility of religion" a pre-condition for the validity of marriage and discountenances IRM.

In Bangladesh, Islam, Hinduism, Buddhism and Christianity are the major faiths professed by its people. Although the position of Hinduism and Buddhism on IRM is hazy, Jewish, Christian and

Islamic scriptures unequivocally prohibit IRM. The Jewish attitude towards IRM is exposed in a text from the Exodus as follows:

> "And thou take of their daughters to thy sons, and their daughters go astray after their gods, and make thy sons go astray after their gods."[2]

The Christian scripture of the Corinthians is also similarly strong against IRM, when it says:

> "Do not be yoked together with unbelievers. For what do righteousness and wickedness have in common? Or what fellowship can light have with darkness."[3]

Islam's prohibition on IRM is qualified. It prohibits IRM between a Muslim man and an idolatress or fire-worshiper, as the Koran prescribes:

> "And do not marry idolatress till they believe (Allah); and indeed a slave Muslim woman is better than a (free) idolatress, even though she pleases you."[4]

But it allows an IRM between a Muslim man and a Christian or Jewish woman (but not an IRM between a Muslim woman and a Christian or Jewish man). The Koran says:

> "Lawful (for you in marriage) are the virtuous women of the believers and also virtuous women of those who received the Scripture before you, if you give them their due dowers, live with them in honour…"[5]

Although this writer is not aware of any Hindu scripture on IRM, the sacramental character of its marriage and the customary disapproval of inter-caste marriages in Hindu societies suggest that IRM is somewhat disfavored in Hinduism.

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[2] Exodus (34:16).
[3] 2 Corinthians 6 : 14.
[4] The Koran, 2:221.
[5] The Koran, 5:5.

Because of such religious barriers, people sometimes fear to engage in an IRM as against the ordinances of their religion. If we dig deep into the reasons behind religious objections regarding IRM, we may possibly find issues like religious hegemony, strategic precaution, fear of contamination of faith by exogenous elements, relative closeness of community etc.

In orthodox non-secular countries, the religious prohibitions are made legally binding, and are strictly followed. Even in secular countries, like Bangladesh, having religion-based personal laws, IRM is legally and socially disfavored and discouraged. Of course, global trend is towards disentangling religious barriers and tolerating IRM.

3.2 Social Reservations

Although IRM is accepted in some social stratum in Bangladesh, it will not be correct to say that it is widely accepted in Bangladeshi society as a whole. Parties to an IRM are frowned upon and are not warmly welcomed by people on all occasions. So, although marriage is a personal matter, it is the society where the couples do live and socialize. Therefore, they have to conform to its norms. Consequently, social approval or disapproval has significant impact upon a couple's life. If the IRM parties are not economically independent, their social lives may be particularly precarious. This social unacceptance has its roots again in the religious disapproval of such marriages.

3.3 Legal Barriers

Legal barriers for IRM parties in Bangladesh come from two fronts. On the one hand, following religious prescriptions, traditional personal laws deny its validity. Secondly, the special laws made for facilitating such marriages are insufficient to protect their rights and interests.

The parties to an IRM cannot contract their marriage under the traditional personal law, because one or the other family law holds such a marriage as prohibited, and therefore void. Because of the inapplicability of traditional marriage laws, a wide range of marriage related issues, such as, divorce, legitimacy of children, guardianship and custody of children are not governed by traditional law. This inapplicability of general law has potential to put the parties to an IRM into disadvantageous position in marriage related rights and entitlements.

In order to facilitate the inter-religious marriage of those who have decided to marry transcending all barriers, although a special law was enacted in 1872, namely, the Special Marriages Act (Act No.III of 1872), an analysis of the law shows that it does not provide the parties to an IRM with enough legal protection.

4. Personal Law Provisions on IRM

Bangladesh is home to 89.58% Muslims, 9.34% Hindus, and the rest 1.08% of Buddhists and other faith groups[6]. Buddhists do not have their own personal law, and, in practice, they are governed by Hindu law. Let us examine the settled personal law principles on IRM in Bangladesh:

4.1 Muslim Law Principles on IRM

The genesis of the Muslim law principles on IRM can be found in the following two verses of the holy Quran:

> (1) *"And do not marry idolatress till they believe (Allah)*; and indeed a slave Muslim woman is better than a (free) idolatress, even though she pleases you. And give not your daughters in marriage to idolaters till they believe (in Allah

[6] Bangladesh Census 2001, available at http://www.bbs.gov.bd/dataindex/census/bang_atg.pdf (last visited: August 16, 2010).

alone); and verily a believing slave is better than a (free) idolater, even though he pleases you. Those (idolaters and idolatresses) invite you to the Fire, but Allah invites you to the Paradise and unto Forgiveness by His grace, and thus makes His Ayaat (lessons, signs etc.) clear to mankind that hopefully they may remember."[7] [The Holy Quran, Verse-2:221]

(2) "---------- (*Lawful for you in marriage*) are the virtuous women of the believers, and *also virtuous women of those who received the Scripture before you*, if you give them their due dowers, live with them in honour, not in fornication, nor taking them as secret concubines. If any body rejects the faith, his work is vain and he will be among losers in the Hereafter."[8] [The Holy Quran, Verse-5:5]

Based on above two verses of the Quran and other relevant sources of law, jurists categorized Muslim law principles on IRM under the following three heads:

4.1.1 Muslim Man's IRM with a Christian/Jewish Woman

A Muslim man's IRM with a Scripturalist[9] woman, meaning a Christian or Jewish woman, is fully valid as it is explicitly allowed in the Quran.

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[7] See Muhammad Marmuaduke Picktal, *The holy Quran: With Original Arabic Text and English Translation*, Kutubkhana Ishat-ul-Islam [Delhi: 2005], pp. 37-38.

[8] Ibid, pp.111-112.

[9] Syed Ameer Ali, referring to Hedaya: vol. I, p. 85 and Fatwa Alamgiri: vol. I, p. 398, writes- "Jews and Christians are, by consensus, Scripturalists as both received a Dispensation". Syed Ameer Ali, *Muhammedan Law* (Reprinted 5th Edition: 1985) vol. II.

Of course, the early jurists of most prominent schools of Islamic jurisprudence were conservative on this issue following the opposition of such marriages by early Muslim leaders. Noryamin Aini writes, "It (opposition to IRM) was seemingly true during the later era of Abu Bakr (d. 13 H/634) and Umar ibn Khattab (d. 23 H/644), the first and second Guided Caliphates, especially when Umar threatened people who were willing to marry non-Muslim women."[10] Yohanan Friedman writes the same as follows:

> "Naturally enough, from the historical point of view, we cannot easily substantiate the notion that marriage with kitabi women was forbidden until revelation of Quran 5:5. Yet we can say with reasonable certainty that marriage to Jewish and Christian women confronted widespread opposition during the first two centuries of Muslim History."[11]

One very conservative stance adopted by some traditionalists is that a Jew or a Christian woman can be married by a Muslim man only if they believe in the divine books of their religions in their true contents because belief in the original Bible revealed to Prophet Jesus and the Turah revealed to Prophet Moses was the *raison d'être* for allowing such an IRM in Islam. They vehemently argue that the term "People of the Book" by no means refers to the present Torah or Pentateuch or the Bible which were written by various authors decades and centuries after their respective

[10] Noryamin Aini, *Inter-religious Marriage from Socio-Historical Islamic Perspectives*, Brigham Young University Law Review, 2008, pp. 672-673. See footnote 13.

[11] Yohanan Friedman, *Tolerance and Coercion in Islam: Interfaith Relations in the Muslim Tradition*, (2003), p. 192.

prophets.[12] Again, they assert that the women should be practicing their religion at the time of marriage and they can not practically be *Mulhid* (atheist). To any woman of those faiths who does not believe anymore in God, religion, God's message, and does not practice religion at all, the IRM of a Muslim man will be invalid.[13]

It is submitted that such an extreme view is totally unacceptable in today's world. Religion is more a matter of belief than of practice, and as there is no parameter to gauge the sincerity and depth of one's belief, so in this sub-continent, the practice of our courts is to recognize whoever claims and declares himself to profess a particular religion to be the follower of that religion for any purpose, including marriage. The position is ably sketched by Dr. Tahir Mahmood as follows:

> "If a person professes a particular religion, the mere fact that he is of an 'unorthodox type' or has 'no belief personally' in the tenets of that religion would not take him out of the category of persons professing that religion."[14]

So, a Muslim man's IRM with a Christian and Jewish woman is subject to no judicial confusion, rather the validity of this particular type of IRM is a settled question of law.

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[12] Arif Khan, *Marriage between Muslims and Non-Muslims*, referring to A. Yousuf Ali's '*The Holy Quran: Text, Translation and Commentary'* Ashraf Ali Publishers [Lahore: 1939], note 390.
See, http://www.jannah.org/sisters/intermarriage.html. [Last visited: March 15, 2011].

[13] Ibid.

[14] Tahir Mahmood, *The Muslim Law of India*, [Butterworths: 2002], p.34, referring to the the case of Abdool Razzak (1894) 21 IA 56; G Michael AIR 1952 Mad 474; Syed Amanullah (1977) 1 Andh WR 123; Syed Fateh Yab AIR 1991 Cal 205.

4.1.2 A Muslim Man's IRM with a Hindu/ Buddhist Woman

Based on the explicit Quranic injunction (not to marry polytheists in verse 2:221 of the Quran), both the Sunni and Shia schools of Muslim Law prohibit a Muslim male from marrying an idolatress female, or one who worships the stars or any kind of fetish whatsoever.[15]

The question is, what is the status of a marriage that has already place between a Muslim man and a Hindu woman or a woman from any faith group other than Christianity and Judaism?

Although early jurists held such marriages to be void, now the text-writers are divided into two camps. Scholars like Fyzee and Khalid Rashid, following the original scripture, opined that such marriages are void. Perhaps they were mostly led by the consideration that what is unequivocally prohibited in the holy Quran is, in the nature of things, void in Muslim Law. Higher Courts of this sub-continent upheld such position in earlier cases.[16] Another group of writers like Ameer Ali, D.F. Mulla hold that a marriage with an idolatress or a fire-worshiper is not void, but merely irregular. Syed Ameer Ali, the pioneer of this view, argued that prohibitions of marriage between a Muslim man and a polytheist woman are relative in their nature and in their effect. He was very precise in his view, as he says---

> "They [Prohibitions regarding IRM] do not imply the absolute nullity of a marriage. For example, when a Mohammedan marries a Hindoo woman, the marriage is only invalid and does not affect the legitimacy of the offspring, as the polytheistic woman may at

[15] Syed Ameer Ali, *Muhammedan Law*, [Fifth Edition, Reprinted:1985], vol. II, p.282.

[16] For example, in Abdool Razzak vs. Aga Mohammad Jaffer Bindanim [1893] I.L., 21,Cal. 66; S.C.L.R., 21, I.A.,56.

> any time adopt Islam which would at once remove the bar, and validate the marriage."[17]

He argues elsewhere as follows—

> "As regards intermarriage with females practicing idolatry,------- the disastrous influence exercised by their peculiar idolatry over the people of the Peninsula led Mohammed to interdict unions between the Moslems and the pagan females with the sole object of keeping idolatry out of the Islamic body politic."[18]

Syed Ameer Ali sums up his position strongly as under---

> "But it is a mistake to suppose that under the Musulman Law, a Moslem may only marry a woman belonging to the revealed faiths by which are meant Islam, Christianity and Judaism. Marriages are allowed between Moslems and the Ahl-ul-Hawa (free-thinkers), the Sabeans, Zorostrians, as well as the Jews and Christians. A Moslem may, therefore, lawfully intermarry with a woman belonging to the Brahmo sect. Nor does there seem to be any reason why a marriage with a Hindu woman whose idolatry is merely nominal and who really believes in God should be unlawful. The Mogul Emperors of India frequently intermarried with Rajput (Hindu) ladies and the issue of such unions were regarded as legitimate and often succeeded to the imperial throne. What the Mohammedan Law requires is

[17] Supra note 15, p. 282.

[18] Ibid. p.154.

> that any such union should not lead to the introduction of idolatry in a Mohammedan household."[19]

With due respect to this towering authority, it is submitted that as against the unequivocal prohibition regarding such IRM in the Koran, the oratory exposed in the above passages are insufficient to refute the old view. The enlightenment and modernism that pursued him to this progressive view is not hard to understand, but refuting as weighty an injunction as that of the Koran needed much more convincing arguments than merely claiming that the prohibition is relative, or that it was imposed for political reasons, or that the idolatry of a polytheist is only nominal. Precedents of Mogul emperors cannot stand as a justification either, since many of them leaned more to the preservation of their throne through communal fusion than to the propriety of their actions in Islamic legal perspective. If we accept Ameer Ali's position here, the provisions of Quran prohibiting IRM becomes redundant. Therefore, it is perhaps not unfair for a law student to think like Fyzee, as to "whether the courts would, in view of the clear texts of law and Koranic provisions, accept such a broad view (as expounded by Syed Ameer Ali) in all its implications is extremely doubtful."[20]

The doubt of Fyzee has, of course, been disproved in practice. The courts of Indian sub-continent now consistently hold that a marriage with an idolatress or a fire-worshiper is not void, but merely irregular. This is perhaps because a secular court like ours is free to deviate from original Sharia position for civic reasons.

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[19] Ibid.

[20] Asaf A. A. Fyzee, Outlines of Muhammedan Law, Oxford University Press [Delhi: 1997], p.99.

4.1.3 Muslim Woman's IRM with Christian / Jewish / Hindu / Buddhist Man

In contrast to a Muslim man, a Muslim woman is not allowed to engage in any sort of IRM. Such a marriage is void. She has got no option to marry a *kitabi* (Scripturalist) either unlike her male counterpart. The reasons for such stricter view for them are recorded by Ameer Ali as follows—

> "A union between a Moslem female and non-Moslem, on the other hand, was forbidden for political reasons, as a non-Moslem in those days was an alien and generally an enemy, and consequently the marriage of a Moslemah with a non-Moslem meant the adoption by her of a hostile domicile and complete expatriation from her domicile of origin, -- a result strongly disapproved of and reprehended by archaic communities."[21]

Apart from above reasons noted by Ameer Ali, other perceived reasons are: (a) Being head of the family, a non-Moslem husband may prevent her from carrying out her religion, and (b) that her kids will be raised in the religion of their father (non-Moslem spouse), not Islam. The ultimate reason is, of course, the divine will.

Whatever may be the reason behind this rule in Sharia, an IRM between a Muslim woman and non-Moslim man is unequivocally prohibited in Islam, and thus void in Muslim Law. Following Syed Ameer Ali, however, Mulla is of opinion that such a marriage is merely irregular, not void.

Fyzee, of course, outspokenly negates the above view of Ameer Ali and Mulla by saying—

[21] Supra note 15, p. 154.

> "This is an inaccurate statement of the law. The marriage of a Muslim woman with a non-Mulim is declared by the Koran to be *batil*, void and not merely irregular. Thus it would seem that reform, in consonance with the view of Ameer Ali, can only be introduced by legislation."[22]

M. Hidayatullah, the former Chief Justice of India, in an editorial comment to Mullah's Mohammedan Law (18th Edition) writes—"in the opinion of the present editor, there is force in Prof. Fyzee's opinion. However, it will have to be judicially decided."[23]

Whereas a Muslim man's IRM with an idolatress or fire-worshipper is judicially reckoned as irregular, there is no reason why should an IRM of a Muslim woman with a non-Muslim be held otherwise. Both these sorts of IRM were addressed by the same verse of the Koran (verse—2: 221), employing same wording, with the same emphasis. Interpreting an identical Koranic prohibition differently in disfavor of women folk is totally unacceptable. If the bar of IRM is lifted in case of Muslim man marrying an atheist, it is not clear why did our judiciary maintain a different stance in case of Muslim woman's IRM. Either both of these IRM are void according to the scripture, or both are irregular according to the liberals' views. The anomaly hitherto prevailing in these two situations was a clear manifestation of Liberals' dilemma and judicial patriarchy. Judiciary should solve the issue with cogent reasoning.

4.2 Christian Law Principles on IRM

Christian scriptures disapprove IRM in unequivocal terms. Let us look at some scriptures dealing with a Christian's IRM as follows:

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[22] Supra note 20.

[23] M. Hidayatullah and Arshad Hidayatullah, *Mullah's Principles of Mahomedan Law*, [Hongkong Press: 18th Edition], p.287.

> *"Do not intermarry with them, giving your daughters to their sons or taking their daughters for your sons, for that would turn away your children from following me, to observe other gods. Then the anger of the Lord would be kindled against you, and he would destroy you quickly". [Deuteronomy 7: 1-4]*[24]
> *"Be ye not unequally yoked together with unbelievers: for what fellowship hath righteousness with unrighteous? And what communion hath light with darkness? And what concord hath Christ with Belial? Or what part hath he that believeth with an infidel?" [Corinthians 6: 14-15]*.[25]

Based on above passages and many others, many people argue that as these are not substantially reversed by other verses, they are still valid as they were in the era when they were written. They say that IRM is against the will of God and therefore not valid.

On the other hand, it is argued that the present day society is totally different from the cultures under which the Bible verses were written. In today's diverse racial, ethnic and religious climate, the concerned passages of the Bible are to be realistically interpreted. If multiple religions are tolerated within a country, some would argue that multiple religions within a family should be allowed.[26]

According to 'the Code of Canon Law' now in force, a marriage is invalid when one of the two persons was baptized in the Catholic Church or received into it and has not by a formal act

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[24] "What Bible says about inter-faith marriages" at http://www.religioustolerance.org/ifm_bibl.htm (Last visited: August 16, 2010).
[25] Ibid.

[26] Ibid.

defected from it, and the other was not baptized.[27] Of course, this impediment can be dispensed with if the conditions mentioned in Canon 1125 and 1126 are fulfilled. They are given below:

1. The Catholic party must make a declaration that he or she is prepared to remove dangers of defecting from faith, and is to make a sincere promise to do all in his or her power to rear up all the children in Catholic faith.
2. The other party must be informed in good time of the above promise, so that he or she is truly aware of the promise and of the obligation of the Catholic party.

If the above declaration and promise is duly made, the local ordinary can grant this permission if there is a just and reasonable cause. If the dispensation is thus granted, an IRM in present state of Christian Law becomes valid.

Apart from this institutional scope, under our statutory law also, namely, the Christian Marriage Act, 1872, a Christian can contract an interreligious marriage. Section 4 of the Act holds—"every marriage between persons, one or both of whom, is or are a Christian or Christians, shall be solemnized in accordance with the provisions of the next following section…"
So, a Bangladeshi Christian can easily enter into an IRM both under the "dispensation provision" of the Conon Law and the state law.

4.3 Hindu Law Principles on IRM

There is no specific Hindu scripture on IRM. Although in the past, even inter-caste marriages were not approved in Hindu law, now Hindus are holding more liberal views on IRM. But such an IRM is generally held under the Special Marriages Act, not under traditional Hindu law.

[27] Canon 1086, the Code of Canon Law.

5. The Special Marriages Act, 1872: An Analysis

As mentioned earlier, during British rule in Indian sub-continent, the Special Marriages Act, 1872 was enacted to let people contract IRM transcending personal law restrictions. Although this law primarily paved the way for IRM parties to enter into a valid marriage, it did not provide a solution to all marriage related legal issues. Moreover, the law is fraught with many inherent vices, as shown below:

5.1 Short and In-exhaustive law

The law contains only 26 sections and does not cover all legal issues that the IRM parties and others may face because of the IRM. Although it has provisions for divorce, succession, coparcenary status and adoption, it contains no provision on maintenance of wife and children, restitution of conjugal rights, legitimacy of children, custody and guardianship of children etc. As this law is supposed to be an alternative to a full-fledged personal law system covering the whole gamut of conjugal issues, it should have contained enough provisions on all conjugal and other related legal issues IRM parties are supposed to face.

5.2 Conservative Law

The law was enacted in 1872 by British rulers in order to "legalize," as the Preamble goes, "certain marriages the validity of which is doubtful." The law made room for IRM parties to contract a valid marriage without hurting religious susceptibilities of the faith-groups. Section 10 provides that the parties shall sign a declaration in the form contained in the second schedule of the Act renouncing their former faith. Column 2 of the schedule contains the pro-forma of renunciation as, "I (so and so) do not profess the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion." In a 1966 case, the Supreme Court held that renunciation of religion is the necessary condition for a marriage

under the Act, and it declared the marriage that was in issue in that case as null and void as neither party renounced their religion in practice.[28]

The reason for making such a provision is not hard to understand. Because of the intense religious feelings among the people of the Indian sub-continent at the time of enacting this law, the rulers thought that this "provision of renunciation" may pacify the anger of the concerned faith groups who may be hurt by the IRM law. The formula was that because of this provision, as the parties were now out of religion by renunciation and then contracted IRM, faith groups had nothing to say. Perhaps it was a correct appreciation of the religious sense of the people of the sub-continent.

Because of the renunciation, parties to IRM are excluded from succession to the property of their ancestors, when they Christian, Jewish, Muslims and Parsis (section 23 & 24). It causes severance from the undivided family in case of Hindus, Buddhists, Sikhs and Christians (section 22); they also lose their right to adoption under their concerned personal laws (section 25).

Of course, renunciation provision is not applicable to parties to an IRM, when both profess one or the other of the Hindu, Buddhist, Sikh or Jaina religion. Perhaps because of the insignificant differences in-between these religions, they are absolved from the renunciation provision in this case.

This conservative law, although enacted by British rulers 138 years back balancing their openness to IRM and their long-term political interest in the sub-continent, still endures in Bangladesh.

5.3 Ambiguous Law:

Section 11 holds that an IRM under this law may be solemnized 'in any form'. It is not defined what the term means. Although the law

[28] Mustafizur Rahman vs. Rina Khan (1966), 18 DLR 509.

is silent about what would be the religion of the children of an IRM, Section 18 holds that if a child of an IRM marries under this Act, s/he shall be deemed to be "subject to the law to which their fathers were subject" as to the prohibition of marriages by reason of consanguinity and affinity. Whereas their father himself is no more subject to the law, why the issues are so bound is not clear.

Section 23 provides that when the IRM is between parties each of whom professes one or the other of the Hindu, Buddhist, Sikh or Jaina religion, they will have the same rights and subject to the same disabilities like a person to whom the Caste Disabilities Removal Act 1850 applies. Section 24 holds that succession to the property of an IRM party professing the above-mentioned religion shall be regulated by the provisions of the Succession Act, 1925. But the Special Marriages Act is absolutely silent about the succession by the parties to an IRM when they do not belong to above mentioned religions. Nor does it say anything about the succession to the property of such a party.

5.4 Procedural Hardship:

Section 11 of the Act holds that the marriage shall be solemnized in the presence of the Registrar and of three witnesses who signed the declaration of second schedule i.e. the declaration of renunciation of religion by the parties. A marriage in absence of the Registrar is void. So, the Registrar is a key person for conducting such a marriage.

Section 3 provides for the appointment of the Registrar. It holds that the Government may appoint one or more Registrars under this Act, either by name or as holding any office for the time being, for any territory subject to its administration. In practice, the government has so far appointed only one Registrar under this Act for the whole territory of Bangladesh. His office is located in the capital of Bangladesh. Thus, the parties to an IRM must travel all the way to Dhaka from any corner of the country to contract a

valid marriage under this Act. Whereas there are thousands of traditional marriage registrars within a district, it is unreasonable not to appoint at least one special marriage registrar for each district.

5.5 Out-dated Law

The Special Marriages Act was enacted in 1872. Since then, the world has undergone massive changes: the enactors and several of their generation have gone, the British quitted from the sub-continent, we became independent and entrenched secularism in the Constitution of Bangladesh as our mantra. But the Act still survives; survives with its renunciation provision, survives with its ambiguities, survives with a vacuum as to succession, maintenance, custody and guardianship of children. India changed this law back in 1954, and has been continually refining it. In a recent report by the Law Commission of India, they went so far as to say that the word "special" needs to be reconsidered. They argued, "It projects such marriages as unusual and extra-ordinary and creates misgivings in the minds of the general publics."[29] So, in case of Bangladesh, the reform of the Special Marriages Act of 1872 is long overdue.

6. The Special Marriages Act, 1954: An Analysis of the Indian Counterpart

Like Bangladesh, the Special Marriages Act of 1872 was also applicable to India. Repealing the law, they enacted the Special Marriages Act of 1954 (Act no. 43 of 1954) for covering IRM. It is a progressive law, and remedied many of the shortcomings of the

[29] Law Commission of India, *Laws of Civil Marriage in India—A Proposal to Resolve Certain Conflicts, (*Report No. 212: 2008). The text of this Report is available at http://www.lawcommissionofindia.nic.in (Last visited: August 16, 2010).

Act of 1872. We can summarize the improvements in 1954 Act as follows:

6.1 Exhaustive Law:

The Special Marriages Act of 1954 is a self-contained and exhaustive law. Covered in 51 sections, it addresses all marriage related issues, i.e. formalities of marriage, registration of marriage, consequences of marriage under this Act, restitution of conjugal rights, judicial separation, nullity of marriage and divorce, legitimacy of children, maintenance of wife and children, custody of children and succession. Whether all the provisions are ideally correct or not is a different question, but it certainly brought all the marital issues within a single law. So, parties to IRM do not have to remain in uncertainty regarding the legal status of their marriage and its legal consequences.

6.2 Progressive Law:

The Act allows an IRM between "any two persons" (section 4). Religion is not at all in issue for the validity of an IRM under this law, as the Law Commission of India aptly remarks— "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."[30] So, there is no question of renunciation of religion under this law. Parties to an IRM can retain their own particular religion while contracting a marriage under this law.

6.3 Refined and Well-defined law:

The SMA, 1954 has clarified many ambiguities that existed in the Act of 1872. Section 21 of the Act provides that— "Notwithstanding any restrictions contained in the Indian Succession Act, 1925 with respect to its application to members of

[30] Ibid, p.9.

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." Under this law, if an IRM party dies, his property will be distributed under the Succession Act, 1925. Of course, the Act of 1954 is silent about the succession by an IRM party from their ancestors if s/he is Muslim, Christian, Jewish or Parsi. In case of Hindu, Buddhist, Sikh and Jaina, Section 19 holds that they will have the same rights to succession subject to the provisions of the Caste Disabilities Removal Act, 1850. So although the Special Marriage Act, 1954 refined some provisions, it has its own shortcomings.

However, the Act of 1954 defined and made provisions on almost all marital legal issues. It also indicated, in Chapter VII, the appropriate court to hear any legal issues under the Act, and prescribed the procedure to be followed by it.

7. Conclusion:

In the above discussion, we have seen original personal law provisions on IRM with their genesis. We have also witnessed the points of departure in statutory laws on IRM, and their secular roots. This paper does not claim or attempt to prove, based on some super-imposed interpretations of religious scripture, that there is no religious problem in contracting IRM. Nor does this paper reflect on long-term social consequences of such marriages. Social scientists can engage in extensive investigations about the good or bad impacts of IRM on the society. However, what this paper clearly claims is that in a secular society, each individual has a right to live, love and marry anyone s/he wishes; and it is the duty of state to render fullest legal protection to everyone within its jurisdiction.

Does the Special Marriages Act, 1872 render enough protection to IRM parties? Clearly it does not. The Special Marriages Act,

1872 is the sole statutory law in Bangladesh regulating IRM. Such a law is expected to be well-defined and self-contained. Ideally, it is supposed to cover all aspects of marital issues, and be liberal in scope and clear in disposition. Such a law is made to facilitate, and not to obstruct the parties to IRM. But in practice, the age-old Special Marriages Act of 1872 though might be appropriate according to the circumstances of the time it was enacted; it has lost its propriety, since the world has changed apace. The law now needs to go through massive change to cope with the needs of the present time. The Indian example may be a guide in this case for amending the Act or enacting a brand-new law on IRM. We must realize that there is no point in keeping a particular law just in name.

If the Special Marriages Act, 1872 is amended, defining all marital rights and duties of IRM parties and removing all the ambiguities in the Act, it can protect IRM parties from unnecessary legal exclusions and miseries. Whereas law cannot ensure human happiness, it can certainly remove some of the human miseries. A new legislation on IRM can exactly accomplish this goal.

[One of the learned anonymous reviewers of this article thinks that the condition of "renunciation of religion" should still be a pre-requisite of IRM in a new law, making sure that parties to IRM can succeed to the property of their propositus according to his/her pre-renunciation personal law. I find such a proposition necessarily contradictory.]