Jus Corpus Law Journal
Open Access Law Journal – Copyright © 2022 – ISSN 2582-7820
Editor-in-Chief – Prof. (Dr.) Rhishikesh Dave; Publisher – Ayush Pandey

This is an Open Access article distributed under the terms of the Creative Commons Attribution-Non-Commercial-Share Alike 4.0 International (CC-BY-NC-SA 4.0) License, which permits unrestricted non-commercial use, distribution, and reproduction in any medium provided the original work is properly cited.

Personal Laws in conflict with Special Laws and the changing mindset of the society

Nikita Kaushik[a]

[a]SRM University, Sonepat, India

Received 12 September 2022; *Accepted* 20 September 2022; *Published* 28 September 2022

Though personal laws have got protection under article 25 that every person has a right to preserve and profess his religion, customs, and traditions, with changing time traditions also changes. If there is a conflict between personal laws and the spirit of our constitution then it is the constitution that must prevail, the constitution is the holy book of democracy. And the people of India keeping aside their religious practices must welcome change if it is for the progress and betterment of society at large. Eventually, we all are humans first then any religion or nationality comes. We always must be keen on the larger good of society than limiting ourselves to ourselves.

Keywords: *personal laws, religion, constitution, article 25, right to profess, democracy.*

INTRODUCTION

Personal Laws are those laws that govern a particular sect or group of people based on their religion, culture, and faith and are applicable on legal issues related to marriage, maintenance, adoption, inheritance, succession, guardianship, partition, religion, charitable donations, etc. In India, people belonging to different religions, beliefs, and cultures live together. India is famous for its cultural diversity and cultural richness. It is home to several communities that live in

harmony while preserving and sticking to their cultural norms and traditions. Can norms followed by a particular religion govern people of a different religion? No, every religion has its norms and customs to follow, and their distinctness cannot be ignored.

Some of the Personal Laws which have been codified in different Acts are-

- Hindu Marriage Act,1955
- Hindu Succession Act,1956
- Hindu Adoptions and Guardianship Act,1956
- The Muslim Women (Protection of Rights on Divorce) Act, 1986
- The Dissolution of Muslim Marriage Act,1939
- The Muslim Women (Protection of Rights on Marriage) Act, 2019
- Christian Marriage Act,1872
- Etc.

FROM WHERE THE PERSONAL LAWS GET VALIDITY IN INDIA?

Personal Laws get validity from Part III of the Indian Constitution which deals with Fundamental Rights especially from articles 25 to 30 which talk about secularism. India is a secular country though the expression '**SECULAR'** was added to the preamble of our constitution by the 42nd Amendment, 1976, secularism has always been there in India because it was implicit in articles 25-30. Moreover, due to the diverse nature of India secularism has always existed, and people from different religions and cultures have always lived in harmony. The ultimate purpose of the Constitution is to ensure fraternity, which means '**oneness**' and it can only be ensured by ensuring equality, justice, and liberty. Article 25[1] of the Constitution gives freedom of conscience and free profession, practice, and propagation of religion, which implies that every person has the right to choose his/her religion, right to conversion is also one dimension of article 25 only.[2] And any person belonging to any religion has a right to preserve his/her culture, customs, and traditions which are subject to public order, morality (which

[1] Constitution of India 1950, art 25
[2] *Ibid*

includes constitutional morality), and health. From here only personal laws get validity, one of the sources of personal law is the customs of that particular religion thus, personal laws ensure that the culture, customs, and traditions of various groups are preserved and secured. It gives security and confidence to different communities to live together in harmony, it promotes fraternity. Secularism not only means that State has no religion of its own and the State shall not discriminate between persons on grounds of religion rather secularism has a broader meaning it is related to '**mutual respect'** which ultimately ensures the unity and integrity of the nation. I do not prefer relating secularism with mutual tolerance or religious tolerance, these words give a negative meaning that we do not want but are forced to tolerate other religions rather there should be a **mutual respect** that comes from the heart, and it is there among the citizens of India since time immemorial. Thus, the true sense of secularism is not mutual tolerance or religious tolerance rather it is ***mutual respect***.

NOW, WHAT DO YOU MEAN BY SPECIAL LAWS?

These are a branch of the general laws only but are confined to a particular subject matter or enacted for the protection and development of a particular group of the society which may be vulnerable. Under special laws there are special courts also for the adjudication of matters related to such laws only, to ensure speedy trial and remedy to the aggrieved person.

A few examples of Special Laws are -

- **The Prevention of Child from Sexual Offences Act, 2012**[3] **–** deals with the sexual offences committed against any child below the age of 18 years.
- **Juvenile Justice (Care and Protection of Children) Act, 2015**[4] - it applies in case any offence is committed by a minor.
- **The Prohibition of Child Marriage Act, 2006**[5] **–** prohibits the marriage of a girl below 18 and a boy below 21.

[3] Prevention of Child from Sexual Offences 2012
[4] The Juvenile Justice (Care and Protection of Children) Act 2015
[5] Prohibition of Child Marriage Act 2006

- **Rent Acts** - it differs from state to state. Generally, every state has its own Rent Control Act. It lays down certain guidelines for landlord and tenant and also their rights and duties, and redressal process in case of any dispute between them. Etc.

Article 15(3)[6] of the Indian Constitution gives State the power to make any special provision in favour of women and children. And 7article 15(4) enables the State to make special provisions for the advancement of socially and educationally backward classes (SEBCs) of citizens or the Scheduled Tribes (STs) or Scheduled Castes (SCs). Because women, children, SEBCs, STs, and SCs are the vulnerable sections of society and need special care and protection by the state for their upliftment and security in society so that they can feel confident and protected and ultimately it promotes fraternity, cohesion, the feeling of oneness in the society.[8]

IS THERE ANY CONTRADICTION BETWEEN THE HINDU MARRIAGE ACT, 1955 ('HMA') AND THE PROHIBITION OF CHILD MARRIAGE ACT, 2006 ('PCMA')?

HMA[9] governs the marriage, divorce, maintenance, etc of Hindus. Section 5 of the HMA[10] lays down certain conditions for a valid marriage between two Hindus which are as follows-

i) neither party to the marriage has a spouse living at the time of solemnization of marriage,[11]

ii) at the time of solemnization of the marriage, neither party-
   - is unable of giving a valid concurrence to it in consequence of the illness of mind; or
   - though able of giving valid concurrence has been suffering from a mental disorder of such a kind or to such an extent as to be unfit for marriage and procreation of a child or
   - has been subject to periodic attacks of insanity

[6] Constitution of India 1950, art 15(3)
[7] Constitution of India 1950, art 15(4)
[8] *Ibid*
[9] Hindu Marriage Act 1955
[10] Hindu Marriage Act 1955, s 5
[11] *Ibid*

iii) the groom has completed the age of 21 years (twenty-one years) and the bride has completed the age of 18 years (eighteen years) at the time of the solemnization of marriage;

iv) the parties to the marriage are not within the degrees of prohibited relationship except if the custom or usage governing each of them permits marriage between the two,

v) the parties to the marriage are not sapindas of each other except if the custom or usage governing each of them permits marriage between the two.

We have to focus on section 5 (iii)[12] which says that the bridegroom has to be of 21 years of age and the bride has to be of 18 years of age at the time of marriage. Before 1978 the age for the bridegroom was 18 years and for the bride, the age was 15 years then after coming up of Child Marriage Restraint (Amendment) Act, 1978 the age for both was extended to 21 years and 18 years respectively under section 5 (iii) HMA also by an amendment.

But in the year 1976 section 13(2)(iv) [13] was added to HMA by an amendment that provides for the option of puberty for women which means if the marriage was solemnized before the bride attained the age of 15 years then on attaining 15 years, she can apply in court to repudiate (means can refuse to cohabitate) her marriage, this option she can only exercise till the age of 18 years. In simple words, a woman gets 3 years to repudiate her marriage on attaining 15 years of age if her marriage was solemnized before she attained 15 years of age, and this option she can exercise only before she attains 18 years of age. The moment she attains 18 years of age she loses her right to exercise the option of puberty but can dissolve her marriage by way of divorce.

Section 13(2)(iv) [14] was added because the marriageable age for both bridegroom and bride was increased to 18 and 15 respectively, giving women the right to refuse cohabitation upon attaining the age of 15 years. Section 12[15] of the HMA talks about voidable marriage and section 11[16] talks about void marriages but neither of these sections includes section 5(iii)[17] of HMA

[12] *Ibid*
[13] Hindu Marriage Act 1955, s 13(2)(iv)
[14] *Ibid*
[15] Hindu Marriage Act 1955, s 12
[16] Hindu Marriage Act 1955, s 11
[17] Hindu Marriage Act 1955, s 5(iii)

which implies that if marriage is solemnized in contravention of section 5 (iii) of HMA it will neither fall under the category of void marriage nor in the category of a voidable marriage. Hence, child marriage under HMA is a valid marriage. Though section 18(a)[18] of HMA makes it punishable with rigorous imprisonment in case section 5(iii) is contravened which may extend to 2 years or with a fine which may extend to one lakh rupees or both.

PROHIBITION OF CHILD MARRIAGE ACT, 2006 (PCMA)

This Act was enacted to curb the evil practice of child marriage by also introducing penal provisions under the Act. It is more child bride pro Act. This Act[19] was commenced on 1st November 2007.

WHO IS A 'CHILD' UNDER THE PCMA?

Section 2(a)[20] of PCMA provides for as to who is a child under the Act. If a male has not completed the age of 21 years, he is considered a child and if a female has not completed the age of 18 years, she is considered a child under the Act. Under HMA also section 5(iii)[21] states that the age of the bridegroom has to be 21 years and of the bride, it has to be 18 years.

WHAT IS CHILD MARRIAGE?

Child marriage[22] is a marriage in which either party is a child means if the bride is 18 and the bridegroom is 20 then it is a child marriage because here bridegroom is less than 21 years of age and is considered to be a child under PCMA. If the bride is of 17 years and the bridegroom is 21 years of age, then also it is a child marriage as here bride is less than 18 years and is a child under PCMA. If the bride is 17 years of age and the bridegroom is 20 years of age, since both are a child under the PCMA it is also a child marriage.

[18] Hindu Marriage Act 1955, s 18(a)
[19] Prohibition of Child Marriage Act 2006
[20] Prohibition of Child Marriage Act 2006, s 2(a)
[21] Hindu Marriage Act 1955, s 5(iii)
[22] Prohibition of Child Marriage Act 2012, s 2(b)

WHAT IS THE VALIDITY OF CHILD MARRIAGE?

Section 3[23] of the PCMA makes child marriage voidable. [24]Every child marriage whether solemnized before or after coming up of this Act (PCMA) ***shall be voidable*** at the option of either of the contracting party (either groom or bride) who was a child at the time of marriage.

HOW THE CHILD MARRIAGE CAN BE ANNULLED?

The petition for annulling child marriage has to be filed before the District Court by the party who was a child when the marriage was solemnized and he or she gets 2 years for getting the marriage annulled from the age they cease to be a child under the Act, that is, female can file the petition for annulment before she turns 20 years and boy can file the petition for annulment before he turns 23 years.[25] In case the party is minor (defined under section 2(f)[26] of the PCMA- a child who is less than 18 years) at the time of filing of a petition for annulment of child marriage then his/her guardian,[27] next friend, or kin together with the child marriage prohibition officer can file the petition in the court on his/her behalf.

PUNISHMENT UNDER THE ACT

Child marriage is punishable with rigorous imprisonment, a fine, or both. The offence[28] committed under the Act shall be cognizable and non-bailable. The court can also issue an injunction order prohibiting child marriage.[29] Persons punishable under the Act are-

- If an adult male[30] (18 years of age or above) marries a girl or child is punishable with rigorous imprisonment which may extend to 2 years or with a fine which may extend to 1 lakh rupees or both.

[23] Prohibition of Child Marriage Act 2006, s 3
[24] *Ibid*
[25] Prohibition of Child Marriage Act 2006, s 8
[26] Prohibition of Child Marriage Act 2006, 2(f)
[27] Prohibition of Child Marriage Act 2006, s 3(2)
[28] Prohibition of Child Marriage Act 2006, s 15
[29] Prohibition of Child Marriage Act 2006, s 13
[30] Prohibition of Child Marriage Act 2006, s 9

- Any person who directs conducts, performs, or abets child marriage shall be punishable with rigorous imprisonment and shall also be liable to a fine which may extend to 1 lakh rupees unless he proves reasonable grounds that he believed that the marriage was not a child marriage. [31]
- Any person having charge of the child, including guardians, parents, or any member of an organization, permits or participate, or fails to prevent the child marriage shall be punishable with rigorous imprisonment which may extend to 2 years, and shall also be liable to fine which may extend to 1 lakh rupees. Provided no woman shall be punishable with imprisonment. [32]

As we discussed above that under HMA child marriage is valid though under PCMA it has been declared to be voidable. No correspondence amendment is done under HMA after making child marriage voidable under PCMA. Under HMA child marriage though punishable but per se valid, the option of puberty is given to the only female child who was less than 15 years at the time of marriage. What if she was less than 18 but more than 15 years when the marriage was solemnized, HMA is also silent on this point, no corresponding amendment has been made in section 13(2)(iv) in this regard. That means, that women who were 15 years or more but less than 18 years at the time when the marriage was solemnized do not have the right to repudiate their marriage by exercising the option of puberty under HMA.

WHETHER HMA WILL PREVAIL OR PCMA?

When there is a conflict between two laws first, we should try to harmonize between them but if harmonization is not possible then we should adopt a purposive interpretation which is in line with constitutional morality means that interpretation that serves the purpose of the law is better. Here, the object of PCMA is to curb the evil practice of child marriage for the proper development of the child, to decrease the mother mortality rate, and so women can progress in

[31] Prohibition of Child Marriage Act 2006, s 10
[32] Prohibition of Child Marriage Act 2006, s 11

society. Therefore, keeping in mind the larger good of society and being a special law for the protection of the child, PCMA shall prevail.

Moreover, in the case of ***T. Sivakumar v Inspector of Police***[33]**,** the **Madras H.C** also observed that keeping in mind the purpose of PCMA, that is, to prevent the evil practice of child marriage and to enhance the health of the child and status of women, PCMA shall prevail. Also, in the case of ***Independent Thought v Union of India,*** [34] the Hon'ble Supreme Court of India observed (*obiter dicta)* that PCMA being a special law shall prevail over HMA and Dissolution of Muslim Marriage Act,1939 also stated that these two Acts should have amended but not been amended.

INDIAN PENAL CODE, 1860 ('IPC'), PCMA AND PREVENTION OF CHILDREN FROM SEXUAL OFFENCES, ACT, 2012 (POCSO)

Whereas PCMA makes child marriage voidable and punishable, [35]section 375 exception 2 exempts if a husband forcefully has sexual intercourse with his wife who is 15 years or more without her wishes from the definition of rape. In exception II of section 375 IPC, no correspondence amendment has been done after increasing the marriageable age to 18 and 21. Earlier bride's marriageable age was 15 years which is why this exception was there as marital rape is not recognized in India, but now as the marriageable age has been increased to 18 years (for the bride) still exception 2 to section 375 has not been amended.[36]

Moreover, under POCSO penetrative sexual offence is punishable if done with any child under the age of 18 years. This exception is also in conflict with POCSO. But in the case of ***Independent Thought v Union of India***,[37] the question before the Hon'ble Supreme Court was – whether sexual intercourse by a man with his wife who is under 18 years is rape or not. To answer this question the court referred to PCMA where child marriage is voidable at the option of any party, who was a child when the marriage was solemnized. S.C held that PCMA is a special and secular

[33] *T Sivakumar v Inspector of Police* 2011 HCP No 907 of 2011
[34] *Independent Thought v Union of India* Writ Petition (CIVIL) No 382 of 2013
[35] Indian Penal Code 1860, s 375, exception II
[36] *Ibid*
[37] *Independent Thought* (n 34)

law that applies to all and hence the provisions of PCMA will prevail, and it will be considered rape.[38]

MUSLIM PERSONAL LAW, PCMA, AND POCSO

Under Muslim personal law, the age of marriage age group is divided into three categories-

- Saghir- 0-7 years – in this age group no marriage can take place, it is not permissible under Muslim personal law.
- Sariri- 7-15 years- in this age group marriage can take place but with the consent of the guardian.
- Bulugh (age of puberty) - 15 years and above- in the case of male marriage can take place without guardians' consent. But in the case of females- in Shias and Hanafi Sunni she does not require the consent of the guardians if she is 15 years of age or above but in Shafeis and Malikis she requires the consent of the guardian even if she has attained the age of 15.

Hence under Muslim personal law also child marriage is a valid marriage. Here also the option of puberty (Khayar-ul-bulugh) is given to both males and females. Concerning males, it is covered under Muslim personal law, and concerning females, it is covered under [39]Section 2(vii) of the Dissolution of Muslim Marriage Act, 1939 ('1939 Act'). In Shias and Sunni males can exercise the option of puberty on attaining puberty until any age but only in two circumstances either marriage was solemnized by fraud or negligence otherwise when there was the consent of the appropriate guardian it is per se valid. [40]Under section 2(vii) of the 1939 Act, a wife has a right to dissolve her marriage if she proves the following facts-

1. That there has been no consummation of marriage.
2. That the marriage was solemnized when she was less than 15 years of age.
3. And, she repudiated the marriage before attaining the age of 18 years.

[38] *Ibid*
[39] Dissolution of Muslim Marriage Act 1939, s 2(vii)
[40] *Ibid*

In the case of ***Parliament v State of Madhya Pradesh,*** the Madhya Pradesh High Court, the court held that the decree of the court is necessary to dissolve the marriage by exercising the option of puberty.

In the case of ***Independent Thought v Union of India,***[41] the court also observed that PCMA will prevail over the 1939 Act which means if a girl is unable to take recourse of the 1939 Act to dissolve her marriage, then she can very well knock the doors of courts under PCMA to repudiate her marriage before she attains 20 years of age or even can directly take recourse of PCMA irrespective of the conditions given under section 2(vii) of the Act. Even after the enactment of PCMA, no corresponding amendment has been made to section 2(vii) of the 1939 Act also.[42]

By various judgments of the court, it has been clarified that if a male or female contracts marriage with their own free will on attaining the age of puberty (15 years) under Muslim personal law without the consent of the guardian would be a valid marriage. POCSO aims to ensure children are not sexually exploited and to promote their well-being, and health (both mental and physical) so that they can have a great future ahead and contribute to the progress of the nation. When males and females 15 years or above age contract marriage out of their own free will under Muslim personal law and enters into a physical relationship POCSO would not be attracted as Muslim personal law allows them to contract marriage and loving someone is not punishable anywhere in the law, it is recently held by the Hon'ble High Court of Delhi in the case of ***FIJA & ANR. v State.***[43]

Under Muslim personal law, a male can exercise the option of puberty until any age, provided there has been negligence or fraud but under PCMA male can repudiate the marriage before he attains 23 years of age. But the question arises if the girl has attained the age of puberty but was married by her guardian against her wishes then would POCSO and PCMA would be attracted? The answer is yes, as now after **Independent Thought**[44] judgment sexual intercourse by a man

[41] *Independent Thought* (n 34)
[42] *Ibid*
[43] FIJA & Anr v State Govt of NCT Delhi & Ors, WP (CRL) 763 of 2022
[44] *Independent Thought* (n 34)

with his wife (less than 18 years of age) against her wishes is rape. Moreover, POCSO and PCMA being special laws will prevail and such girls would get protection under these Acts.

AMBIGUITIES UNDER PCMA

Under PCMA if a male is an adult, that is, 18 years or above if he marries a girl less than 18 years then he also will be punishable with rigorous imprisonment for the term which may extend to 2 years, or with a fine which may extend to 1 lakh rupees or both under section 9 of PCMA whereas he is a child under the Act as per section 2(a).[45] Due to fear of being prosecuted a male will never exercise his right to get his marriage repudiated under PCMA, a male can also be forced into child marriage. He can also be a victim of child marriage. It is evident that generally, females are the victims of child marriage, but a male can also be. He is an adult (18 years or above) but is a child (less than 21 years) under the Act.

There is no provision under PCMA that makes a woman punishable if she contacts child marriage, that is if she marries a man less than 21 years of age whereas she is 18 years or above. Whereas section 18(a) of HMA states if section 5(iii) is contravened the person shall be punished with rigorous imprisonment which may extend to two years or with a fine which may extend to 1 lakh rupees or with both,[46] which means a girl who contracts marriage in contravention of section 5(iii) also can be punished under section 18(a) of HMA but there has been no such case so far. But seeing the approach of the courts in various judgments it can be said that if such a case comes then PCMA will prevail and females who contravened section 5(iii) of HMA will not be punished under section 18(a).

Moreover, PCMA makes child marriage voidable and not void that's why the evil practice of child marriage is still prevailing in society. The above discussion shows that PCMA is more child bride pro Act. In the case of ***Hardev Singh v Harpreet Kaur,***[47] the Supreme Court stated if we do a literal interpretation of section 9 of PCMA then it goes against the object and purpose of the Act which is to curb child marriages but if we adopt a liberal interpretation then the main

[45] Prohibition of Child Marriage Act 2006, s 9
[46] Hindu Marriage Act 1955, s 18(a)
[47] *Hardev Singh v Harpreet Kaur* Criminal Appeal No 1331 of 2013

purpose of bringing this Act was to control the adverse impact of this practice on the child bride in particular as generally, a woman has very little to say and her family members take the decision. The purpose behind punishing the male adults contracting child marriage is to safeguard the minor young girls by creating a deterrent effect on the prospective bridegroom who is above 18 years of age because he is deemed to have the capacity to avoid such marriages.

The decision of the Supreme Court is respectful, but males also sometimes have to take decisions due to family pressure and have very little say in such matters, they can also be the victim, the Act should be child pro and not only child bride pro since children as the whole group is vulnerable section of the society and not only the females. But if we see it from a different angle then if a male is 18 years or above, he is an adult but making him subject to criminal liability will not serve any purpose rather he will not approach the court to repudiate his marriage and the very purpose of this Act will fail. The marriageable age of the brides should be increased to 21 years, or it should be made 18 years for both bride and groom. This distinction between the marriageable age of males and females is unscientific and a patriarchal stereotype and creates problems in interpreting the law.

By making child marriage voidable we are just welcoming the solemnization of more child marriages. How many victims of child marriage will go and take the recourse of PCMA? – very few due to societal and family pressure. When a girl is married off as a child, she will be having no financial independence to make her living so she would generally not take steps to repudiate her marriage even though there is the provision of maintenance[48] also under the Act, and boys due to fear of being prosecuted under section 9 of the Act will not be willing to repudiate the marriage under PCMA. If child marriages will not get reported, then how and whom you will punish under the Act? Thus, child marriage shall be made void, then only the very inception of child marriage can be stopped.

When they are not even aware such rights exist in their favour how they will take recourse to PCMA? Therefore, it is also very important to spread awareness of the rights under PCMA.

[48] Prohibition of Child Marriage Act 2006, s 4

Karnataka has become the first state to make child marriage void. In the case of ***Seema Begum v State of Karnataka***,[49] the Karnataka High Court discussed the applicability of the Act that it applies to all religions, thus, no citizen of India on the ground of belonging to a particular religion can claim exemption from the application of the PCMA. This was the bold decision taken by the Karnataka High court. If we want to stop the evil practice of child marriage, then instead of making it voidable it must be made void.

HMA, MUSLIM PERSONAL LAW, AND THE SPECIAL MARRIAGE ACT, 1954 (SMA) AND THE CHANGING MINDSET OF THE SOCIETY

Special Marriage Act[50] is a secular law that applies to all irrespective of their religion. If two persons get married under SMA then they will be governed by SMA only and not by their Personal law.

But none of these laws allows same-sex marriage which must be allowed now. As in the case of ***Navtej Singh Johar v Union of India***, [51] voluntary sexual intercourse between two adults of the same sex has been decriminalized by the Hon'ble Supreme Court of India but still, the problem remains the same. Article 21 of the same-sex couple is being violated, everyone has a right to choose their life partner then why does it matter that one has to be male and another to be female if it is mandatory then where article 21 has gone which is the fundamental right of every individual. Article 21 of our constitution ensures individual autonomy which is the very basic right of any individual. It is high time to give recognition to same-sex marriage so that article 21 is not further violated. In our Personal laws marriage has been given a special status, it is considered a sacrament but if it comes between Personal laws or special laws and our constitution then the constitution shall prevail. The issue of giving recognition to same-sex marriage is sub judice before the Hon'ble Delhi High Court in the case titled - ***Abhijit Iyer Mitra and Others v Union of India.*** [52]

[49] *Seeme Begum v State of Karnataka* Writ Petition No 75889 of 2013 (GM-RES)
[50] Special Marriage Act 1954
[51] *Navtej Singh Johar v Union of India* Writ Petition (CRIMINAL) No 76 of 2016
[52] *Abhijit Iyer Mitra & Ors v Union of India* WP(C) 6371 of 2020

In the case of the ***National Legal Service Authority v Union of India,***[53] the Hon'ble Supreme Court upheld the transgenders' right to choose their gender. The court also laid down the distinction between **'sex'** and **'gender'**, sex is determined biologically at the time of birth and gender identity lies at the core of how the person wants to perceive himself, that is, whether he wants himself to be identified as a male or a female. Transgender persons have the right to either identify themselves as male or female. They fall under the term person mentioned in Article 14 and are thus entitled to legal protection of all laws as enjoyed by any other citizen of India.

In the case of ***Arun Kumar and Another v Inspector General of Registration,***[54] the Madras High Court, the issue was whether can a transgender be included in the term 'bride' and get married under HMA. In this case, a transgender who identified herself as a woman married under HMA as per section 5 read with section 7 of the Act, and both the petitioners were professing Hindu religion. But the registrar refused to register their marriage stating that the bride under section 5 of HMA means woman on her wedding day and does not include a transgender. The court referred to the judgment of the ***National Legal Service Authority v Union of India***[55] and held that the expression bride in HMA can be interpreted to include a transgender also who identifies herself as a woman. Moreover, the court also stated that if a transgender is a Hindu and is kept out of the purview of HMA then her articles 14, 21, and 25 are also violated.[56]

Transgenders have a right to identify themselves either as a male or a female and laws which apply to all other citizens shall apply to them also, they are also part of our society, and they cannot be deprived of their basic human rights. Equality, justice, equity, and liberty must be ensured for them also. Even after the various judgment of the Supreme Court and the High Court(s) recognising the rights of the LGBTQ community the State still has not taken any steps in furtherance of such judgments and has always been reluctant in giving recognition to same-sex marriages because most of the Indians still only can think a male and a female to be a couple and not a male and male or a female and a female. But due to some preconceived notions of

[53] *National Legal Service Authority v Union of India*, 2014, Writ Petition (CIVIL) No. 400 of 2012
[54] *Arun Kumar & Anr v Inspector General of Registration & Ors* WP(MD) No 4125 of 2019
[55] *National Legal Service Authority* (n 53)
[56] *Ibid*

society, the basic rights of the LGBTQ community cannot be denied and ignored. Society always keeps on evolving and therefore, the laws should also be amended timely taking into consideration the present morals and values followed in society provided they are in line with constitutional morality. And people should also accept the changes and move with time.

CONCLUSION

In India, we follow constitutionalism which means it is the constitution that is supreme, and no one can rise above the constitution. But we as citizens of India must understand that if our Personal laws do not align with the spirit of the constitution then they need to be changed. Right to follow our distinct religious practices, customs and traditions are on the one hand and constitutional morality is on the other hand. Religious practices which do not go in line with the essential principles of the constitution must not be followed, for example, child marriages.

The legislature also has to be proactive in all spheres if it is making changes in one law or enacting a Special Act then correspondence amendment must be made in other laws also wherever required otherwise this leads to confusion and it takes several years for the matter to get settled by the Apex Court or for the legislature to make amendments in the existing law and the meantime, fundamental rights of the people keep on getting violated. The marriageable age should also be made uniform for all irrespective of their religion which will solve many problems. Also, there should be no distinction between the marriageable age of a male and a female as it triggers patriarchal stereotypes. We all should work together to make our nation a developed nation and society a progressive society. And it is the need of the hour to recognise the rights of the LGBTQ community to ensure that there is no further violation of their rights and make them feel like they also belong here in this society.