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The rise of Secular Legislation in India concerning Marriages & Divorce

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India is a country where one can find very diverse people who differ in their religion, culture, language, caste, etc but there is unity. But sometimes there pops up the problem of personal laws application because many of them here differ in their respective beliefs and faiths hence all of them have their own set of personal laws. As this research is concerned about marriage and divorce there are instances where people from different religions choose to marry each other but as their beliefs are different there comes the problem of the application of personal laws. In India, there are personal laws such as Muslim Law, Hindu Law, Christian Law, Parsi Law, etc. It is contended that these personal laws violate the Constitution when it comes to the rights of women no doubt that there are some provisions in the personal laws which confer an inferior status to women than men. Hence to solve this problem the concept of secular legislation concerning marriages and divorce the Special Marriage Act of 1954 comes into the picture but there are some loopholes in this Act too. The founding fathers of the Constitution inserted Article 44 in the Directive Principle of State Policy (DPSP) so that the state should strive to implement a Uniform Civil Code (UCC) in the nation as time passes, but still, after 75 years of Independence there is no application of this concept hence this research paper analyses the problems of personal laws and the Special Marriage Act of 1954 and gives conclusion on them.

Keywords: *marriage, divorce, secularism, legislation, religion, culture, uniform civil code.*

INTRODUCTION

Personal laws are the laws that govern the people of a particular religion. India is a nation where one can find many religions, languages, castes, etc. Hence every religion has its own set of laws and these set of laws get their validity from the scriptures and texts which are made into law. The state is considered to be secular in India. The state separates itself from religion but it is not absolute because the state can amend these personal laws as per the need of the society and such provisions are there in the Constitution of India, for example, List 5 in the Concurrent list. This paper is limited to personal law applications in marriages and divorces. When people want to marry a person from different religion one of the people has to convert to another religion, then there would be no conflict about the application of laws to that particular couple's marriage and divorce but the problem arises when inter-faith marriages are done. Hence Special Marriage Act¹ is brought by the legislature where without changing the religion one can get married and this is treated as a special type of marriage. There is the concept of the Uniform Civil Code inserted in the Constitution of India in Article 44 under the Directive Principles of the State Policy where the state should strive to bring Uniform Laws to the territory of India. Now the question arises does India has implemented UCC? This will be answered in the current research. The current research identifies what are the problems associated with personal laws, and tries to check the effectiveness of the Special Marriage Act legislation. Also in this research paper, the researcher tries to check the validity of the Personal Laws in India.

WHAT IS THE PROBLEM BEHIND PERSONAL LAWS?

As India is a nation that is very diverse in its religion and culture, every religion has its set of religious laws which govern them so in the case of marriage and divorce. Hindus have their Hindu Law, Muslims have their Mohammedan Law, and Christians have their Christian personal law. Personal laws govern and apply to those people who practice that particular religion the problem arises when two people from different religions marry each other and there comes the matter of which law should be applied to them concerning marriage or divorce. The

¹ Special Marriage Act 1954

concept of a Uniform Civil Code was brought into the Constitution of India whose purpose is to replace the religion-based personal law and bring in the uniform law which would apply to all citizens irrespective of religion, culture, etc².

Uniform Civil Code is mentioned in Article 44 of the Indian Constitution under part IV of the Directive Principles of the State Policy which says that *“The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India”*. But the application of the Code is difficult because the religious laws come in between and hinder the application. For example, according to the holy Quran of the Muslims, A man can have more than 1 wife and if the Code is made applicable by inserting a provision that no person can marry more than 1 wife even with the consent of the 1st wife while the marriage is subsisting but it is allowed according to the holy text, such kind of matters start to arise. Personal laws govern an individual’s private sphere of life and are hence considered personal law³.

The Special Marriage Act of 1954, S.4 speaks about what are the conditions related to the solemnization of special marriages **“Notwithstanding anything contained in any other law for the time being in force relating to the solemnization of marriages, a marriage between any two persons may be solemnized under this Act, if at the time of the marriage, the following conditions are fulfilled”** marriage between any two subjects to the conditions mentioned in section 4 includes two people from same or different religious faith to marry and to those who marry under this Act, the provisions of the Act apply. So what does culture mean? According to the Cambridge Dictionary **culture** means *the way of life, the beliefs, and general customs of a particular group of people at a particular point in time.*

Marriages among the tribal communities are performed, it may be within the tribe or inter-tribal marriage. The tribal population of India is about 8.6% of the population and more than 700 tribes have been accorded the Schedule Tribe status, but the tribal communities are still more in number which is unofficial and each tribe has distinct customs, laws, etc which makes them

² ‘What is Uniform Civil Code? Why it is Important?’ (Sahodar, 15 December 2022) <<https://sahodar.in/what-is-uniform-civil-code-why-it-is-important/>> accessed 21 November 2022

³ Farrah Ahmed, ‘The Problem with Personal Law in India’ in Shazia Choudhry and Jonathan Herring (eds), *The Cambridge Companion to Comparative Family Law* (CUP 2019)

different from each other and such are the number of laws to be governed. In the case of *Satprakash Meena v Alka Meena*⁴, where both the parties belonged to the Meena tribe and approached the Delhi High Court, both the parties had a dispute over the validity of the family court's judgement which rejected the divorce decree. The Husband who is a petitioner in this case wanted their divorce proceedings to be governed by the Hindu Marriage Act, 1955 because it was solemnized as per the Hindu rites and customs. On the other side the wife, the respondent in this case contended that as per S.2 (2) of the Hindu Marriage Act, their divorce would not be governed by the Hindu Marriage Act. S.2 (2) of the Act, which speaks about the application of the Act excludes the members of Schedule Tribes which come under the meaning of Cl. 25 of Article 366 of the Constitution of India⁵.

Article 366, Cl.25 speaks about tribes or tribal communities or parts within them which are deemed as scheduled tribes under Article 342 of the Constitution of India⁶. Article 342 says that notification is to be made where tribes or tribal communities or groups within them are specified by the President of India⁷ and in this case, the Meena tribe was notified as a scheduled tribe in the state of Rajasthan hence this Act of Hindu Marriage wouldn't apply to their divorce⁸. Then the court directed the trial court to adjudicate the matter under S.13-1(ia) of the Hindu Marriage Act. This kind of problem starts to arise when there is no uniform personal law. The court also cited the case of *Ms. Jordon Diengdeh v S. S. Chopra*⁹, where the Supreme Court stated that the personal laws which apply to the marriage be it Muslim law, Hindu law, Parsi law, etc are very far from being uniform and said the time has come where a uniform law should be made which would govern the population of India irrespective of their caste and religion as well as said that mutual consent and irretrievable breakdown of the marriage should be introduced in all the

⁴ *Satprakash Meena v Alka Meena* (2021) SCC Del 3645

⁵ Hindu Marriage Act, 1955, s 2(2)

⁶ Constitution of India 1950, art. 366

⁷ Constitution of India 1950, art. 342

⁸ Salil Tiwari, 'The Hope Expressed in Article 44, 'A Uniform Civil Code', Ought Not To Remain A Mere Hope: Delhi High Court' (*LawBeat*, 9 July 2021) <<https://lawbeat.in/top-stories/hope-expressed-article-44-uniform-civil-code-ought-not-remain-mere-hope-delhi-high>> accessed 21 November 2022

⁹ *Ms. Jordon Diengdeh v S. S. Chopra* (1985) 3 SCC 62

cases¹⁰. The parties also get motivated to spur up the problem when they see that they would get more benefits under other laws.

WHAT IS THE SECULAR LEGISLATION OF INDIA REGARDING MARRIAGES AND DIVORCE? IS IT EFFECTIVE?

The Special Marriages Act, of 1954 is an act that deals with the special form of marriage in certain cases, for the registration of certain other marriages and also for divorce¹¹. First of all the meaning of ‘Secular’ and ‘Secularism’ should be understood. Secular means not being specifically religious but it means that a person has rational and scientific thinking¹². Secularism is a concept where religion is a separate sphere of life and other spheres of life such as political, economical, and cultural aspects are treated as a separate sphere of life and most importantly neither of them should interfere in the other’s sphere¹³.

By the name of Personal Law itself a layman can say it belongs to a particular religion for example Muslim Law would apply to all the Muslims of the land. But the Special Marriage Act doesn’t have this notion of favouring one religion. The former sentence can be well established by just reading the Act where the object of the Act is not to favour any particular religion but aims to encourage inter-faith inter-caste marriages, and also marriages within the same faith¹⁴. People who have already married under personal laws applicable to them can afterward register their marriage under this Act also if they don’t want their personal law’s rule applying to them as per S.15 of the Special Marriages Act¹⁵. Special Marriage Act applies to heterosexual marriage and is not homo-sexual or not gender neutral as per S.4(c) which says the male has to complete 21 years of age and the female 18 years¹⁶. Now that it is established that it can be considered

¹⁰ Salil Tiwari (n 9)

¹¹ Special Marriage Act 1954

¹² ‘To the Point’ (*Drishti IAS*, 15 May 2019) <<https://www.drishtias.com/to-the-points/paper1/secularism-1#:~:text=A%20secular%20person%20is%20one,as%20a%20purely%20personal%20matter>> accessed 21 November 2022

¹³ *Ibid*

¹⁴ Vakasha Sachdev, ‘Confused About Special Marriage Act? Inter-faith Couples Take Heed’ (*The Quint*, 28 February 2019) <<https://www.thequint.com/explainers/special-marriage-act-specifications>> accessed 21 November 2022

¹⁵ *Ibid*

¹⁶ Special Marriage Act 1954, s 4(c)

secular legislation in terms of laws governing marriage and divorce in India let us test whether this is an effective law and what are the challenges faced by it.

There are various incidents in the country where people who wanted to marry under the Special Marriage Act and couples who were already married under the Act and wanted to perform their religious rites and ceremonies were attacked by vigilante groups and the sole reason is because of a loophole under the Special Marriage Act. For example, in the state of Maharashtra, a Muslim man and a Hindu woman were they were protested against their marriage by vigilant groups even though they don't have any right to interfere in others' personal life. Vigilant groups are influenced by a particular ideology and backed by right-wing political parties. It was in the case of *Lata Singh v State of UP*, the SC said there is a right to choose a partner for life. In this case, Lata Singh's brothers filed a frivolous case against her husband saying that the marriage is not valid but the court held that as Lata Singh is a major she can choose her husband. In the case of *Shafin Jahan v Asokan K.M. and others*, SC has held that the right to marry is a right that is integral in Article 21 of the Constitution of India. This right to marry cannot be taken away except by a reasonable law. It is the fundamental liberty of an individual to take decisions in pursuit of his/her happiness and society has no role to play in influencing the choice of partners because this matter of belief and faith is at the core of constitutional liberty.¹⁷

In the Special Marriage Act, the problem of notice arises which is being misused by people. Under the Special Marriage Act, a notice period is mentioned after which the marriage can be solemnized¹⁸. The object behind introducing the notice period is to prevent elopement.¹⁹ As per S.5 of the Act, both the parties to the marriage shall give notice to the District Marriage Officer in writing and one of the parties to the marriage should be residing in the district for 30 days preceding the date on which the notice is given²⁰ and as per S.6 of the Act such notice should be

¹⁷ Doorman J Dalal, 'The fundamental right to marry in India and its application to same sex marriage' (*Bar & Bench*, 3 January 2021) <<https://www.barandbench.com/columns/the-fundamental-right-to-marry-in-india-and-its-application-to-same-sex-marriages>> accessed 21 November 2022

¹⁸ Vakasha Sachdev (n 16)

¹⁹ *Ibid*

²⁰ Special Marriage Act, 1954, s 5

displayed at the conspicuous place, as well as such notice, should be maintained in the Marriage Notice Book surprisingly this book is available to inspection every time without any fee.²¹

Even though the object behind including this provision of the notice period in the Act is good but the object is not being fulfilled because it is so lenient that no family members of the parties to the marriage can check that but any random outsider, might be a person politically motivated to create chaos can have a look at it and this may lead to vigilantism. Allahabad HC has given a decision on this 30 days notice period mentioned under the Special Marriage Act stating that this provision infringes a person's right to marry without intervention hence the couples need to go for such notices as it is not mandatory²². The couple in their petition stated that such kind of notices invades their privacy, and cause unnecessary social pressure which will ultimately interfere with their free choice of marriage²³. Department of Stamps and Registration showed that in the year 2013-2014, marriages performed under the Special Marriage Act was 2624, this number increased to 10,655 in the subsequent year²⁴. But when the data is compared with the adult population of Bangalore it is just 0.01%. As per the statistical data provided by the Department of Stamps and Registration Karnataka, 2,10,627 marriages were registered under the Special Marriage Act from the year ranging 2001 to 2022²⁵. While marriages registered under Hindu Marriage Act from the year 2001 to 2022 is 15,32,158.²⁶

Special Marriage in other forms was 1,01,635²⁷. It can be concluded that there are problems with the Act and because of some activities there is no protection for couples of interfaith but still people are going for marriages under the Act. The Government should make proper rules and

²¹ *Ibid*

²² 'Allahabad HC Says 30-Day Notice in Special Marriage Act No Longer Mandatory' (*The Wire*, 13 January 2021) <<https://thewire.in/law/allahabad-hc-says-prior-notice-in-special-marriage-act-no-longer-mandatory>> accessed 21 November 2022

²³ *Ibid*

²⁴ Arun Dev, '300% rise in weddings under special marriage act' (*The Times of India*, 20 June 2016) <<https://timesofindia.indiatimes.com/city/bengaluru/300-rise-in-weddings-under-special-marriage-act/articleshow/52826291.cms>> accessed 21 November 2022

²⁵ 'Marriage Registration' (*Departments of Stamps & Registration*) <<https://igr.karnataka.gov.in/page/Department+Statistics/Marriage+Registration/en>> accessed 20 November 2022

²⁶ *Ibid*

²⁷ *Ibid*

make sure that the data is only available to people who have the right to check it like parents. The right of Choice should be protected.

ARE PERSONAL LAWS THE DISCRIMINATORY LAWS MADE BY THE STATE VIOLATING THE IDEA OF A SECULAR STATE?

Personal laws in India have a long history as they date back to the pre-colonial era²⁸. These personal laws are considered to be unchanging over time because they get their authority from religion²⁹. It was the Britishers in India who started codifying the laws. It is said that the personal laws are discriminatory in nature as well as far ahead from the concept of equality³⁰ for example allowing polygamy under Muslim law³¹, imposition of purdah, depriving divorced Muslim women of maintenance rights³², Deprivation of joint-heirship to females under Mitakshara school of Hindu law³³, Christian women not entitled to divorce on the ground of adultery committed by the husband³⁴, Parsi women if married a man who is not Parsi she would lose all the property right³⁵. Today society just doesn't want secular laws but they should also be gender-just laws³⁶. Personal laws are challenged in a court of law because they are considered constitutionally invalid. A woman has to deal with a variety of issues like divorce, marriage, adultery, bigamy, polygamy, custody of the children, etc.³⁷

First of all, one needs to check whether the personal laws having so much bias in them, are valid laws under the Constitution of India. The case of the *State of Bombay v Narasu Appa Mali*³⁸ is a landmark precedent that determines the relationship between personal laws and Article 13 of

²⁸ Kumar Aditya, 'Conflicting Fundamental Rights: Why do we need to codify Personal Laws in India?' (*Lawctopus*, 30 August 2021) <<https://www.lawctopus.com/academike/personal-laws-in-india/>> accessed 20 November 2022

²⁹ *Ibid*

³⁰ *Ibid*

³¹ *Ibid*

³² Vibhuti Patel, 'All Personal Laws in India are Discriminatory' (*Mint*, 22 August 2017)

<<https://www.livemint.com/Opinion/Cn69qE9pQCImtQzzvw1oVP/All-personal-laws-in-India-are-discriminatory.html>> accessed 20 November 2022

³³ *Ibid*

³⁴ *Ibid*

³⁵ *Ibid*

³⁶ *Ibid*

³⁷ *Ibid*

³⁸ *State of Bombay v Narasu Appa Mali* (1952) Bom 84

the Constitution of India. Article 13 tells about the laws which are inconsistent or are in derogation of the fundamental rights shall to the extent of inconsistency are void as well as it prohibits the state from making such laws that contravene the Fundamental rights guaranteed under Part III of the Constitution of India. Article 13 also tells ordinances, orders, bye-law, rules, regulations, notifications, customs, or usages which are having the force of law in the territory of India. Also, it tells laws in force including the law made by the legislature or any other competent authority.³⁹

In the aforementioned case law it was held that the personal laws are immune from the application of Article 13(a) and (b) because they are not the laws and they are not the force of law.⁴⁰ Justice Chagla in this case distinguishes between personal laws and the custom and usages as used in Article 13 of the Constitution. As customs and usages deviate from the scriptures and texts of the religion while personal laws don't deviate hence personal laws are not the same as customs and usages. By referring to the Constitutional Assembly Debates Justice Chagla pointed out that it was purposeful that the personal laws were left out from Article 13 because then they would have to face the Constitution challenges⁴¹. Entry 5 in the concurrent list under Schedule 7 gives power to the state legislature and the Union Parliament to make laws regarding personal laws also to amend them when necessary and establish a UCC. Article 372(1) and (2) expresses that the laws in force under this article do not include personal laws⁴². As per this judgement, personal laws are outside the scope of Part III of the Constitution. In the case of *C Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil*⁴³, the court observed that the personal laws which confer inferior status to women than men are anathema to equality⁴⁴. In the case of *Pannalal Bansilal and Ors. v State to A.P.*⁴⁵, the court opined that the founding

³⁹ Constitution of India 1950, art. 13

⁴⁰ Khushboo Dev, 'Personal Laws Vis-à-vis Fundamental Rights, Part III of the Constitution' (CJP, 19 March 2021) <<https://cjp.org.in/personal-laws-vis-a-vis-fundamental-rights-part-iii-of-the-constitution/#:~:text=accepted%20without%20debate.,Personal%20laws%20are%20not%20%E2%80%9Claws%E2%80%9D,India%20the%20force%20of%20law>> accessed 20 November 2022

⁴¹ *Ibid*

⁴² *Ibid*

⁴³ *C Masilamani Mudaliar v Idol of Sri Swaminathaswami Thirukoil* (1996) SC 1697

⁴⁴ *Ibid*

⁴⁵ *Pannalal Bansilal & Ors v State to A.P* (1996) SC 1023

fathers of the Constitution wanted to give a secular constitution to the people of India. During the time of independence of India in the year 1947, it had become very difficult to secure unity amongst the population of India, there were many communal tensions, and India was separated into 2 nations.

India also has a vast diversity in religion, culture and everyone has their faiths and beliefs in this context it would become very difficult to bring personal laws and test them under Part III of the Constitution and strive to make a uniform law for everyone because it would lead to another havoc because religion is such a thing if mixed with political ideologies would take a sectarian turn and cause widespread destruction. The founding fathers of the constitution also recognized the concept of the Uniform Civil Code and that's why it is included in Article 44 of the Constitution of India the state shall strive to achieve that but it cannot be done immediately because the law has to pass through all stages⁴⁶. In another case of *Reynold Rajamani and Anr v Union of India*⁴⁷, it was the case where the S.7 and 10 of the Indian Divorce Act, 1869 was challenged because it did not have the option of divorce by mutual consent while other personal laws had this hence contented this violated the Article 14 of the Constitution. Here the SC refused to test the personal laws against fundamental rights and said it is the legislature that should include the provision and not the judiciary⁴⁸. It can be concluded that courts have repeatedly refused to test personal laws against fundamental rights.

CONCLUSION

From this research, it can be concluded that the application of the Uniform Civil Code in India is still a distant dream even after 75 years of Independence. There are loopholes in the Special Marriage Act and the major one of them is the publication of notice and access to any random individual which infringes the privacy, the Fundamental Right of an individual. Personal Laws are not entirely taken into consideration to check their validity of them. Only some part of them is taken into view when a case is filed in a court of law. For example the Triple Talaq.

⁴⁶ *Pannalal Bansilal Pitti & Ors v State of A.P* (1996) SC 1023

⁴⁷ *Reynold Rajamani & Anr Union of India* (1982) SC 1261

⁴⁸ *Reynold Rajamani & Anr v Union of India* (1982) SC 1261

Special Marriage Act is an effective legislation? Partly because out of the problems associated with it which are discussed in the current research paper there is a lack of motivation among the masses to perform marriage under this Act. India needs legislation that applies to every individual equally irrespective of religion, or caste. If the application of the UCC is difficult at least an Act should be made for the people who want to be governed by the laws made by the Parliament and not by Personal Laws. One hindrance to the effective application of the Special Marriage Act is the society itself where inter-faith marriages are looked at as a sin, this outlook of the society should be changed.