Handle with Care: Fragility of Special Marriage Act in Interfaith And Inter-caste Marriages

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ABSTRACT

The Special Marriage Act, 1954 (SMA) is legislation that provides for civil marriage between individuals regardless of their caste, community, religious belonging, or nationality. While SMA appears to bridge the gap between personal law and secularism, it is essential to account for the problematic politics that is embedded in the language and experience of the Special Marriage Act. A cursory glance at the SMA indicates a secular law, but a closer reading of the text reveals that it is embedded within a Brahminical and patriarchal ideology. Additionally, the procedural aspects of the law and empirical experiences of the SMA show that the secular agenda of the legislation is constantly undermined by everyday actors. Therefore, it is necessary to examine the language and ethnographic implications of the SMA to determine the extent of its secular and radical potential.

INTRODUCTION

Embodying aspirations of secular nationhood and social change, the Special Marriage Act (SMA) was introduced in post-colonial India as vanguardist legislation. Demands for the law were part of a larger project of nation-building, in the aftermath of colonial rule and partition violence. With the recent din surrounding the 'love jihad legislation, the discourse surrounding the rights of inter-faith and inter-caste couples has turned to the SMA. Legal scholars have juxtaposed the anti-conversion 'love jihad legislation and the SMA, holding up the latter as a secular, gender-just and revolutionary legislation that preserves the diverse social fabric of India. It is necessary to ask whether the SMA – characterised as the impenetrable fortress against the ensuing war on love -- is as radical as it is deemed. A close investigation of the ideologies embedded in the language of the SMA, coupled with its procedural and experiential aspects suggests that its progressive facade obscures a darker underbelly of parochial politics.

LANGUAGE AND EMBEDDED IDEOLOGIES

The SMA can be located within the parallel historical processes of "legal Hinduism" and the communal politics surrounding the Uniform Civil Code[1]. The SMA was enacted in the 1950s

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[1] Flavia Agnes, "Law and Gender Inequality – The Politics of Women's Rights in India" in Malla Khullar (ed.), *Writing the Women's Movement: A Reader* 118 (Zubaan, New Delhi, 2005).

during the decline of Nehruvian secularism, which eventually culminated in the rise of communal politics in the Rajiv Gandhi era[2]. The Hindu and Brahminical influences are visible through several instances in the Act. For example, the provision for "prohibited degrees of relationship" in the SMA is similar to the Hindu Marriage Act (HMA)[3]. Section 15 of the SMA elaborates that for a valid solemnisation or registration of marriage, parties should not be within the degrees of prohibited relationship[4]. Several communities including Muslims, Parsis, Jews and certain South Indian communities do not have similar requirements, a fact that attests to the hegemonic Brahminical emphasis on the law. Additionally, Vanita[5] argues that such a clause undermines the very objective of the Act, which is to enable individuals to marry freely despite their religion. She further suggests that such a provision is absurd since it prohibits marriage between consenting individuals, thereby not according equality before the law[6].

In an amendment in 1963 to the SMA, the Act was subsumed under customary practices. While before the amendment, religious personal law was subordinate to the secular character of the SMA, the amendment reversed such a legislative relationship. Additionally, an amendment to the HMA in 1976 expanded its ambit to include progressive provisions, including the incorporation of 'mutual consent' in divorce. Agnes argues that through these changes, the remedies and provisions in the HMA and SMA were being coordinated and placed on par[7]. Moreover, the amendment to the SMA in 1972 awarded concessions to Hindu men, as it permitted Hindu couples married under the SMA to be governed by the Hindu Succession Act, as opposed to the Indian Succession Act, 1925. The restructuring of legislative mechanisms of the SMA further denied progressive Hindu couples the choice to be governed within secular law[8]. The modifications made to the SMA consolidated the power of Hindu men, reproducing a patriarchal grounding to the law. The history of the SMA – tied as it was to a steady progression towards legal Hinduism – illustrates how efforts in the Indian context to make a secular law have been shaped by power structures and ideology.

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[2] Ibid.
[3] The Hindu Marriage Act, 1955 (Act 25 of 1955), s. 3g.
[4] Special Marriage Act, 1954 (Act No.43 of 1954), s. 15.
[5] Ruth Vanitha, "The Special Marriage Act: Not Special Enough" 58 *Manushi* 15-21 (1990).
[6] *Id.* at 20.
[7] *Supra* note 1.
[8] *Supra* note 1.

Examining the Lok Sabha discussions surrounding marriage and personal law, Gangoli[9] argues that Indian secularism is undercut because of what is constructed as the 'Indian' norm. In this regard, she suggests that in the legislative debates in India surrounding marriage, several assumptions have been made about what it means to be 'Indian', and by extension, "an Indian citizen"[10]. As Menon cautions, the uniformity in secularism is not always gendered just, and it is essential to therefore situate debates around marriage concerning the Brahminical and patriarchal beliefs assumed to be the norm[11]. For instance, Gangoli[12] cites Lok Sabha debates in 1976 in which it was suggested that in "Indian culture and tradition, marriage is a sacred and eternal bond. When a man and a woman enter into marriage, our culture and civilisation tell them that only death can separate the two". This construction of Indian culture as being monolithic and uniform amounts to an erasure of its pluralistic and composite character. Additionally, the construction of marriage as sacramental further erodes rational secularism and obscures the practices of Islamic communities from its ambit. Gangoli[13] also flags that in the 1986 debates about the Muslim Women (Protection of Rights on Divorce) Act, Members of Parliament expressed discomfort with the contractual basis of Islamic marriage, suggesting that it is inferior to Hindu marriages. It is therefore essential to recognise that the structural forces of majoritarianism and patriarchy often contour the presumptions of lawmakers. Secular laws like the SMA need to be located historically to identify the hegemonic and structural influences that operate during the process of their drafting. The emphasis on the sacrament, and the homogenisation of Indian culture within a Brahminical norm reveals how secular legislation is constantly evacuated of its progressive potential.

The question of the Brahminical and patriarchal language embedded in the SMA also needs to be interrogated for how it depicts women. Gangoli[14] suggests that the construction of secular law is perceived to be "dangerous" and potentially carrying the possibility for women's sexual

[9] Geetanjali Gangoli, *Indian Feminisms Law, Patriarchies and Violence in India* (Routledge, New York, 2016).
[10] *Id.* at 54.
[11] Nivedita Menon, "Uniform Civil Code – Once again, where is gender justice?" *KAFILA,* July 15 2016, available at < https://kafila.online/2016/07/15/uniform-civil-code-once-again-where-is-gender-justice/> (last visited on March 31, 2021).
[12] *Supra* note 9 at 54.
[13] *Supra* note 9 at 54.
[14] *Supra* note 9 at 81.

autonomy and agency. Such anxieties result in the blunting of the radical potential of such a law. For instance, Section 37(3) of the SMA which discusses maintenance states that a district court can modify a maintenance decree when "the wife in whose favour an order has been made under this section has remarried or is not leading a chaste life"[15]. The invocation of chastity in this regard indicates that the SMA seeks to control sexual autonomy. It is essential to note that Brahminical patriarchal structures exert control over women's bodies to preserve caste purity. It is in this regard that Ambedkar described caste as an enclosed class[16]. The reference to chastity points to the reproduction of casteist norms that police the bodies and agency of women. Rooted in a Brahminical foundation and invoking regressive ideas of women's chastity, the SMA reproduces patriarchal and casteist tropes.

Further, because the SMA adopts a Hindu norm, it stands as an important metaphor for the contradictions within the Indian feminist movement. Gangoli[17] suggests that debates surrounding the SMA assume a patronising tone, as women from minority communities are expected to take on the burden of reforming their own personal laws. Also, by advocating for "internal reforms" within the Muslim personal law, proponents of the SMA display a condescending attitude towards minority communities and their personal law. This construction of communities as "inherently backward"[18] exists within the hegemonic ideology of the SMA. The SMA, like the HMA, presupposes itself to be progressive and radical, dismissing the power structures that it reproduces. Therefore, the progressive and radical imagination supposedly embedded within the SMA is highly questionable.

It is essential to recognise the class politics that are embedded within the history of the SMA. For instance, when the provision for mutual consent as grounds for divorce was integrated into the SMA, it was done with the image of an "educated, sophisticated, and enlightened urban-based elite" in mind[19]. This reveals an underlying class prejudice within the legislation. Agnes

[15] *Supra* note 4 at s. 37 (3).
[16] Bhimrao Ambedkar, "Castes In India: Their Mechanism, Genesis and Development" 46 *The Indian Antiquary* (1917).
[17] *Supra* note 9.
[18] *Supra* note 9 at 12.
[19] Flavia Agnes, *Family Law Marriage, Divorce, and Matrimonial Litigation* 50 (Oxford University Press, New Delhi, 2nd edn., 2011).

indicates that the addition of mutual consent into Section 13B of the HMA came much later, only in 1976, as it was perceived that the HMA was meant for the conservative Hindu masses, who would have been vehemently opposed to such a provision[20]. Thus, the SMA is indicative of bourgeois culture and anxiety in post-colonial India. Interrogating its internal class politics enables the analysis that the egalitarian rhetoric of such legislation emerged from a history of exclusion.

SMA AND PUBLIC NOTICES: MARRIAGE IN-BETWEEN PRIVATE AND PUBLIC

While examining the problematic politics embedded within the language of the SMA, it is also necessary to account for how individuals experience the law. The SMA claims to transcend the acts of violence of communalism and casteism through a "special hybridisation"[21]. However, procedural aspects, including the display of notice regarding the intention to marry, the provision about raising objections, and the 30-day notice period, all act as significant impediments to the "silent revolution" of radical inter-caste and interfaith marriages[22]. These barriers within the SMA procedure result in the reconstitution of patriarchal power structures, in which caste and community can exercise control over women's bodies. The experience of the SMA is thus rooted in the structural violence of law that couples have to contend with.

Indicating that the public notice of intention is dangerous, Vanita[23] argues that its public nature could lead to harassment in the case of subversive marriages, often, inter-caste or interfaith. The publication of such a notice attracts parental and familial intervention to prevent marriage. By raising "irrational" objections, families may easily deny two consenting adults the possibility of marriage[24]. Additionally, the publication of such notices can also result in a grave risk to the life of a partner, as it alerts "powerful members of their communities" who might

[20] *Ibid.*
[21] Beatrice Jauregui and Tara McGuinness "Inter-Community Marriage and Social Change in Contemporary India: Hybridity, Selectivity and Transnational Flows" 26:1 *Journal of South Asian Studies*, 72-79 (2003).
[22] Meena Dhanda, "Runaway Marriages: A Silent Revolution?" 47 *Economic and Political Weekly* 100 (2012).
[23] *Supra* note 5.
[24] *Supra* note 5 at 20.

consequently abduct and even kill[25]. It is in this regard, that Mody refers to the board of public notices as a "wall of infamy"[26].

The cacophony surrounding 'love jihad' has spurred organisations like the RSS, VHP and Bajrang Dal to examine the documentation regarding public notices of intended marriage[27]. The Kerala Registration website, for instance, carries several details of couples intending to marry under the SMA, which dictates that notices must be "open for inspection" and be available "conspicuously"[28]. This emphasis on disclosure has resulted in tragic consequences. By noting essential details including names, addresses and phone numbers, Hindutva organisations can easily access such information and alleged 'love jihad'. They often make use of such information, widely circulating the details of the couple on social media. In an instance in Kerala, RSS instigators plastered the details of an interfaith Hindu-Muslim couple on several social media platforms[29]. Moreover, it has been reported that the details of over 120 couples were leaked on social media from the Kerala Registration website[30]. Additionally, Lucknow based lawyer, Renu Mishra, suggested that it is routine practice to summon couples and their parents in the case of interfaith marriages to the police station and harass them[31]. This is easily done due to the easy availability of such information.

In the aftermath of Justice K. S. Puttaswamy v. Union of India[32], it is necessary to examine how these public notices make couples vulnerable by compelling their data to become public. A petition filed in the Supreme Court to remove the system of public notice from the SMA was responded to dismissively by Chief Justice Bobde, who declared that "[The] plea is that this is a violation of their privacy. But imagine if the wife or daughter runs away, why should they

[25] *Supra* note 5 at 20.
[26] Pervez Mody, "Love and the Law: Love-Marriage in Delhi" 36 *Modern Asian Studies* 243 (2002).
[27] Namita Bhandare and Surbhi Karwa, "How The Special Marriage Act Is Killing Love", *article 14,* October 19, 2020, available at < https://www.article-14.com/post/how-the-special-marriage-act-is-killing-love > (last visited on March 31 2021).
[28] Special Marriage Act, 1954 (Act No.43 of 1954), s.6.
[29] Shiba Kurian, "To Harass Hindu-Muslim Couples, Rightwing Activists Are Now Using Their Marriage Documents" *The Wire*, July 20, 2020, available at < https://thewire.in/communalism/hindu-muslim-couples-love-jihad-rightwing-marriage-notice > (last visited on March 31, 2021).
[30] *Id.* at 27.
[31] *Id.* at 27.
[32] (2017) 10 SCC 1.

(husband, father) not come to know?"[33]. The Chief Justice's statement points to the institutional apathy that both the SMA and courts embody. Embedded in caste and patriarchal structures of oppression, the SMA exposes vulnerable couples, through its procedural apparatus, to extreme forms of harm. Its ostensibly secular character unleashes the same unfreedom that it seeks to eradicate.

The stifling procedural apparatus of the SMA is evident in the fact that the practice of posting the intended notice of marriage to the homes of the couple was stopped through a court case only as late as 2018. In Kuldeep Singh Meena v. State of Raj and Ors, it was ruled that marriage officers need not dispatch notices to the residences of applicants who seek to solemnise their marriage under the SMA, as it would amount to a breach in privacy of the individuals[34].

The question of caste violence must be understood as an integral aspect regarding people's experiences of the SMA. Halder and Jaishankar[35] suggest that despite the existence of secular laws, court intervention into inter-caste marriages do not uphold the standards of individual freedom associated with the SMA. It is in this regard, that Kandaswamy[36] suggests that Indian courts dispense a 'caste justice'. In an instance in Tamil Nadu, the relationship between a dominant caste girl, Divya, and Dalit boy, Ilavarasan, resulted in the death of the Dalit, and the entire Dalit *basti* of the village was razed to the ground[37]. In another instance, a Dalit man, V. Shankar, was hacked to death after marrying a privileged caste woman, Kausalya. Additionally, in the criminal case against Kausalya's family, the Madras High Court acquitted Kausalya's father, the primary accused, of all charges[38]. This was in contrast with the judgement of the

[33] Samanwaya Rautray "SC issues notice to govt on petition requiring couples to give public notices before marrying across religions" *The Economic Times*, September 16, 2020, available at < https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-issues-notices-to-govt-on-petition-requiring-public-notices-from-couples-marrying-across-religions/articleshow/78153131.cms> (last visited on March 31 2021).

[34] 2018 SCC Online Raj 3469.

[35] Debarati Halder and Karuppannan Jaishankar, *Therapeutic Jurisprudence and Overcoming Violence Against Women*, 30-42 (IGI Global, Hershey, 2017).

[36] Meena Kandswamy, *No one Killed the Dalits,* Seventh Anuradha Ghandy Memorial Lecture, 2015, *available at* < https://www.youtube.com/watch?v=_jClj177b7k>.

[37] Vidhya Bhushan Rawat, "Ilavarsan's Death and the Ugly Face of Tamil nadu's Vanniyar Politics", *Countercurrents,* July 9, 2013, available at < https://www.countercurrents.org/rawat090713.htm > (last visited on March 31, 2021).

[38] *Ibid.*

lower court that had sentenced the primary accused to death. Kandaswamy argues that it is a regular practice of higher courts in India to acquit those involved in caste brutality and overturn the harsher sentences of lower courts. It is, therefore, necessary to problematise the secular institutions through which the SMA plays itself out, as its mechanisms, procedures and theatrics present a caste justice[39]. Arguing that the Madras High Court did not employ the use of "therapeutic justice" in the case of V Shankar, Halder and Jaishankar[40] argue that Court systems relying on the SMA do not sufficiently protect inter-caste couples and their autonomy and rights, instead of enabling a culture of social ostracization and honour killing.

In Lata Singh v State of UP [41], the Supreme Court acknowledged that parents need not approve of inter-caste unions. The Court further stated that parents "cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage"[42]. The Court further directed the administration and police authorities to ensure that "if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by anyone nor subjected to threats or acts of violence". By deflecting blame to the police, the Court seems to erase caste and patriarchal violence. Kandaswamy[43] suggests that in the incidents of caste atrocities, "the judiciary goes to great lengths to build an elaborate charade to ensure that its reputation is not sullied". The SMA and court, therefore, act as important ideological apparatuses for the Brahminical Indian state; at first glance, they do not seem patriarchal, but they are entrenched in those very structures.

LAW AS EVERYDAY PRACTICE

In his "Love Jurisdiction", Mody[44] argues that romance, relationships and rights are often intertwined through "legal statute, procedures and everyday practices". In his ethnographic research in the Delhi Courts, Mody witnessed that couples were often less inclined to go the

[39] *Supra* note 35.
[40] *Supra* note 34 at 31.
[41] (2006) 5 SCC 475.
[42] *Ibid.*
[43] *Supra* note 35.
[44] Perveez Mody, "Love Jurisdiction" 31 *Cambridge Journal of Anthropology* 40 (2013.)

SMA route, as the 30-day notice period made couples vulnerable. Court touts and marriage lawyers would lure such couples into fast-track two-day marriages, which is sanctioned under the HMA[45]. Mody comments on the ready availability of priests to perform quick, makeshift ceremonies for couples. Mody also calls attention to the irony of "Beware of Touts" signs hanging in the court premises[46]. In his interviews with several couples at the court, Mody illustrates that couples often described that they were getting a "court marriage" without explicitly referring to the law under which it had been made valid[47]. This illustrates how the SMA as an ideological vanguard for Indian multiculturalism is absent from the court space. The eagerness of legal actors to sidestep the SMA is, however, universes apart from its reconstitution and reproduction in courtrooms. For instance, in Mrs Valsamma Paul v. Cochin University and Others, the Supreme Court suggested that through the SMA "secularism would find its fruitful and solid base for an egalitarian social order under the Constitution"[48].

The provisions relating to residence as prescribed under Section 15 also places couples in a precarious position[49]. Mody observes how eloping couples, who would be in danger upon being traced are often compelled to offer friends' addresses. These additional procedurals often complicate the situation for couples. He notes how *havaldars* visiting a couple to ascertain their proof of residence has to be bribed for providing an attestation[50]. It was ruled in John Lukose v. District Registrar that under Section 16, the marriage certificate can be issued even before the expiry of 30 days in exceptional cases[51]. However, in a consequent ruling in Deepak Krishna v. District Registrar[52], it was held that the statutory period of 30 days was mandatory. In this regard, Agnes argues how the SMA does not award discretion to the Registrar of Marriages, often worsening the plight of couples[53]. In its everyday practice, therefore, the SMA is not a transformative radical law, and instead, is mired in the processes that constantly undermine it.

[45] *Id.* at 52.
[46] *Supra* note 26 at 241.
[47] Supra note 26 at 241.
[48] AIR 1996 SC 1011.
[49] *Supra* note 4 at s. 15.
[50] *Supra* note 26 at 244.
[51](2003) 6 KLJ 768.
[52] AIR 2007 Ker 257.
[53] *Supra* note 19 at 97.

CONCLUSION

In conclusion, the SMA presents itself as progressive legislation at the postcolonial moment, as it seeks to preserve marriage as a secular affair. However, at a closer glance, it is visible that the language of the SMA carries many of the patriarchal and communal undertones that it seeks to distance itself from. Moreover, in its procedural experience, the SMA poses several obstacles to couples, eroding its radical potential. The analysis of the SMA should therefore not only be limited to its idealistic construction but also include its everyday material contradictions. The everydayness of the SMA in turn, enables it to be problematised and understood as legislation located at the crossroads between several power structures.