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Guest Post: The Notice Regime under the Special Marriage Act

MAY 17, 2023 GAUTAM BHATIA 5 COMMENTS

[**Editor's Note**: The present editor is involved in the equal marriage case before the Supreme Court, in which judgment has been reserved. A part of the case included a challenge to the notice-and-objection regime under the Special Marriage Act. By way of disclosure, this guest post was submitted independently to the blog, through the normal submission channels, after arguments had concluded, and was reviewed and accepted in the same way.]

[This is a guest post by **Rehan Mathur**.]

The Supreme Court articulated its **disapproval** (https://www.livelaw.in/top-stories/same-sex-marriage-case-supreme-court-questions-special-marriage-act-provisions-on-notice-inviting-objections-226828) with respect to the notice regime under the Special Marriages Act ('SMA'), during the recently concluded same-sex marriage hearings. While this case may not be the specific case to adjudicate upon these provisions, the time is right to remove these provisions from the statute books given the advances in jurisprudence surrounding decisional autonomy. These provisions must be removed from the SMA if any recognition of same-sex relationships (whether under marriage or civil union) is to be of any real value given the social realities of oppression and violence faced by couples marrying under the Act, which have been well documented **here (https://www.thenewsminute.com/article/kerala-interfaith-couples-harassed-right-wing-vigilantes-using-marriage-notices-129053)** and **here** (https://www.article-14.com/post/how-the-special-marriage-act-is-killing-love).

Section 5 (https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00019_195443_1517807321908&sectionId=30163&sectionno=5&orderno=5) of the SMA requires parties intending to marry to give a notice in writing to the Marriage Officer of the district in which at least one party has resided for minimum 30 days immediately preceding the date on which the notice is given, while **Section 6** (https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00019_195443_1517807321908&orderno=6) mandates such a notice to be published at a 'conspicuous place' and allow any person desirous of inspecting such notice to do so at any time. Further, **Section 7** (https://www.indiacode.nic.in/show-data?

actid=AC_CEN_3_20_00019_195443_1517807321908&orderno=7) allows individuals to raise objections to the marriage within 30 days after the publication of the notice while **section 8** (https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00019_195443_1517807321908&orderno=8) empowers the marriage officer to stop the solemnization of such marriage if they uphold the objection.

For the purpose of the article, I analyse specifically sections 5-8 of the Special Marriages Act, by unpacking the legislative intent of the provisions and analysing the provisions as a whole to argue that the notice regime is violative of the Right to Privacy under Article 21. I conclude, that any recognition of same-sex relationships under the SMA must also be followed by removal of the notice regime under the SMA for such recognition to be of practical value.

Tracing the legislative history of Notice Requirements

The present SMA has been greatly influenced by Act III of 1872, which attempted to introduce civil marriage based on contract in India for those interested in marrying without the restraints of religion. This Act was heavily contested by the orthodoxy of the time. A prime example of this was that while one of the draft bills required a five-day residential period and permitted solemnisation five days after the publication of notice, the Act eventually included a residential requirement of 14 days in the district the marriage was to be registered before the submission of the notice, much like how presently section 5 stands. Similarly, such a 14-day period was to be observed after the publication of the notice after which the marriage could be solemnized.

Such an extension was put in to satisfy the orthodoxy who wished to give time to families before the marriage was solemnised to travel to the district where the notice of marriage was registered to put up their objections to the marriage. Clearly, this displayed the preference of the law to include the parents and by extension, society as stakeholders in the marriage. Such marriages of "choice" were viewed as ones which would, after the Act's passage promote unions whose foundation lay in lust and 'carnal desires' of men. The infusion of public morality in viewing the role of women in such marriages was clear as a binary was created. A "corrupt" woman would begin to live with their paramour as husband and wife on one hand while the other woman was the innocent, gullible, easily seduced one whose chastity had to be **protected** (https://www.jstor.org/stable/3876697).

Post independence, when the Special Marriage Bill, 1952 was introduced, some members of the Lok Sabha advocated for extending the residence requirement period to thirty days. The members **argued** (https://eparlib.nic.in/bitstream/123456789/55669/1/lsd_01_07_08-09-1954.pdf) that such an increase was necessary to prevent the runaway couple from getting themselves registered in an unknown place without adequate notice *to the parties who are really interested in the marriage*. This was clear legislative disapproval of so called 'run-away marriages.' This is reflected in Section 7 as well which allows 'any person' to object to the marriage on the ground that such marriage would contravene some conditions specified in section 4.

The present **section 6(3)** (https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00019_195443_1517807321908&orderno=6) was also a new section inserted in the Special Marriage Bill which got activated in situations where the notice given was in a district where neither party was permanently residing. In such a situation, the Marriage Officer has an obligation to transmit a copy of the notice to the Marriage Officer of the district the parties are permanent residents of. Such a copy must also be affixed on some conspicuous place. This provision ensured that the notice was sent to the home-town of the parties where it was easier for the families to find out and obstruct the intending couple from marrying.

All these additions clearly indicate the moral reprehensibility of Inter-faith marriages in the opinion of the state. Such marriages are viewed from a lens of public morality and other than the couple, the larger public was also a stakeholder and an interested party in the marriage. It is thus clear, that at the time of the passage of the SMA, the main intent for inserting the 30-day residence and objection requirement was

to give a notice to the general public and the families of the parties. However, the intent of keeping the notice regime has at present changed. The Union of India, in its **counter affidavit** (https://d2r2ijn7njrktv.cloudfront.net/IL/uploads/2021/02/11125119/NIDA-REHMAN-VS-STATE.pdf), in a plea challenging the 30-day public notice period in the Delhi High Court, argued that without the 30-day objection period, it would not be possible to verify the credibility of parties involved.

However, it is curious to note that such verification requirements are missing with respect to couples marrying under other laws. Thus, the question arises, why essentially is the state interested in verifying the credibility of only a certain type of couples? The answer seems to be the same, packaged in different wording. Even today, the state looks at inter-faith, inter-caste and possibly same-sex marriages with fear and thus, seeks to restrict them through the backdoor by continued application of such provisions.

Constitutionality of Sections 5-8: Violation of Right to Privacy?

Though made in the context of inter-caste marriages, Justice M. Katju in ***Lata Singh*** (https://indiankanoon.org/doc/1364215/) observed, that in a free and democratic country, a major can marry whomsoever they like. The maximum that disapproving parents can do is cut off ties with their wards, but they "*cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such inter-caste or inter-religious marriage.*" In ***Shakti Vahini*** (https://indiankanoon.org/doc/92846055/), while holding that the choice of an individual is an inextricable part of dignity, the court recognised the right to marry while giving primacy to the consent of the consenting adults. An erosion of such a liberty and choice, envisaged under the constitution could not be compatible with the dignity each individual possesses.

This position was buttressed in ***Shafin Jahan*** (https://indiankanoon.org/doc/18303067/), where the court held that the right to marry a person of one's choice was a fundamental right under Article 21. Since the Constitution protects the choice and ability of each individual to pursue their way or life, faith and matters of love and partnership are central to individual identity, society has no role to play in the determination of who consenting adults should marry. Since members of the LGBTQ community are equal citizens capable of enjoying the full range of constitutional rights including the liberties protected by the Constitution, as was recognized in ***Navtej Singh Johar*** (https://indiankanoon.org/doc/168671544/).

Similarly, decisional autonomy has also found a place within the scheme of Article 21 under the Right to Privacy. In ***Puttaswamy*** (https://indiankanoon.org/doc/91938676/), Justice Chadrachud concluded that "*privacy includes at its core, the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation.*" He observed further, though in the context of sexual orientation, certain rights were elevated to the pedestal of fundamental rights to protect their exercise from sanction of popular majorities, recognising how insular minorities face discrimination due to non-adherence of norms. Such a position also affirms how popular acceptance (or lack thereof) of same-sex marriages cannot in any way be a valid basis to disregard the couples' fundamental right to marry whoever they wish to. The reference to the term "popular majority" clearly displays the rejection of curtailing of decisional autonomy in the face of public morality.

It is clear that by requiring the marriage officer to publicly affix the notice of marriage under section 6 which in many situations leads to harassment, boycott and even threats to the life of the intending couple, is an unwarranted invasion of their privacy, in a matter that is extremely personal. By allowing *any person* to object to such a notice clearly violates the dictum of the Supreme Court in recognising the primacy of the intending couple to marry, allowing public morality and social approval to restrict the rights of the couple. These provisions force consenting adults to choose between two alternatives, their freedoms or the possibility of violence and repression. Such a choice is antithetical to the constitutional morality envisaged under article 21 which places the **individual at the centre** (https://indconlawphil.wordpress.com/2017/08/31/the-supreme-courts-right-to-privacy-judgment-v-privacy-and-decisional-autonomy/) and not society.

Limitations to the Right to Privacy

While it is established that the notice requirements violate the Right to privacy of couples, the central government has argued that the right to privacy can be restricted in the context of the SMA, under **social, moral and compelling public interest**. (https://d2r2ijn7njrktv.cloudfront.net/IL/uploads/2021/02/11125119/NIDA-REHMAN-VS-STATE.pdf) While it is true that even Article 21 can be restricted by the state, this test for restricting the Right to Privacy does not form a part of the plurality judgement in any case. However, reading **Justices Chadrachud and Kaul's judgements** (https://indiankanoon.org/doc/91938676/) reveals a four-fold stringent test to determine state intrusions into privacy. The test is as follows:

(i) The action must be sanctioned by law; (ii) The proposed action must be necessary in a democratic society for a legitimate aim; (iii) The extent of such interference must be proportionate to the need for such interference; (iv) There must be procedural guarantees against abuse of such interference."

Necessity & Legitimate Aim

In the plurality opinion of Justice Chandrachud, the requirements of a legitimate state aim are enunciated, which hold that the nature and content of the restriction imposing law must fall under Article 14 and should not suffer from manifest Arbitrariness. In **Shayara Bano** (https://indiankanoon.org/doc/115701246/), it was held that "manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle."

In differentiating marriages under the SMA and other personal laws, it is clear that there is no rational determining principle in light of each individual's right to marry on the basis of their choice. There appears to be no rationality in ghettoising couples marrying under the SMA who clearly do not meet the requirement of an '*intelligible differentia*'. Even if an *intelligible differentia* is made out, there is no a rational nexus in distinguishing between couples marrying under the SMA and other personal laws. Both types of couples possess the same decisional autonomy, yet couples under the other acts are not subject to notice requirements. Is there really any ground for differential treatment other than non-adherence to social norms?

As the history of the SMA has shown, the aim of the notice provisions is one which was designed to include the consent of third parties, who have no stake in the marriage and restrict the right to marry of the intending couple. In ***Satyawati Sharma*** (https://indiankanoon.org/doc/1703207/), the SC argued that a legislation could be struck down even if it subsequently became arbitrary or unreasonable. Even if it is assumed that the aim of the notice requirements at the time of enactment was reasonable, given the wide recognition of rights at present, the notice requirements must be deemed to be unreasonable and arbitrary to the extent they limit decisional autonomy of an individual. In the present day and age, such an aim is neither legitimate nor necessary in a democratic society as it clearly restricts decisional autonomy under the larger scheme of the Right to Privacy by prioritising social approval and discriminating against couples marrying under the SMA.

Proportionality Test

Arguendo notice requirements have a legitimate aim of checking the "creditability of the parties involved", the provisions of the SMA must meet the proportionality test which mandates that there must be a **rational nexus between the aim of the infringement and the means of achieving such an aim** (https://indconlawphil.wordpress.com/2017/09/01/the-supreme-courts-right-to-privacy-judgment-vi-limitations). The law must minimally infringe rights in this process. Alternatively, if it is established that the state can achieve its goals through a less intrusive method, the law would not be proportional.

It is clear that that there is dissonance between the aims of the provisions and the method adopted. How exactly is a marriage officer seeking to ascertain the veracity of the parties by the publication of a notice with all the private details of the couple? The Marriage Officer can easily ascertain the identity, residence

of couple by the documents submitted at the time of the registration. From the realities on ground, it is clear that a public notice is not used for any rational ascertainment but rather for disclosure of private details of the parties allowing others to disproportionately intervene in the marriage.

Conclusion

The history of the SMA reveals the inclusion of such sections in the Act to allow families and other members of society to object to and stop marriages which are seen to be deviant and invoke strong social disapproval. These provisions have had the intended effect of harassment of such couples, the non-solemnisation of their marriages and the state and society playing a greater role in determination of partners. The provisions of the SMA have consistently acted as impediments in special marriages by making the process of marriage more public, time-consuming and onerous for the intending couple.

All the arguments presented above apply to same-sex relationships as well which invoke strong social disapproval. Merely coming out, leave aside publicly declaring the intention to marry someone from the same sex in a society entrenched in patriarchal practices centred around family reputation and warped conceptions of honour is something extremely difficult for members of the LGBTQ community to do. Noting the experiences of other couples marrying under the SMA, reveals that continuing with the notice regime would leave same sex couples (individually and collectively) open to harassment, violence and ultimately non recognition of their relationships. This could take place either by sending marriage notices to the residential address of the couples by the police (a practice later **stopped** (https://indiankanoon.org/doc/26886784/) by the Delhi HC) or by being locked up in one's own home, requiring a ***Habeas Corpus*** (https://www.article-14.com/post/how-the-special-marriage-act-is-killing-love) petition to be filed to be free, or even being forced to publish the notice of their marriage in a **national newspaper (https://www.livelaw.in/procedure-adopted-in-marriage-registration-must-reflect-mindset-of-the-changed-times-in-a-secular-nation-promoting-inter-religion-marriages-punjab-haryana-hc-read-judgment/)**.

All these actions constitute arbitrary and unreasonable intrusions in an extremely private matter, unreasonably restricting the exercise of decisional autonomy and a possible recognition of same-sex relationships which could take place within the SMA. Unless the notice regime is done away with, any sort of recognition of same-sex relationships will be merely illusory in nature leaving same-sex couples exposed to violence from the family and pressure groups.
 DECISIONAL AUTONOMY, FAMILY LAW AND THE CONSTITUTION, NOTICE AND OBJECTION REGIME, PRIVACY, SAME-SEX MARRIAGE, SPECIAL MARRIAGE ACT

5 thoughts on "Guest Post: The Notice Regime under the Special Marriage Act"

1. **Indirect Discrimination and the Special Marriage Act | Law and Other Things** says:
   SEPTEMBER 21, 2023 AT 6:08 AM
   […] by the Puttaswamy judgement. While literature surrounding the provisions has also centred around a such a privacy challenge, I argue that the sections facilitate violence against a vulnerable group (inter-faith couples) […]

   REPLY
2. **The Supreme Court's Marriage Equality Judgment: Round-Up – Indian Constitutional Law and Philosophy** says:
   NOVEMBER 22, 2023 AT 7:05 AM
   […] The Notice Regime under the Special Marriage Act, by Rehan Mathur [May 17, 2023]. […]

   REPLY

3. **From society to authorities; Many battles of inter-faith couples – The Softcopy** says:
   MARCH 28, 2024 AT 4:34 PM
   […] to the Indian Constitutional Law and Philosophy, "Requiring the marriage officer to publicly affix the notice of marriage under section 6 which […]

   REPLY
4. **कैसे भारतीय कानून इंटरफेथ जोड़ों के लिए शादी करना असंभव बनाने की कोशिश कर रहा है - News.Compcode** says:
   FEBRUARY 18, 2025 AT 2:03 AM
   […] कानूनी विशेषज्ञ हैं आलोचना की अधिनियम के तहत शादी करने वाले जोड़ों की गोपनीयता के लिए मौलिक अधिकार का उल्लंघन करने के लिए 30-दिवसीय नोटिस अवधि की आवश्यकता। यह उनकी शादी को "अधिक सार्वजनिक, समय लेने वाली और इच्छुक युगल के लिए अधिक सार्वजनिक, समय लेने वाली और महत्वपूर्ण" को पंजीकृत करने की प्रक्रिया बनाता है, एक के अनुसार, एक के अनुसार समीक्षक। […]

   REPLY
5. **How Indian law is trying to make it impossible for interfaith couples to marry - ReadFeed.in** says:
   FEBRUARY 18, 2025 AT 3:03 AM
   […] Legal experts have criticised the 30-day notice period requirement for violating the fundamental right to privacy of couples marrying under the act. It makes the process of registering their marriage "more public, time-consuming and onerous for the intending couple", according to one critic. […]

   REPLY