



**SPECIAL MARRIAGE ACT; A  
BURDEN TO LIVE : A  
SOCIOLOGICAL  
INTERPRETATION**

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**Abstract**

Freedom of religion is a recognized fundamental right in India. Is this fundamental right being questioned after a woman's marriage? This Article draws attention to a relevant question of wife's presumption of religion in inter-caste marriage. The presumption of wife's religion to be that of her husband can be a forceful conversion of religion. This concept under certain personal laws is a violation of the constitutional guarantee that directly affects the basic structure of the Constitution. This study is highlighting the concept of fundamental rights and the conflict of this fundamental right under personal laws. It also analyses the fact that any such presumption will be vitiating the object of the beneficial legislation for inter-caste marriages and those personal laws restraining to continue the wife's religion would be affecting the basic structure of the Constitution. This issue raises a question of social importance. The incorporation of fundamental rights in all legislations gives utmost importance to human rights. Freedom of religion is one among the basic human right. But in real life the predominance of religious rulings makes the concept of fundamental rights into a question mark. The Special Marriage Act of 1954 is seen as a statutory alternative for couples who choose to retain their

identity in an inter-religious marriage. This weightage given to customary practices under personal laws is diluting the object of the Act. This is because the guiding factors of customary beliefs in India and this guiding factor is becoming the burden of Special Marriage Act. The veiled reason is that there is an indirect interference of religious institutions into the personal life of an individual. Such interferences must be curtailed for promoting the universally recognized principles of human life and also for promoting international peace and security in the nation.

**Introduction**

Freedom of religion is a recognized fundamental right in India. Is this fundamental right being questioned after a woman's marriage? A relevant question of wife's presumption of religion in inter-caste marriage arises. Sometimes the presumption of wife's religion to be that of her husband can be a forceful conversion of religion. This concept under certain personal laws is a violation of the constitutional guarantees that directly affects the basic structure of the Constitution. Any such presumption will be vitiating the object of the beneficial legislation for inter-caste marriages and those personal laws restraining to continue the wife's religion would be affecting the basic structure of the Constitution.

Currently the issue of a Parsi lady, married to a Hindu, was restrained from performing her last rituals to her father. The matter of discussion arises at this point. Though there is a beneficial legislation in India, Special Marriage Act,



1954 allowing the inter-caste marriage and Art.25 of Constitution of India, guaranteeing the Freedom of Religion, the personal laws here are having an overriding effect. This personal law deems the wife's religion to be that of her husband but the lady still like to be a Parsi. The contradictory fact is that unless and until a person voluntarily renounces his religion he continues to be in his original religion. But here the irony is that the wife has no choice rather than accepting her husband's religion. This issue raises a question of social importance.

The statement "A woman does not mortgage herself to a man after marriage" made by Chief Justice Dipak Misra in the Parsi lady and Hindu man marriage issue raises the question of social importance.

### Concept of Fundamental Rights

The concept of human rights can be traced to the natural law philosophers, such as Locke and Rousseau<sup>1</sup>. According to Locke, man is born "with a title to perfect freedom and an uncontrolled freedom of all the rights and privileges of the law of nature."<sup>2</sup>

1. M.P.Jain, Indian Constitutional Law, 2014, p-846
2. ibid

*The right that cannot be taken away by an ordinary procedure or legislation is known as fundamental right. The Constitutional documents of all legislations and International recognition of fundamental rights arose from the doctrine of natural law and natural rights.*<sup>3</sup>. Thus the concept of fundamental

right give a prominent place both nationally and internationally. The recognition of fundamental rights as a constitutional guarantee was first drafted in U.S. Constitution in 1787<sup>4</sup>. As a result, the Bill of Rights, 1791 was incorporated in the U.S Constitution.<sup>5</sup> This concept has been emphasized by Justice Jackson in *West Virginia State Board of Education v. Barnette*<sup>6</sup> he had described fundamental rights like right to life, liberty, and property, free speech, free press, freedom of worship and assembly may not be subjected to vote as these rights are not a result of any election. This view shows that the fundamental rights are inalienable.

In 1948 The United Nations Organization had adopted the Universal Declaration of Human Rights. In 1950 The Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms. Based on this European Convention the British Parliament in 1998 had enacted the Human Rights Act.

The purpose of the Act was to give effect to the rights and freedoms guaranteed under the European Convention on Human Rights.<sup>7</sup>

This incorporation of fundamental rights in all legislations gives utmost importance to human rights. Freedom of religion is one among the basic human right. But in real life the predominance of religious rulings makes the concept of fundamental rights into a question mark. The choice of a life partner from other religion by a woman does not mean her relinquishment of customary practices.



Any such restraint will be a violation of the basic human right. The presumption of religion after marriage is only applicable to a woman. This leads to discrimination and inequality. Such practices are against the basic human rights.

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3. *ibid* FN1
  4. *ibid*
  5. *ibid*
  - 6.319 U.S.624
  7. *ibid* FN1

### Indian Socio and legal Scenario

India is a secular country. The concept of fundamental rights plays a significant role. The freedom of religion is guaranteed under Articles.25 to 28 of the Constitution of India. Art25 (1) guarantees the right to freely practice a religion. As the concept of fundamental rights is an internationally recognized principle, whenever there arises a conflict in these rights the Supreme Court of India looks into the United Nations Declaration of Human Rights. There are several landmark cases<sup>8</sup> where the Supreme Court has frequently drawn attention to define the scope and content of fundamental rights in India<sup>9</sup>. This reference of Indian courts shows the due importance given to the fundamental rights

The relevance of these references shows that the presumption of wife's religion in inter-caste marriage to that of her husband is against the existing recognized legal regimes. There is no such regime that prescribes this presumption in Indian Constitution, thus it leads to a controversial issue of social importance. The object of Special

marriage Act, 1954 was to simplify the marriages and give a permanent record of marriage. The Act does not put a bar on religion but recognizes the customary practices under personal laws. This weightage given to customary practices under personal laws is diluting the object of the Act.

Currently the relevance of Parsi lady marriage issue comes into highlight because of this shortfall in the Act. The issue of the Parsi lady, married to a Hindu, was restrained from performing her last rituals to her father on the ground that she was inter married. This violates her fundamental right to: choice, life, religion, equality, and not to be discriminated. These violations are directly questioning the Preamble of the Constitution. The matter of discussion arises at this point. To overcome this issue there is a beneficial legislation, Special Marriage Act, 1954 allowing the inter-caste marriage and Constitutional guarantee under Art.25 guaranteeing the Freedom of Religion, but these legislations are thorned with the personal laws. The personal laws here are

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8. *Maneka Gandhi v. Union of India*, AIR 1978 SC 597. Also in *Vishaka v. State of Rajasthan*, (1997) AIR SCW 3043, *Peoples Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301
  9. *Supra* FN 1

having an overriding effect on these legislations. When the lady likes to retain her religion the personal law deems the wife's religion to be that of her husband. The contradictory fact is that, as per the Constitutional right, unless and until a



person voluntarily renounces his/her religion he/she continues to be in his/ her original religion. But here the irony is that the woman has no choice rather than accepting her husband's religion and this rule is not applicable to men. This is a matter to be debated and addressed in large format and come to the consent on right and equality as the modern society is in fight for social justice.

The pointing statement by Chief Justice Dipak Misra "A woman does not mortgage herself to a man after marriage"<sup>10</sup> highly draws the attention of the State to resolve this social issue. The social issue is that the burden of recognition of customary practices under Special Marriage Act.

The Special Marriage Act of 1954 is seen as a statutory alternative for couples who choose to retain their identity in an inter-religious marriage.

"Special Marriage Act confers in her the right of choice. Her choice is sacred. I ask myself a question: Who can take away the religious identity of a woman? The answer is only a woman can choose to curtail her own identity," Chief Justice Misra said on the first day of hearing of a petition filed by a Parsi, who was barred by her community from offering prayers to her dead in the Tower of Silence for the sole reason that she married a Hindu under the Special Marriage Act<sup>11</sup>

Nobody could presume that a woman has changed her faith or religion just because she chose to change her name after marrying outside her community, the Chief Justice observed.<sup>12</sup>

The Indian society has a culture of giving prime importance to their religious and cultural practices. The Constitution guarantees the Equality, Justice and Liberty as its basic structure but these basic features are at times seen impossible. This is because the guiding factors of

10 Reported in The Hindu on Dec 7, 2017

11. ibid

12. ibid

customary beliefs in India and this guiding factor is becoming the burden of Special Marriage Act. The veiled reason is that there is an indirect interference of religious institutions into the personal life of an individual. Such interferences must be curtailed for promoting the universally recognized principles of human life and also for promoting international peace and security in the nation.

The resultant issue of religious practices is the discrimination of practices applied between women and men. Unfortunately even in the present social scenario of India only women are subjected to all religious taboos and restrictions. This leads to discrimination of women on the basis of religion, custom, equity and violation of equality principle. The amazing fact is that these same restrictions are seen to be changing with people and controversies. If such a change can be brought in one case then it can be observed as a general practice. The only requirement for this social change is the mind to accept the need for social justice and the place for women in the society. The abolition of the customary practices like sati, dowry system and such



other practices that were discarding the rights of women are evident recognition of her status in the society. The addressing of our nation as 'Mother Nation' pin points the place given to a women in the society. In such a country, where the nation itself is addressed as Mother, such discrimination to this magnitude is against the ideology of the nation. The age old such customary practices, which are restrictive and discriminative in nature must be strictly curbed from the interference into the objects of legislations. All men are born equal to exercise their own rights .This must be an underlying principle of every religious practices.

### Conclusion

The customary beliefs and practices are essential for an organized living. These practices were followed for personal liberty and well-being of an individual .The concept of fundamental rights also emphasize this organized living. The Constitution guarantees the Equality, Justice and Liberty as its basic structure but these basic features are at times seen impossible. This is because the guiding factors of customary beliefs in India and this guiding factor is becoming the burden of Special Marriage Act. Such interferences must be curtailed for promoting the universally recognized principles of human life and also for promoting international peace and security in the nation. All men are born equal to exercise their own rights .This must be an underlying principle of every religious practices. Therefore the restrictive and discriminative nature of customary practices must be strictly curbed from the interference into the

objects of legislations for enforcing the view of social justice in all angles of the society.

### REFERENCES

- 1.M.P.Jain,Indian Constitutional Law,7<sup>th</sup> edition, Lexis Nexis, 2014
2. The Hindu, Trivandrum edition, Dec 7 2017

