TITLE:

NAVIGATING DISCRIMINATION AND AGENCY: HURDLES TO INTERFAITH MARRIAGES IN SECULAR INDIA

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ABSTRACT

This socio-legal study aims to understand the legal framework on interfaith marriages in India. In India, despite its secular identity, integrating religious diversity into society poses challenges. Article 25 of the Indian Constitution guarantees freedom of religion. Dr. Ambedkar highlighted marriage as a crucial means of fostering communal ties in the context of caste. The right to marry though is not explicitly mentioned in the Constitution, but has been read into it by the Supreme Court under various case laws. However, interfaith marriages face unique obstacles, with two primary options: registration under the Special Marriage Act or conversion to one party's religion. The former requires a public notice, making couples vulnerable to extremist scrutiny and potential honour killings, while conversion has become difficult due to anti-conversion laws.

Anti-conversion legislations in various states complicate matters, deeming conversions for marriage unlawful. These laws place a reverse burden of proof on the accused (husband) to demonstrate the conversion's consensual nature and takes away the voice from the woman. Such regulations infringe on women's agency, as the burden shifts from men to prove a woman's willingness to the conversion. This also challenges established patriarchal norms where women typically adopt their husband's name or religion.

The absence of a framework similar to interfaith marriages for intra-religious marriages highlights discrimination. While India is a party to the International Covenant on Civil and Political Rights (ICCPR), which recognizes the right to marry without discrimination, domestic practices contradict these international standards. The conflict between anti-conversion laws and human rights, particularly freedom of religion and women's agency, underscores the need for a re-evaluation of domestic legislation to align with global principles of non-discrimination and equal rights.

Keywords: Interfaith Marriage, Conversion, Anti-conversion laws, Agency, Discrimination

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LIST OF ABBREVIATIONS

ACRONYM	ABBREVIATION
Art	Article
CEDAW	Convention on the Elimination of All forms of Discrimination Against Women
ICCPR	International Covenant on Civil and Political Rights
OBC	Other Backward Castes
s.	section
SC	Scheduled Caste
SMA	Special Marriage Act, 1954
ST	Scheduled Tribe
UCC	Uniform Civil Code
UDHR	Universal Declaration on Human Rights

CHAPTER I

UNDERSTANDING THE SPECIAL MARRIAGE ACT

1.1. INTRODUCTION

The institution of marriage is considered to be one of the most sacred bonds in India. As a traditional society, marriage holds immense importance across South Asia in general, and particularly India. As one of only two secular countries in South Asia (the other being Nepal), India is home to several religions and sects. As per the 2011 census, Hindus constitute about 79.8% of the population, followed by Muslims, 14. 2%, and the remaining 6% is constituted by Jains, Christians, Sikhs, Buddhists, Jews, and Parsis.[1] While Hindus evidently constitute the majority, when it comes to the conduct of personal affairs, there are personal or religious laws for each of these religious groups that deal with issues pertaining to marriage, divorce, adoption, maintenance, etc. However, there are also some secular legislations, pertaining to these areas, and they can be made use of voluntarily by anyone, regardless of their religious affiliation, such as the Special Marriage Act, 1954, the Indian Divorce Act, 1869, the Indian Succession Act, 1925, and the Juvenile Justice (Care and Protection of Children) Act, 2015. Under these statutes, anyone can register their marriage, get divorced, inherit property, and adopt children respectively. As the focus of the thesis is on marriage, the discussion shall be on laws pertaining to marriage between people from different religions. The current chapter focuses on providing a history of and the contemporary legislation on civil marriage laws in India, called the Special Marriage Act. The second chapter deals with the various anti-conversion laws that different states in India have come up with, and how they have hindered solemnizing marriages even when conversion took place with consent. The third chapter talks about international law on interfaith marriages and explores the debate between universalism

[1] 'RGI Releases Census 2011 Data on Population by Religious Communities' <https://pib.gov.in/newsite/printrelease.aspx?relid=126326> accessed 11 June 2024. Note- 2021 census could not be done due to the covid 19 pandemic and has been pending since.

and cultural relativism. The fourth chapter provides the stance of the Indian Supreme Court on the right to marry a partner of one's choice. It also talks about the challenges that interfaith couples face not just by their families and vigilante groups, but also by the lower judiciary and how the Supreme Court has time and again come to the rescue of such couples by upholding Constitutional values. The fifth chapter delves into the scholarly debate surrounding agency of women, as the entire societal structure, right from socialization of women to the anti-conversion laws, all work together to restrict women's autonomy. The sixth and the last chapter finally provides a conclusion, including an analysis of the laws and their impact, and the way forward.

1.2. A Brief History And The Issues Associated with the Special Marriage Act, 1954

Inter-faith marriages as such are not prohibited or banned in India. However, there exists a hurdle because of the legal framework in place. This legal framework implies that the right for consenting adults of different religions to marry isn't absolute. Even with mutual consent, the laws introduce hurdles and scrutiny, suggesting that marriage across religions may still face legal challenges and restrictions. There are two options for interfaith marriages. Marriage between individuals from different religions can either be solemnized under the Special Marriages Act, 1954, or as per the customary norm, if woman converts to the religion of the man, marriage takes place under the personal laws. The Special Marriage Act, 1954 (hereinafter SMA) was enacted in the aftermath of independence. During the passage of the bill, Members of Parliament had raised concerns regarding the substance of the Act. For the first time, a law was being introduced which would legalize and govern marriages between parties regardless of their caste and faith. Such a big step was seen as an erosion to the traditional practices of an

orthodox society.[2] SMA, 1954 had repealed the earlier SMA of 1872. Under the 1872 Act, if a person intended to marry, they were required to renounce the religion in which they were born into. In other words, it was not applicable if one was a practising Hindu, Muslim, Sikh, Jain, etc. Renunciation of religion to solemnize marriage was required by the law.[3] However, an amendment was made to the Act in 1922 to remove this clause on renunciation. When the Special Marriage Bill was introduced, in spite of the 1922 amendment to the SMA of 1872, some members of the Parliament were unhappy with the thought that marriages involving people from different castes and religion were being given legal recognition.[4] Some also saw this as being against Hinduism and were vehemently opposed to the adoption of such a law.[5] The SMA 1954 was adopted against this background. To satisfy some of the concerns of those opposing the Act, a clause on notification was made a part of it.

Sections 5, 6, and 7 of SMA 1954 have been of immense scrutiny and concern amongst human rights activists. As per section 5, the couple intending to get married is required to furnish a notice about the intended marriage to the "*the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given*".[6] As per clause 1 of Section 6, the Marriage Officer is required to keep a record of these notices in a Marriage Notice Book which can be looked into and examined "*by any person desirous of inspecting the same*"[7] free of charge. As per clause 1 of Section 7, the intended marriage can be objected to by any person within 30 days of furnishing of the notice of marriage on the grounds laid down in section 4 of

[2] 'Discussion on Special Marriage Bill 1952, Commission of Inquiry Bill, 1952, Rajya Sabha Debate' <https://rsdebate.nic.in/bitstream/123456789/590532/1/PD_01_07081952_33_p3267_p3284_4.pdf> accessed 11 June 2024.
[3] Nandini Chatterjee, 'English Law, Brahmo Marriage, and the Problem of Religious Difference: Civil Marriage Laws in Britain and India' (2010) 52 Comparative Studies in Society and History 524.
[4] Discussion on Special Marriage Bill 1952, Supra (n 2)
[5] Chatterjee (n 3).
[6] Special Marriage Act, 1954, s5
[7] Ibid, s6

the Act which provides for preconditions required for a valid marriage under SMA. As per Section 4 of SMA, neither of the parties to the marriage should already be having a living spouse, or be in prohibited degree of relationship, there should be free consent from both sides, the consent should not be vitiated by bouts of insanity, and the male should at least be 21 years of age, while females should be 18 years of age

These three provisions together have raised concerns about the privacy and safety of the couple intending to get married. Honor killings have long been associated with the SMA as personal details about the couple, including their address, age, occupation are required to be mentioned in the notice that is put up for public display and available for anyone to be scrutinized.[8] As a lot of marriages that transgress boundaries of religion and caste are "runaway marriages"[9] taking place without the approval of families, the clause on notice is used by family members to kidnap the parties to the marriage, and also misused by vigilante groups.[10] In 2010, the then Government had unsuccessfully tried to amend the provisions of SMA to remove the requirement of the 30-day notice period and to introduce a law on honour killings so as to recognize it as a separate and specific crime.[11] The menace is strongly felt in north Indian states of Punjab, Haryana, and Uttar Pradesh[12] with presence of bodies in the nature of Kangaroo

[8] 'Kerala Interfaith Couples Harassed by Right Wing Vigilantes Using Marriage Notices' <https://www.thenewsminute.com/kerala/kerala-interfaith-couples-harassed-right-wing-vigilantes-using-marriage-notices-129053> accessed 30 March 2024.
[9] '"Love Looks Not With the Eyes, But With the Mind": HC Comes to the Rescue of a Runaway Couple' (*The Wire*) <https://thewire.in/law/love-looks-not-with-the-eyes-but-with-the-mind-hc-comes-to-the-rescue-of-a-runaway-couple> accessed 11 June 2024.
[10] Gautam Bhatia, 'Guest Post: The Notice Regime under the Special Marriage Act' (*Indian Constitutional Law and Philosophy*, 17 May 2023) <https://indconlawphil.wordpress.com/2023/05/17/guest-post-the-notice-regime-under-the-special-marriage-act/> accessed 30 March 2024.
[11] 'Govt Planning to Amend Laws to Rein in Honour Killings: Moily - The Economic Times' <https://economictimes.indiatimes.com/news/politics-and-nation/govt-planning-to-amend-laws-to-rein-in-honour-killings-moily/articleshow/6099192.cms?from=mdr> accessed 30 March 2024.
[12] Ashwini M Sripad, 'Killing Honour in the Name of "Honour Killings"' (*The New Indian Express*, 4 September 2023) <https://www.newindianexpress.com/states/karnataka/2023/Sep/04/killing-honour-in-the-name-of-honour-killings-2611437.html> accessed 30 March 2024.

Courts like khap panchayats that order and promote such killings.[13] However, this does not mean that such cases are not occurring in rest of the regions of India.

During the hearing of petition on marriage equality[14], where the Supreme Court refused to recognize same-sex marriage, SMA provisions were also under scrutiny and the Court remarked that provisions of SMA had been abused by society at large to harass inter-caste and inter-faith couples.[15] However, as the question before the Court was not related to constitutional validity of these provisions, the Court could not strike them down. The provisions have been deemed to be archaic, patriarchal, and outdated in today's time.[16] While the Supreme Court could not comment on the constitutional validity of SMA, the Allahabad High Court, in 2021, held the publication of notice clause under section 6 and the raising of objections by any person under section 7 to be directory and not a mandate that needs to be strictly followed.[17] The said case presents the very problem that the paper intends to highlight about the framework of marriage legislations in India. The Petitioner in that case had converted to the religion of her husband as solemnizing marriage under SMA would require them to furnish a notice about their intended marriage and would alert extremist groups and their respective families leading to undue interference.[18] However, even if one converts so as to avoid the application of SMA, problems still persist, which will be explored in the next chapter.

[13] 'Love In The Crosshairs: Honour Killings Still Continue In India' (*Outlook India*, 15 January 2022) <https://www.outlookindia.com/national/india-news-love-in-the-crosshairs-honour-killings-still-continue-in-india-news-305349> accessed 30 March 2024.
[14] Supriyo @ Supriya Chakraborty & Anr. v Union of India. Citation: 2023 INSC 920
[15] Krishnadas Rajagopal, 'Supreme Court Slams Sections of Special Marriage Act Requiring Prior Notice' *The Hindu* (20 April 2023) <https://www.thehindu.com/news/national/open-notice-of-intent-to-marry-under-special-marriage-act-is-an-invasion-into-privacy-of-couples-reeks-of-patriarchy-sc/article66760460.ece> accessed 30 March 2024.
[16] Ibid.
[17] Safiya Sultana Thru. Husband Abhishek Kumar Pandey and Anr. v. State of U.P. Thru. Secy. Home, Lko. and ors. 2021 SCC OnLine All 19
[18] Omar Rashid, 'Publication of Notice under Special Marriage Act Optional; Mandatory Notice Invades Privacy: Allahabad HC' *The Hindu* (13 January 2021) <https://www.thehindu.com/news/national/publication-of-notice-under-special-marriage-act-optional-mandatory-notice-invades-privacy-allahabad-hc/article33569377.ece> accessed 30 March 2024.

CHAPTER II

INTERFAITH MARRIAGES AND ANTI-CONVERSION LAWS

Since India gained independence in 1947, there have been several attempts at legislating anti-conversion laws at the national level.[19] While Article 25 of the Indian Constitution guarantees freedom of religion to all persons, the topic of conversions has always been a concern amongst law enforcement and the common people alike. Article 25 is titled as "Freedom of conscience and free profession, practice and propagation of religion".[20] The word "propagate" has been of an issue when it comes to conversion. While there is no doubt that forced conversions are banned,[21] when it comes to conversion through consent, it is believed that propagating religious views is intrinsically linked to it. The Supreme Court had held that the word "propagate" does not include the right to conversion. However, the said judgment was in light of forced conversions.[22]

2.1. PASSING OF ANTI-CONVERSION LAWS

As India does not have a nationwide statute on the matter, law and order being a state subject[23], various states have come up with their own anti-conversion laws. Previously, there were bills that were unsuccessfully introduced at the national level, that were targeted at preventing forced conversions of people belonging to marginalized caste groups like the scheduled caste (SC), scheduled tribe (ST), and the other backward castes (OBCs).[24] There was a fear amongst some

[19] 'Anti-Conversion Laws in India: How States Deal with Religious Conversion' (*India Today*) <https://www.indiatoday.in/news-analysis/story/anti-conversion-laws-in-india-states-religious-conversion-1752402-2020-12-23> accessed 30 March 2024.
[20] Constitution of India, 1950
[21] Rev. Stanislaus v. State of Madhya Pradesh 1977 SCR (2) 611
[22] Business Standard, 'Anti-Conversion Law: What It Is and How Various States Implement It' (6 June 2023) <https://www.business-standard.com/india-news/anti-conversion-law-what-it-is-and-how-various-states-implement-it-123060600648_1.html> accessed 30 March 2024.
[23] Constitution of India, Seventh Sched., http://lawmin.nic.in/olwing/coi/coi-english/coi-4March2016.pdf, archived at https://perma.cc/H8TF-SAVH. Accessed 11 June 2024
[24] 'Acts of Violence? Anti-Conversion Laws in India' <https://journals.sagepub.com/doi/epdf/10.1177/09646639241251613> accessed 8 June 2024. Pg 6

politicians and lawmakers, that by converting people from marginalized groups, the population of minority religions would outnumber the majority, which prompted them to propose these bills. The bill explicitly stated that its aim was to prevent "Hindus from converting to non-Indian religions", hinting at the belief that every other religion apart from Hinduism would be looked at as foreign, and therefore people professing those religion (the minority communities) would also be seen as less than Indian.[25] However, they could not gain support. There were also attempts to bring about a law to put check on missionary activities, such as the Indian Conversion (Regulation and Registration) Bill that had provisions for registration of license for the purpose of conversions. This too could not gain support.[26] The Freedom of Religion Acts were enacted after politicians in states where right wing parties head the government started speaking against conspiracies by Muslim men to lure Hindu women through forced and fraudulent conversions, or what is colloquially called "love jihad".[27] It is important to note that interfaith marriages, first of all are not that common. As per one of the studies which made use of the data provide by the third round of the National Family Health Survey, it was found that interfaith marriages constitute a minuscule 2%.[28] [29] Inter caste marriages are also not as common as per data.[30] In spite of this, there is a law that imposes such restrictions on such marriages, and provides for unnecessary state interference into the lives of individuals.

[25] Ibid
[26] Ibid
[27] Lauren Frayer, 'In India, Boy Meets Girl, Proposes — and Gets Accused of Jihad' *NPR* (10 October 2021) <https://www.npr.org/2021/10/10/1041105988/india-muslim-hindu-interfaith-wedding-conversion> accessed 30 March 2024.
[28] K Das and others, 'Dynamics of Inter-Religious and Inter-Caste Marriages in India' (2010) <https://www.semanticscholar.org/paper/Dynamics-of-inter-religious-and-inter-caste-in-Das-Das/e34180005b2f0f467c364c31632a1b18c4d0c8d7> accessed 13 June 2024.
[29] 'Love Jihad: The Indian Law Threatening Interfaith Love' (8 December 2020) <https://www.bbc.com/news/world-asia-india-55158684> accessed 30 March 2024.
[30] 'Inter-Caste Marriage Data and Deceptive Virality of Social Media Posts' (*The Satyashodhak*, 18 September 2023) <https://thesatyashodhak.com/inter-caste-marriage-data-and-deceptive-virality-of-social-media-posts/> accessed 30 March 2024.

2.2. IMPACT ON MARRIAGES

Odisha was one of the first states to pass such an anti-conversion bill in 1968. Originally, this law aimed to prevent and punish forced and fraudulent conversions. While the intent behind anti-conversion laws was to prevent forceful and fraudulent conversions, in recent years these laws have also started to focus on conversions that take place for marriage.[31] These legislations at present have been criticised for targeting minority communities. Over the course of years, several states, such as Gujarat, Uttar Pradesh, Karnataka, etc, have come up with their own anti-conversion laws, or as they are called "Freedom of religion Act/ Prohibition of Unlawful Conversion of Religion".[32] These laws have started to focus on the issue of conversion that takes place during marriage. Various states have passed laws with similar features regarding religious conversions. One common requirement is giving a 60-day notice to the District Magistrate before converting to another religion.[33] In some states, like Haryana, there is a public hearing where people can raise objections to the planned conversion. These laws make it illegal and a criminal offense to convert for the sake of marriage. They also place the burden of proof on the accused, meaning the person accused (husband) must prove the conversion wasn't just for marriage.[34] Forcible conversions as such involve a sentence of one year or a fine of Rs. 5,000, and where it involves converting women, minors, or people from SC/ST communities, the punishment is for two years or a fine of Rs. 10,000.[35] Furthermore, the laws allow "any aggrieved person" or "relative" to file a complaint if they believe the conversion is for marriage. However, converting back to one's previous religion is not considered illegal under these laws. This framework aims to regulate conversions and ensure they are genuine

[31] 'Acts of Violence? Anti-Conversion Laws in India' (n 24).
[32] Tariq Ahmad, 'State Anti-Conversion Laws in India'. <https://tile.loc.gov/storage-services/service/ll/llglrd/2018298841/2018298841.pdf> accessed 11 June 2024
[33] zahid maniyar, 'SC Issues Notice to 5 States in CJP's Renewed Challenge to Anti-Conversion Laws' (*CJP*, 4 February 2023) <https://cjp.org.in/sc-issues-notice-to-5-states-in-cjps-renewed-challenge-to-anti-conversion-laws/> accessed 30 March 2024.
[34] Ibid.
[35] Ahmad (n 32).

and not done for marital reasons, adding several layers of oversight and legal scrutiny to the process.[36] The offence under these Acts is non-bailable and cognizable, i.e., arrest can be made by the police without a warrant. There is a presumption against the validity of these conversions, as they are deemed to be unlawful since inception, and only once the accused is able to prove that the conversion was not forced, the conversion is held valid. The Act passed by the state of Gujarat has been stayed by the High Court on the grounds that it interfered with individual choices pertaining to marriage and violated Article 21 (Protection of life and personal liberty) of the Indian Constitution.[37] The High Court relied on the case of Shafin Jahan (which will be discussed later) in which while discussing about the importance of right to choice of partner, the Supreme Court explained that,

> "Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty……. The Constitution protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. The law may regulate (subject to constitutional compliance) the conditions of a valid marriage, as it may regulate the situations in which a marital tie can be ended or annulled. These remedies are available to parties to a marriage for it is they who decide best on whether they should accept each other into a marital tie or continue in that relationship. Society has no role to play in determining our choice of partners."[38]

The stay has subsequently been challenged by the Government of Gujarat before the Supreme Court.[39] While the Supreme Court refused to put a stay on the operation of all these

[36] maniyar (n 33).
[37] State of Gujarat vs Jamia Ulama-E-Hind Gujarat and others R/SPECIAL CIVIL APPLICATION NO. 10304 of 2021 With R/SPECIAL CIVIL APPLICATION NO. 10305 of 2021
[38] Shafin Jahan v. Asokan KM 16 SCC 368
[39] Ashish Tripathi, DHNS, 'HC Frustrated Provisions of 2003 Conversion Law by Stay Orders, Gujarat Tells SC' (*Deccan Herald*) <https://www.deccanherald.com/india/hc-frustrated-provisions-of-2003-conversion-law-by-stay-orders-gujarat-tells-sc-1168161.html> accessed 30 March 2024.

laws,[40] the constitutional validity of all of these state laws has been challenged before the Supreme Court and the matter is now sub-judice.[41]

These laws are often invoked by relatives of interfaith couples who elope and seek to convert willingly. These provisions have been reported to have been misused in cases of interfaith marriages, where women willingly convert to the religion of their husbands to solemnize their marriage under personal laws. There have also been instances of complaints being filed by extremist groups that have no stake in personal affairs of interfaith couples,[42] as the locus standi under these legislations is extremely wide and can hence be misused. This has naturally created a feeling of fear and anxiety amongst interfaith couples[43] as the law does not seem to be favouring either marriages where there is no requirement of conversion (SMA), or when conversion takes place willingly.

This leads to a question of why are such laws and regulations even required in a secular state? While forced conversions definitely need to be curbed, there is no data that supports the statement that forced conversions per se are on the rise and that Hindus, especially Hindu women, are targeted by minority religions like Islam and Christianity through deceitful means. Without specific data, statements made by politicians seem mere conjecture over which broadly-worded legislations have been drafted.

[40] 'Supreme Court Refuses to Stay Anti-Conversion Law, Issues Notices to UP and Uttarakhand Govts – Firstpost' <https://www.firstpost.com/india/supreme-court-refuses-to-stay-anti-conversion-law-issues-notices-to-up-and-uttarakhand-govts-9176501.html> accessed 30 March 2024.
[41] Note 17 ; Citizens for Justice and Peace vs Union of India | WRIT PETITION (CRIMINAL) No. 14 of 2023
[42] 'Hindutva Groups Are Misusing UP's Anti-Conversion Law, As Police Register Cases With No Legal Standing' <https://article-14.com/post/hindutva-groups-are-misusing-up-s-anti-conversion-law-as-police-register-cases-with-no-legal-standing--65260e4c5987e> accessed 30 March 2024.
[43] '"Number Of Hindu-Muslim Couples Seeking Help To Get Married Has Fallen. Such Is The Fear"' <https://article-14.com/post/-number-of-hindu-muslim-couples-seeking-help-to-get-married-has-fallen-such-is-the-fear--63b4e512cf35f> accessed 30 March 2024.

CHAPTER III

INTERNATIONAL LAW ON INTERFAITH MARRIAGES

The anti-conversion laws have attracted criticism from the international community too, including the United Nations. In 2022, the Special Rapporteur for Freedom of Religion, and Rapporteur for Minority issues wrote a letter to the Indian government addressing their concerns on the anti-conversion laws and calling them "tool of persecution".[44] The Government failed to respond to the letter and thereafter the letter was made public. While the letter does not mention the impact of these laws on interfaith marriages particularly, it does highlight that these laws have stigmatized the religious minorities.

International Conventions

3.1. TREATY OBLIGATIONS CONCERNING MARRIAGE LAWS

What are the standards set by international human rights law on interfaith marriage? Firstly, at the outset, it is to be borne in mind that India has not made any reservations on the below mentioned Articles.[45] Article 16 of the Universal Declaration of Human Rights (UDHR) guarantees "without any limitation due to race, nationality or religion, have the right to marry and to found a family".[46] Article 23 (Protection of family) of the International Covenant on Civil and Political Rights (ICCPR) also provides for similar guarantees. Both these Articles only have "marriageable age" and "consent" as requirements to solemnize marriage and explicitly state that religion, inter alia, cannot be a ground for denying the right to marry. Apart

[44] 'Indian Government Warned by UN That Anti-Conversion Laws Are a "Tool for Persecution"' <https://www.opendoorsuk.org/news/latest-news/india-letter-conversionlaws/> accessed 19 May 2024.
[45] List of Reservations, 'United Nations Treaty Collection' <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en> accessed 30 May 2024.
[46] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Art. 16

from this, Article 18 of both the UDHR and the ICCPR (Freedom of thought, conscience, and religion) provide for freedom of religion, which includes freedom to change one's religion as well. At the same time, there is also a provision that protects individuals from forceful conversions.[47] While forceful conversion is a violation of Article 18, conversion that is not forced upon is protected. The anti-conversion laws, such as the one that Uttar Pradesh has adopted require that the person intending to convert for any purpose, and not just marriage, register with the government (District Magistrate).[48] This requirement to register for a conversion to be valid, meaning government involvement in voluntary religious changes, is also considered a breach of Article 18. As this article protects the right to freedom of thought, conscience, and religion, so any state interference in personal religious decisions is seen as a violation.[49] This means that the state intervention in non-coercive conversions, as provided by the anti-conversion laws of India does not meet the requirements of Article 18.

Coming back to Article 23 of ICCPR, it mentions that family is "entitled to protection by both society and state".[50] Therefore, it is not enough for just the state to ensure safety of families, but the entitlement can also be used against society.[51] In other words, a family needs to protected by both the state and the society. This protection is offered by laws and policies, and also by empowering social institutions.[52] Families are considered to be the unit of society and

[47] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) Art. 8 (2)
[48] Section 8, Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2020
[49] 67th Session of the General Assembly, The right of conversion as part of freedom of religion or belief, A67/303 (2012) [46]
[50] ICCPR, Supra (n 47), Art. 23
[51] Paul M Taylor (ed), 'Article 23: Protection for the Family', *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) <https://www.cambridge.org/core/books/commentary-on-the-international-covenant-on-civil-and-political-rights/article-23-protection-for-the-family/7AF457530B2E10A2E63CEA16E8F6BCB6> accessed 27 May 2024.
[52] 'CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses' (*Refworld*) <https://www.refworld.org/legal/general/hrc/1990/en/38884> accessed 31 May 2024.

their benefit to the society is acknowledged in terms of eradicating poverty and strengthening economy. Marriage is, for instance, often associated with higher income and a way of escaping poverty. Breakdown of marriage, as a consequence is bad for the economy as it leads to government expenditure on social welfare mechanisms.[53] Unnecessary interference from the society needs to be kept in check. A family needs protection, not just from the interference by the state, but also by society, which becomes evident in cases of honour killings or harassment faced by interfaith couples.

Moreover, the term "family" not just includes the generational bonds between children and parents, but it also includes the matrimonial relation between spouses.[54] Therefore, a family which involves just the spouses also deserves to be protected from the state and the society. They do not need to have children in order to qualify for protection. Honour killings and harassment of interfaith couples first and foremost requires protection from the society. India is a signatory to the ICCPR and in the absence of any reservations made against the provision on marriage, there is an international obligation that India owes. As civil and political rights usually entail negative obligations on part of the state, not interfering in the exercise of a particular right would be sufficient to adhere to the obligations enshrined in ICCPR.[55] In the context of interfaith marriages, not interfering in voluntary conversions, and especially those voluntary conversions that take place for marriages is important for the purpose of Article 23. But at the same time, the positive obligation to protect families is also a part of this Article, as para 4 clearly mentions that state parties are required to "take appropriate steps".[56] Obligations of state parties under Article 23 entail both a positive and a negative approach.[57] It is also

[53] Stefano Gennarini, 'Submission to the Office of the High Commissioner for Human Rights (OHCHR) from the Center for Family and Human Rights (C-Fam)'.
[54] Aumeeruddy-Cziffra et al. v. Mauritius, Supp. No. 40 (A/36/40) at 134 (1981), 9 April 1981
[55] Muhammad Firdaus, 'The Legalization of Interfaith Marriage in Indonesia (Between Universalism and Cultural Relativism)' (2023) 1 The Easta Journal Law and Human Rights 64.
[56] ICCPR Supra (n 47) Art. 23 (4).
[57] Taylor (n 51) Pg 640

implicit in Article 23, the right against discriminatory treatment on the basis of "race, religion, and nationality".[58] Article 16 para 1 of the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) states that state parties are required to take steps towards ensuring equality for women in matters of equality. Further, clause (b) states that states are required to ensure equality amongst men and women when it comes to freely choosing a partner and marriage should be entered only with their free and full consent.[59]

3.2. UNIVERSALISM V. CULTURAL RELATIVISM

Given this understanding of international law on interfaith marriages, the domestic framework in India is different as it is not only discriminatory, but also lacks the requisite state obligations, both positive and negative. This problem of difference in international standard and domestic standard opens up the debate on whether human rights should be universal, or should they be culture specific to respect the diversity in a given society.

The debate between cultural relativism and universalism has always impeded the enforcement of human rights, especially international human rights treaty obligations. Jack Donnelly views the UDHR as containing the basic minimum core of human rights guarantee that often transcends cultures across the globe.[60] According to him, if one has to examine if a right is universal or there should be space for cultural relativism, it has to be firstly shown that the alleged violation is not a manifestation of systemic injustice, i.e., not widespread.[61] Secondly, the human right norm or standard does not hold much value in the given society, and lastly, the right is being protected by some other effective means.[62] This means that if the act is an example of systemic injustice, or if it holds importance in the given society, and there are no

[58] Ibid. Pg 645
[59] Convention on Elimination of all forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1984) UNTS 1249 (CEDAW) Art. 16(1).
[60] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 Human Rights Quarterly 400.
[61] Ibid Pg 417
[62] Ibid

means by which it is being protected, then it can be said that the right is universal in nature, and cultural relativism should not be used as an explanation to justify the violation.

This is how Donnelly says we can reconcile the debate between cultural relativism and universalism of rights. Meanwhile others see the discourse on universalism and cultural relativism as a tool that helps countries negotiate and come up with a compromise to help them adhere to the international standards to the extent that is possible for them without eroding cultural values of their society. If universal standards are imposed without any concessions to the cultural context, then it might lead to no adherence altogether. Therefore, universalism should be accommodative of cultural context.[63]

This debate, while has always been relevant at the international level, has also been hotly debated within India in the context of having a uniform civil code (UCC). Similar to how there is a divide between those who push for universal standards of human rights and those who believe that human rights should be interpreted as per the cultural context of each state, in India, a similar debate exists with respect to family law legislations, guided by personal laws. While some support the existence of various personal laws, some advocate for a uniform code in matters of marriage, divorce, adoption, and inheritance. The UCC is intended to apply to all, irrespective of the religion of the people in question and will, in a way replace the different personal laws so that there is uniformity and no difference in rights due to religion, which can be understood to be similar to what universalism talks about. UCC has not seen the light of the day on the national level (except the state of Uttarakhand), but its advocacy is seen as a threat to erase the cultural rights of minorities.[64]

[63] Nhina Le, 'Are Human Rights Universal or Culturally Relative?' (2016) 28 Peace Review 203.
[64] 'Why the Uniform Civil Code Falls Short in Advancing Gender Justice' (*The Wire*) <https://thewire.in/rights/why-the-uniform-civil-code-falls-short-in-advancing-gender-justice> accessed 31 May 2024.

Cultural relativism usually makes an attempt to not impose any uniform or universal standards on people, but to understand the practices of people based on the subjectivity that a particular culture offers. It believes that being objective is often not possible due to these differences. This explains why there are different understandings of the standards or extent to which human rights operate.[65] Sometimes cultural relativism can impede the implementation or guarantee of human rights, which in this case has been the right to marry.[66]Internationally, cultural relativism allows each country to address human rights issues within its own cultural context, promoting a better understanding of different cultures and the people within them. This approach defers human rights questions to individual states, acknowledging their unique practices and beliefs. However, when applied within a country, cultural relativism becomes more complex. It can lead to situations that appear discriminatory or biased because it may justify practices that conflict with universal human rights standards.

The difficulty is in balancing respect for cultural differences with the need to protect basic human rights within a country. Ensuring both can be complex and may sometimes seem contradictory.[67] Differences in human rights standards (here, the right to marry) are not just about cultural differences but rather due to politically motivated factors that often seem communal.[68] The right to marry being recognized as absolute when it comes to solemnizing marriage between people of the same religion, but creating legal impediments in the framework for interfaith marriages cannot be labelled as and should not be seen as a result of cultural relativism. If that is resorted to, it will lead to justification of discriminatory standards and trivialize the issue of honour killing and agency of women.

[65] Nhina Le, Supra (n 62) Pg 203-206
[66] Lea Brilmayer and Tian Huang, 'The Illogic of Cultural Relativism in Global Human Rights Debate' in Giuliana Ziccardi Capaldo (ed), *The Global Community Yearbook of International Law and Jurisprudence 2014: Volume I* (Oxford University Press 2015) <https://doi.org/10.1093/acprof:oso/9780190270513.003.0002> accessed 26 May 2024. Pg 2
[67] Ibid
[68] Ibid

Coming to the Indian context, if we make us of Donnelly's model to understand if right to marry should be implemented as laid down in international treaties, or should be given a leeway owing to culture. The right to marry has already been recognized highlighting its importance in the Indian society. It is not that the current fight centres for recognition of this right. However, the way that this right has been recognized, it can only be freely exercised by those marrying within their religion, while those marrying across religion face issues. The right is therefore not absolute when it comes to interfaith marriages, and so this is a manifestation of injustice. Further, there are no alternative effective means. As mentioned before, solemnizing interfaith marriages through either the route of SMA, or by conversion have problems and challenges of their own.

The SMA provides a way for people to get married without adhering to any specific religious laws, making it a universal framework. This means that individuals from different religions can register their marriage under this Act. However, there are significant issues with the SMA that create problems for those who choose to marry under it. These problems can jeopardize the safety of the couple, making the process risky. One major issue is that personal religious laws can only be used if the individuals convert to that religion. As a result, the SMA might inadvertently promote the practice of religious conversion, even though such conversions are legitimate. Couples may feel pressured to convert to another religion to benefit from personal laws that are not available under the SMA. This can complicate the marriage process and introduce additional risks. The intent of the Act is to provide a neutral and inclusive option for marriage, but its current implementation has unintended consequences that undermine its purpose. Therefore, while the SMA aims to be a universal solution, it may actually encourage conversions and create safety concerns for couples.

CHAPTER IV

SUPREME COURT'S TAKE ON ISSUES CONCERNING INTERFAITH MARRIAGE

Now that both the domestic and international law framework has been discussed, this chapter will focus on the judicial and societal attitude towards interfaith marriages, inter caste marriages, and the resultant honour killings. Though the scope of the current research is limited to interfaith marriages, as inter-caste marriages too face a similar societal reaction of ostracization, it has been briefly discussed as well.

As interfaith marriages often take place against the wishes of the families of the bride and groom, there is a lot of rift and tension that the parties experience with their families and also the society. One of the most interesting facets of cases concerning marriages that reach the High Courts and the Supreme Court is that quite a few of them have allegations of kidnapping being made by the woman's family on the man, a writ petition either by the family or the woman, a court decree annulling the marriage, and the subsequent challenge to the annulment of the marriage.[69] Three of the most notable cases in this regard, *Lata Singh v. State of Uttar Pradesh*[70], *Shafin Jahan v. Asokan K.M*[71]*, and Shakti Vahini v. Union of India*[72] highlight how people entering into inter caste and interfaith marriages experience undue interference from their families. Both these cases recognize the right to marry between consenting adults and also bring forth the issue of lack of recognition of woman's agency by the society and the lower judiciary in matters of marriage. All the three cases will be discussed to elucidate firstly how society sees women who exercise their agency and liberty in matters of marriage, and secondly how the judiciary responds to these issues. In all these three cases, it can be seen that even as

[69] https://lawandotherthings.com/is-the-up-anti-conversion-law-necessary-what-do-the-numbers-say-part-2/
[70] 2006 AIR SCW 3499.
[71] AIR 2018 SC 357.
[72] AIR 2018 Supreme Court 1601.

adults, women do not have autonomy over their lives and how their families and society exercise control over decisions as important as choosing a life partner for them.

3.1. LATA SINGH V. STATE OF UTTAR PRADESH (ON INTER CASTE MARRIAGE)

The case of *Lata Singh v. State of Uttar Pradesh*[73] involved a 21 year old woman, who married a man from another caste. Though this case was on inter caste marriage, the jurisprudence laid down in it on the right to marry a partner of one's choice is importance for consideration. To briefly state the procedural history, the family of Lata Singh (the Petitioner), mainly her brother, had filed a missing person's report with the police a day after Lata Singh eloped with her husband. Thereafter, several family members of Lata Singh's husband were arrested on charges that were not even clear. The Petitioner then gave her statement to the police that she had gotten married willingly and was not kidnapped or coerced into marriage, while her family alleged that she was mentally unfit. Ignoring her statement and the fact that a final report had already been filed by the police in the matter, and relying only on the statement of the family members, the lower court forwarded the matter to the High Court because the family members insisted that the Petitioner was not of sound mind. The Petitioner was then sent for medical examination where the possibility of her suffering from any mental illness was ruled out and then she approached the Supreme Court under the writ of mandamus to quash the criminal complaint against her in-laws. The Supreme Court remarked that as an adult, the Petitioner was free to marry whomever she wanted. The Court also noted that use of threats and violence are very commonly used by family members of eloping couples who come from different caste and religions. Directions were given to the police to see to it that such couples are not harassed and criminal proceedings are instituted against anyone who threatens or commits violence against

[73] Lata Singh, Supra (n 70)

such couples.[74] The Court strongly condemned the practice of honour killings in the following words,

> "We sometimes hear of "honour" killings of such persons who undergo inter-caste or inter-religious marriage of their own free will. There is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal-minded persons who deserve harsh punishment. Only in this way can we stamp out such acts of barbarism."[75]

The case highlights a few important features that are usually present in all such cases, even inter-faith marriages as discussed previously. Firstly, it can be seen that the voice of the woman is not only ignored by her own family, but also the lower judiciary. If even the judiciary is complicit in giving family a voice over a woman's voice, then it heralds the failure of the system along with that of the society. Secondly, although inter-caste marriage per se means difference in caste, and not religion, the attitude of our society towards inter-caste marriage shows that even if the religion of the other party to the marriage is same, it is not enough. Everything from caste to religion has to be the same for it to be an acceptable marriage in the eyes of the families and the society. An upper caste person solemnizing marriage with another person from a lower caste community but involving the same religion still faces severe backlash and opposition from society. This reflects the mindset of traditional societies to house and foster only homogenous relations within themselves. Thirdly, it can be seen that to prevent the Petitioner, who was an adult woman from exercising autonomy, her family went so far as to say that she was mentally unfit. It highlights the fact that if a woman goes against the wishes of her family, her sanity is made to question in the eyes of the society to save the "honour" of the family.

[74] Lata Singh, Supra (n 70) Para 17
[75] Ibid, Para 18

3.2. SHAFIN JAHAN V. ASOKAN K.M. (ON INTERFAITH MARRIAGES)

In another landmark case mentioned previously, *Shafin Jahan v. Asokan K.M.*[76], the Court was dealing with a wilful conversion by an adult Hindu woman in order to marry her husband, who was a Muslim. To briefly sum up the facts of the case, the wife of the Petitioner, Hadiya (Akhila before conversion) was a medical student in her twenties who converted to Islam and got married to the Petitioner in secrecy. Thereafter she refused to come back to live with her parents, and her father, the Respondent, filed a habeas corpus petition before the High Court of Kerala. He alleged that she had been forcefully taken away by the Petitioner, coerced into converting to Islam to marry him, and now the Petitioner intended to take her out of the country, so he needed to be stopped and the daughter be removed from his custody and produced before the Court. The High Court remarked that "Girls aged 24 are weak and vulnerable, and capable of being exploited in many ways"[77] and surprisingly made use of the doctrine of parens patriae (which is usually used in cases of custodial issues involving people of unsound mind or minors) to annul the marriage and hand over the custody of an adult woman, to her parents, saying that marriage can only be entered into with the permission of parents.[78]

The Supreme Court expressed shock and concern with the way the High Court had exercised its parens patriae jurisdiction and proceeded to annul the marriage. The Court discussed at length how the parens patriae jurisdiction is used to protect and look after those who cannot look after themselves, such as minors, or people suffering from psychological disorders. In this case, its use was wholly inappropriate. Further, to have annulled the marriage of the Petitioner in a habeas corpus petition, especially when it was evident that she was not under illegal confinement, was also incorrect and in excess use of the jurisdictional powers of the

[76] Shafin Jahan, Supra (n 71)
[77] Ibid, Para 56
[78] Ibid

High Court. The Court also remarked on an adult woman's choices to be the only guiding factor that should decide her course of life and future, thereby highlighting that agency and autonomy of a woman are the only aspects that need to be considered when it comes to issues, such as marriage and the right to choose a partner.

3.3. SHAKTI VAHINI V. UNION OF INDIA (ON HONOUR KILLINGS AND KANGAROO COURTS)

The third landmark case on the subject matter is the case of *Shakti Vahini v. Union of India*[79]. This case particularly dealt with the question of right to marry a person of one's own choice in light of honour killings, especially those mandated by kangaroo courts (informal courts that do not follow rule of law and have no official recognition)[80] like Khap Panchayats that operate in states such as Haryana, Bihar, and Uttar Pradesh. The Petitioner, Shakti Vahini, is an NGO working for women and child rights in India. The Petition was filed before the Supreme Court seeking directions to be issued to the Centre and various state governments to tackle the issue of honour killings. As honour killings are not treated as a separate class of offence, and are usually dealt with by the provision on murder under the Indian Penal Code, 1860, their plea was also to specifically criminalize honour killings as a separate offence. The Petitioner therefore sought a comprehensive national action plan to combat honour killings. While the focus of the case was specifically on honour killings, the Court emphasized the right to choose one's partner without interference from family and society at large. The only limits that can be placed on individual liberty are to be provided by the Constitution, and in its absence, no one can place limits on it. The Court explicitly said that exercising the right to marry out of choice is a part of human dignity and liberty. In the opening paragraph, the Court stated,

[79] Shakti Vahini, Supra (n 72)
[80] Shaun Ossei-Owusu, 'Kangaroo Courts Criminal Law: Response' (2020) 134 Harvard Law Review Forum 200, Pg 202.

> "Class honour, howsoever perceived, cannot smother the choice of an individual which he or she is entitled to enjoy under our compassionate Constitution. And this right of enjoyment of liberty deserves to be continually and zealously guarded so that it can thrive with strength and flourish with resplendence. It is also necessary to state here that the old order has to give way to the new. Feudal perception has to melt into oblivion paving the smooth path for liberty."[81]

It also held that,

> "It has to be sublimely borne in mind that when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution. Such a right has the sanction of the constitutional law and once that is recognized, the said right needs to be protected and it cannot succumb to the conception of class honour or group thinking which is conceived of on some notion that remotely does not have any legitimacy"[82]

The Court goes on to discuss several judgments on the issue and even 242nd Law Commission Report which had suggested enactment of legislation on the matter, titled "The Prohibition of Interference with the Freedom of Matrimonial Alliances Bill" as being a solution to the issue at hand. This bill aimed at conferring protection to interfaith couples. However, adopting the bill depends on the will of the Parliament and the state legislative assemblies, it being the domain of the legislature. The Court did not comment on the problems created by the SMA even though couples solemnizing their marriage under it also fear safety to their lives. The case is important to understand the stance of the Court on the issue of right to marry. As it is clear that right to marry is guaranteed under Articles 19 (Protection of certain rights regarding freedom of speech, etc.) and 21 (Protection of life and personal liberty).

As all the cases discussed above were ruled in light of interfaith and inter-caste marriages, it can be said that right to marry a person of one's choice is recognized not just when it comes to people marrying within their own religion but also those marrying across. Yet, it is evident

[81] Shakti Vahini, Supra (n 72) Para 1
[82] Ibid, Para 42

from the legal framework that the right cannot be freely exercised by those marrying outside their religion.

CHAPTER V

AGENCY AND AUTONOMY OF WOMEN IN INTERFAITH MARRIAGES

"It is necessary to move toward something: toward pleasure, agency, self-definition. Feminism must increase women's pleasure and joy, not just decrease our misery."[83]

Anti-conversion laws, as mentioned previously, were drafted with the intent of "saving Hindu women".[84] As discussed, anti-conversion laws impose a reverse burden of proof on the accused, that is, the husband, and in doing so, it takes away and hampers the agency and autonomy of the wife, or women. Such a law treats women as invisible and irrelevant to the issues that affect them in the first place. There is also another dimension of agency that can be seen in the way society treats such women who go against the wishes of their families to choose a partner for themselves. It can also be seen in the language used by the High Courts. The issue of agency has two aspects: how society and the law treat women. Society often marginalizes women, limiting their freedom and opportunities. Additionally, legal systems may fail to protect their rights or may reinforce societal biases, further restricting their agency and autonomy.

3.1. TYPES OF AUTONOMIES

In this context, it is useful to draw on Diana Meyers' categorization of types of autonomies.[85] She distinguishes three types of autonomies; narrowly programmatic autonomy, episodic autonomy, and partial access autonomy.[86] She argues that all these three types of autonomy

[83] 'Vance, Pleasure and Danger - Exploring Female Sexuality (1985) Intro.Pdf' <https://xyonline.net/sites/xyonline.net/files/2019-11/Vance%2C%20Pleasure%20and%20Danger%20-%20Exploring%20Female%20Sexuality%20%281985%29%20Intro.pdf> accessed 10 June 2024.
[84] 'Acts of Violence? Anti-Conversion Laws in India' <https://journals.sagepub.com/doi/epdf/10.1177/09646639241251613> accessed 8 June 2024 Pg 8.
[85] Diana T Meyers, 'Personal Autonomy and the Paradox of Feminine Socialization' (1987) 84 The Journal of Philosophy 619.
[86] Ibid, Pg 625.

ensure limited autonomy to women in some way or the other, but they do not completely rob women of autonomy on the whole, just limits or restricts it to an extent. She also talks about the "traditional woman" who is seen as an ever-giving individual.[87] This traditional woman is always required to put the needs of others before hers. She is not permitted to develop an identity of her own and so she traces and associates her identity through the males in her family, be it her father, or brothers, or husband.[88] All this is a consequence of the socialization that she goes through since childhood, that places her in subordination to the men in her life. Other feminists have argued that in addition to this patriarchal socialization, autonomy is also affected by institutional androcentrism, and that this has an impact on the aspirations, opinions, and views that women hold.[89] Such a culture is likely to limit and severely curtail choices and also come down harshly on those women who voice their opinions. This will in turn make women see themselves as inferior to men, and instil a purpose of serving them.[90] [91] Another important aspect of agency highlighted by Kathryn Abrams is the political dimension of this socialization that actually help maintain the status quo, and that encapsulates and negatively perpetuates the power dynamics and competence of women to make choices that affects their lives and bodies.[92]

If we place the aforementioned discussion on agency, androcentrism, and patriarchal socialization, in terms of power dynamics in the Indian society between various groups it stands true. People who come from affluent rich families marrying people of different religion are less likely to experience ostracization by their fellow people or even the wrath of vigilante groups.

[87] Ibid, Pg 621.
[88] Ibid.
[89] Kathryn Abrams (ed), 'From Autonomy to Agency: Feminist Perspectives on Self-Direction' [1998] William & Mary Law Review.
[90] Jeremy Waldron, 'Homelessness And The Issue of Freedom' (2019) 1 Journal of Constitutional Law 27.
[91] 'Is Man the Measure of All Things? A Social Cognitive Account of Androcentrism' <https://journals.sagepub.com/doi/epdf/10.1177/1088868318782848> accessed 9 June 2024.
[92] Kathryn Abrams (ed), 'Sex Wars Redux: Agency and Coercion in Feminist Legal Theory' [1995] Columbia Law Review.

Moreover, being able to exercise choice by a woman is often looked down upon by her family and the society, especially when it comes to issues of selecting a partner or the way she would like to live. Abrams also discusses the importance of transformative agency, which is often targeted at political and legal set up and the forms of oppressions created by them. She builds on Catherine Mackinnon's work to further propound on this. Catharine MacKinnon's essay[93] probes into the daring exertions of three remarkable women—Linda Marchiano, Andrea Dworkin, and MacKinnon, who took a stand against the detrimental bearings of the pornography industry by turning to law. MacKinnon stresses on the implication of their actions, noting their unanticipated and potent nature, as they challenged the oppressive norms propagated by the porn industry. A comparison will be drawn between the feminist debate on porn and anti-pornographic legislations to that of conversion and anti-conversion legislations later for the purpose of understanding how the lack of agency exists in both the scenarios.

MacKinnon's essay emphasizes the dehumanizing nature of pornography, portraying women as mere objects of sexual desire, thereby stifling their voices and perspectives. Linda Marchiano's act of defiance following her coerced participation in a pornographic film such as "Deep Throat" is particularly noteworthy.[94] Despite immense pressure to remain silent, she bravely voiced her opposition to being reduced to an object of exploitation. Similarly, Andrea Dworkin fearlessly confronted the entrenched norms of a male-dominated society, despite facing frequent misunderstandings and dismissals of her views.[95] MacKinnon herself grappled with a legal system that failed to acknowledge the harm inflicted by harassment and instead upheld pornography as a form of protected free speech.

[93] Catharine A Mackinnon, 'Discourses on Life and Law' (Harvard University Press). Pg 127-33
[94] Ibid, Pg 128.
[95] Ibid, Pg 129-130.

The experiences of these women shed light on the inner workings of institutional structures and the constraints they impose. At times, when posed with these limitations, women gain fresh insights into their own identities and circumstances, contrary to societal expectations. This fresh understanding can inspire them to take critical actions that aim at uprooting the oppressive systems in which they find themselves engulfed in. The essay hypothesizes that both comprehending the underlying mechanisms of oppression and actively working to challenge them constitute forms of agency for women. This agency manifests in various ways, be it through personal epiphanies, the support of allies, or the outright defiance of societal norms. It serves to underscore the inherent power wielded by women to confront and reshape the systems that seek to subjugate them.

In simpler terms, MacKinnon's essay narrates the compelling stories of three women who bravely confronted the harmful effects of pornography through legal channels. Despite facing immense pressure to conform, they boldly spoke out against being objectified and exploited. Their actions serve as a testament to the resilience of women in the face of oppression, illustrating their ability to comprehend and challenge systemic injustices, thereby reclaiming agency over their own lives.[96] This essay therefore puts into perspective that for feminists, pornography is inherently demeaning to women and laws are needed to regulate it as porn is equated with male dominance and lack of consent.

On the other hand, Abram's agency and law further provides links between the two and how the two can be clashing against each other two impede women's rights.[97] She discusses two theories of agency, first on instrumental approaches, and second on reconstruction of liberal assumptions.[98] The first one, instrumental approach deals with how law paradoxically ends up

[96] Louise F Fitzgerald, Suzanne Swan and Karla Fischer, 'Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment' (1995) 51 Journal of Social Issues 117.
[97] Abrams (n 89)
[98] Ibid

strengthening autonomy and agency of women even though technically laying down rules is usually seen as curtailing freedom. She gives the example of regulation of pornography. While some see regulation of pornography as a necessity to put an end to the sexual oppression faced by women[99], others see it as a hindrance to expression of female sexuality and female erotica.[100]

3.2. THE SEEMINGLY FEMINIST, NON- FEMINIST LEGISLATIONS

One parallel that can be drawn here between the anti-pornography law and anti-conversion laws is both are mistakenly seen as feminist legislations while in reality they see women as helpless and worthy of being saved. Anti-conversion laws do this by criminalizing conversions that take place solely for the purpose of marriage and place the burden of proof on the husband to show that his wife's conversion was not solely for the purpose of marriage. These laws are perceived as restricting women's actions, specifically prohibiting them from converting to a different religion for marriage. Some argue that the intent behind such laws is positive, with feminist undertones, as they recognize women as more than commodities whose identities must change due to marital alliances.

The legislation as such challenges the traditional notion that women are passed from one family to another like property, necessitating a change in identity, akin to a change in title. However, if this is only seen as a problem when it comes to marrying men from other religion, then that is an overemphasis and completely overlooks the fact that marriage as an institution is designed to rob women off their identity. Women traditionally take their husbands last names, adopt their linguistic and cultural identities in cross-cultural marriages regardless of whether they marry within or across religion. Sometimes women lose their nationality while marrying men of

[99] Andrea Dworkin and Catharine A MacKinnon, *Pornography and Civil Rights: A New Day for Women's Equality* (Organizing Against Pornography 1988). Pg- 33-34

[100] Nan D Hunter and A Law, 'Brief amici curiae of feminist anti-censorship taskforce, et al., in American Booksellers Association v. Hudnut' 21.

different nationality. Women always undergo a change in their identity under the institution of marriage and so to see interfaith marriage or conversion as a problem and not the patriarchal nature of marriage as the root cause is what the laws are overlooking.

However, the argument that the anti-conversion laws help keep forced conversions under check can be countered by saying that these laws undermine women's autonomy and the freedom to make their own choices. They contend that such legislation disregards the agency of women who willingly convert, suggesting that it stigmatizes and marginalizes those who exercise their freedom to convert for marriage. By framing these choices as inherently suspect or illegitimate, the laws deny women the ability to act on their own volition in an environment that already views their exercise of freedom with suspicion and disdain. This debate highlights the tension between protecting women from potentially coercive practices and respecting their personal autonomy and decision-making capabilities. While the laws aim to prevent women from being treated as property in marital exchanges, they also risk infringing on individual freedoms by imposing external judgments on personal decisions. Thus, the issue remains contentious, with strong arguments on both sides regarding the balance between protection and autonomy.

An alternative avenue for empowering women through legal mechanisms extends beyond mere legislative prescriptions, delving into the realm of shaping societal perceptions and conceptions of women's roles and capabilities. Within this architype, legal constructs and portrayals contribute to a broader socio-cultural tapestry that influences not only women's self-perception but also societal attitudes towards them. By understanding and connecting this nuanced interplay, legal frameworks can be fashioned to cultivate a paradigm shift towards acknowledging and affirming women's agency in decision-making processes. When considering the notion of women's agency, the conventional metrics of resistance to oppression often overlook subtler forms of empowerment that do not conform to overtly confrontational

models[101], something as simple as choosing a partner. Consequently, instances of women exercising agency through quieter, non-confrontational means tend to be disregarded or underestimated. This oversight perpetuates the misconception of women as passive subjects of oppression, leading to erroneous assumptions within both public discourse and legal spheres. Such fallacies may manifest in the authoritarian perception of women as vulnerable entities in need of protection or in the imposition of external pressures to compel decisiveness, thereby undermining the intrinsic agency of women.[102]

To compensate for a unilateral approach centred on regulatory directives, leveraging legal mechanisms to reshape societal perceptions of women's capabilities becomes imperative. By cultivating a more nuanced understanding of women's agency, legal frameworks can serve as conduits for challenging and dismantling entrenched stereotypes that constrain women's autonomy.[103] This entails shifting the focus from a prescriptive stance to one that engenders a transformative discourse on women's capacities and strengths.

The aim of these efforts goes beyond simply enforcing behaviour rules; it seeks to shift societal attitudes towards women. By changing the narratives around women's capabilities and potential, the legal system plays a crucial role in creating an environment that empowers women. This transformative process results in a socio-legal context where women are not only given the agency to assert their rights but are also recognized and embraced as active agents of change. Ultimately, these efforts lead to a society where women are valued for their contributions and have the freedom to make significant impacts.[104]

[101] Jane Dyson and Craig Jeffrey, 'Reformist Agency: Young Women, Gender, and Change in India' (2022) 28 Journal of the Royal Anthropological Institute 1234.
[102] Ibid.
[103] Olga Frańczak, '(Stereo)Typical Law: Challenging the Transformative Potential of Human Rights' (2022). Pg 19-25
[104] Abrams (n 92).

By emphasizing the diverse yet meaningful ways women navigate and resist oppression, legal regulations could alleviate the burden of misrepresentation, the misrepresentation here being that every conversion is legally envisaged as forced or done by means of fraud. Resisting oppression not just applies to a woman's matrimonial home, but the law fails to see that for women, oppression exists even in parental homes. Impeding a woman's choice to marry a partner of her choice is one of the forms of oppression that women face in parental homes. Through shaping societal attitudes, legal rulings could enhance understanding of the nuanced impact of oppression on women's responses, debunking unrealistic expectations of universally confrontational reactions to gender-based harm. Leveraging the symbolic or illustrative capacity of the law may facilitate a more nuanced portrayal of women's experiences and responses to oppression. In doing so, it offers a pathway to mitigate misrepresentations and misconceptions, fostering a more inclusive and accurate understanding of women's agency and resilience in the face of adversity.[105]

Another work by Abrams, titled "*Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*"[106] discusses agency of women under the context of pornography and sexual freedom. She mentions the efforts of what she calls "sex radicals" in scrapping the anti-pornographic statute in the state of Indianapolis in the U.S. She talks about one such group of sex radicals, Feminist Anti-Censorship Taskforce (FACT) that played a key role in the case.[107] Their fight against anti-pornography statute can be seen as a fight against feminists themselves. While on the one hand, there were feminists who wanted to get pornography banned because it objectified and degraded women to just tools of pleasure meant to be used by men, FACT emphasized that banning pornography in a way stigmatized women's pleasure and sexuality

[105] Ibid.
[106] Ibid.
[107] Ibid, Pg 317.

and desires and reinstated the image of how a woman should be like, "neo-Victorian" and passive.[108] This also stigmatized men as the ban saw men as monsters and beasts who had no control over their sexual desire and it was their desire that the helpless women needed to be saved from.[109] FACT strategically placed its argument through the lens of the first amendment to the U.S. Constitution, successfully placing sexual speech under free speech. Secondly, they highlighted that the socio-economic position of women was responsible their sexual exploitation and the solution to that was not to ban pornography but to set up a system which enables and empowers women to stand up for themselves, and where they have a real choice to engage or not engage in something.[110] Sexual freedom, FACT said, was just one of the ways of self-direction.

Another parallel that can be drawn with the anti-pornography legislation is that anti-conversion laws too hit at the agency of women. While some feminists view porn as demeaning to women, others see it as a way through which women attain sexual liberty and is therefore a form of self-expression as it frees them from the societal image of an ideal women who should be submissive. Similarly, conversion might be looked down upon as it unfairly sees mostly women changing their religion to that of their husbands. However, for some women, this might not be coerced but out of their own volition and therefore a form of self-expression as it allows them to be with their chosen partners. Therefore, just like how blanket ban on pornography affects agency of women, a blanket ban on conversions for the purpose of marriage affects autonomy and decision-making of women. As has been mentioned, there has been no data provided by the legislature on forced conversions and also that merely 2% of marriages in India are interfaith shows that it is disproportionate for the law to treat all the conversions that take place for the sake of marriage to be void.

[108] Ibid, Pg 317.
[109] Ibid, Pg 322.
[110] Hunter and Law (n 95).

The right to marry the partner of one's choice is one of the many aspects of agency and self-direction, especially in conservative and traditional societies where most of the decisions affecting a woman are made for her by her parents or husband. Therefore, the choice to convert to the husband's religion is also another form of agency and self-direction. Given that the SMA has a peculiarity on public notice, conversion is seen as a way to escape the state apparatus. With the introduction of a similar clause in the anti-conversion laws on furnishing notice to a magistrate, there is an unwarranted intrusion into the private sphere of family. An anti-conversion law that sees women as helpless submissive beings that need protection from men has been clearly stigmatizing those women who are able to make a choice, and has mistakenly conferred their voice, i.e., whether they have been coerced to convert, or willingly converted, to their husbands. The anti-conversion law envisages that the woman has no voice or agency of her own and that for this agency to be exercised legally, there needs to be state intervention, or else, it remains illegal, and attract trouble to the husband.

This also ensures that the society, and the family of the woman particularly has the main reigns of control over the woman, and that family remains a homogenized unit without any difference in religious identities. It therefore not only impacts a woman's agency, but also ensures that family as a unit remains over and superior in hierarchy to the individual needs of the daughter, and that there is no scope of cultural differences unless the state permits the woman to do so. When the society and family already restrict women from exercising their agency, the law should, in such a context, enable women to exercise this very freedom that society is preventing them from exercising. Law should be freeing them from this oppression, but it is instead enabling this oppression.

Even if we analyse the law through Mill's utilitarian approach as to when should liberty be curtailed in the interest of protecting others, or to preserve the happiness and pleasure of the

large majority, the anti-conversion law fails to qualify the test there as well. Firstly, as it has been mentioned before, there has been no data that has been made use of before legislating on the law. In the absence of data, it is difficult to envisage the extent to which coerced and fraudulent conversions are taking place. Further, even if there was data, it would not have justified the unnecessary state intrusion in the lives of those who are willingly converting to solemnize marriage under personal laws. Positive liberty in this context is also requires a mention. Positive liberty intends to aid exercise of liberty by setting up social structures that facilitate the oppressed.[111]

Advocates of anti-conversion legislations might say that such a law should be seen as a champion of positive liberty, but instead, what it does is enable "second guessing"[112]. Second guessing, as explained by Charles Taylor, is when others know what is better for you, and impose that opinion on you and coerce you to live by it believing that this is actually meant to set you free or is for your own good. In such situations, the person on whom the opinion is imposed usually never has a say and has no choice but to live as per the imposition.[113] Hirschmann also draws comparison of this with Rousseau's General Will as it encapsulates true will is not merely just law. When individuals obey such a law, it automatically leads to fulfilment of their own will, even if they may not be aware of it.[114] The anti-conversion laws, or rather the legal system in general has therefore attracted the wrath of feminists for it is made by men for women, as men believe they know what is good for women, because women do not

[111] Ian Carter, 'Positive and Negative Liberty' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2022, Metaphysics Research Lab, Stanford University 2022) <https://plato.stanford.edu/archives/spr2022/entries/liberty-positive-negative/> accessed 10 June 2024.
[112] Charles Taylor, 'What's Wrong With Negative Liberty', *Liberty Reader* (Routledge 2006).
[113] Nancy J Hirschmann, 'Freedom, Power and Agency in Feminist Legal Theory', *The Ashgate Research Companion to Feminist Legal Theory* (Routledge 2013). Pg 53
[114] Ibid.

have the intellect or reasoning due to them being too emotional.[115] Such a law is therefore oppressive, denies them agency, and ultimately only strengthens the oppressor.

[115] Jonathan Bennett, 'A Vindication of the Rights of Woman with Strictures on Political and Moral Subjects' Mary Wollstonecraft.

CHAPTER VI

CONCLUSION

6.1. ANALYSIS

India, a nation of vast expanse and unparalleled diversity, is home to a multitude of races, languages, religions, sects, castes, and linguistic identities, often heralded as the epitome of diversity. This rich tapestry, while a source of national pride, occasionally becomes a catalyst for conflict, particularly within the realm of interpersonal relationships. Marriage, as an institution, is frequently criticized for its patriarchal underpinnings.[116] However, it is also regarded as a crucial means of fostering integration and bridging societal divides.[117]

Inter caste and interfaith marriages, despite their potential to unify disparate communities, are often met with societal disapproval. Individuals who dare to transcend the rigid boundaries of caste and religion in their pursuit of love frequently encounter severe resistance from their families and society at large. These brave souls, in choosing to love beyond prescribed social confines, often find their safety compromised, sometimes facing life-threatening situations.

Despite these significant risks, they remain steadfast and fearless, challenging the deeply ingrained prejudices that pervade their communities. The social ostracism and potential violence they face underscore the urgent need for legal and societal reforms to protect and support such unions. In this context, marriage not only serves as a personal commitment but also as a powerful statement against societal norms that perpetuate division and inequality.

In essence, the challenges faced by those engaging in inter caste and interfaith marriages highlight the ongoing struggle between tradition and progress in India. While diversity is

[116] Elizabeth Brake, 'Critiques of Marriage: An Essentially Unjust Institution?' in Elizabeth Brake (ed), *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford University Press 2012) <https://doi.org/10.1093/acprof:oso/9780199774142.003.0006> accessed 12 June 2024.

[117] Saptarshi Mandal, 'Ambedkar's Illegal Marriage: Hindu Nation, Hindu Modernity and the Legalization of Intercaste Marriage in India' (2022) 6 Indian Law Review 147.

celebrated, it also demands a nuanced understanding and acceptance of the evolving nature of relationships within the country. Ensuring the safety and recognition of these marriages is paramount in fostering a more inclusive and equitable society, where love and personal choice are honoured over rigid social constructs.

The issues at hand are longstanding, yet the legal system has done little to acknowledge and protect couples. Parental control over adult women, who are independent and fully capable of making their own decisions, persists in hindering their agency. Instead of reducing this control, the provisions of the SMA have only served to strengthen parental and societal dominance. For instance, Sections 5, 6, and 7 of the SMA mandate a notice period that effectively invites parental and societal interference, thus undermining the autonomy of adult individuals seeking to marry.

The legal framework of interfaith marriage comprising of SMA and the anti-conversion laws that prevent conversion for the purpose of marriage allows unnecessary intrusion into the lives of the concerned couple. This intrusion is not present under personal laws and so those marrying within religion do not face this problem. It can therefore be said that such a difference is arbitrary and discriminatory and hence violates the right to equality (Article 14 of the Indian Constitution). Given this understanding, it can be drawn that when it comes to interfaith marriage, the same is not an absolute right, and the difference in religion acts as a hurdle.

It is essential for the Supreme Court to strike down these provisions as unconstitutional, or for Parliament to amend the law to remove the requirement of the notice period. The judiciary has already demonstrated an awareness of the issues inherent in the SMA, yet a definitive adjudication on its constitutional validity remains elusive. The judicial attitude towards the

SMA suggests a recognition of its problems, but until a clear ruling is issued, the statute continues to operate in a manner that restricts individual freedoms.

Furthermore, anti-conversion laws, which are ostensibly designed to prevent coercion, also need significant amendments to respect voluntary conversions and marriages. These laws, in their current form, often act as barriers to personal autonomy and freedom of choice. Voluntary conversions, which should be a matter of personal belief and decision, are frequently subjected to undue scrutiny and control. To ensure that the legal framework genuinely supports the rights and freedoms of individuals, particularly women, it is imperative that these outdated provisions and laws be reformed. Both the SMA and anti-conversion laws should be aligned with contemporary values of autonomy and equality, allowing individuals to make personal decisions free from external interference. By addressing these legal inadequacies, society can move towards a more just and equitable recognition of personal rights and freedoms.

6.2. THE WAY FORWARD

First and foremost, independent as well as government surveys are required to collect the latest data for census. As the current data on the religious distribution of the population and proportion of interfaith marriages is not recent, there is a need to understand the contemporary developments. There is also an urgent need to legislate against the menace of honour killings, as highlighted by the 242nd Report of the Law Commission of India. This report not only addresses honour killings but also scrutinizes the problems posed by khap panchayats, which are informal village councils exercising unnecessary and often oppressive control over individuals. The existence and actions of these bodies underscore a significant gap in the legal framework, where societal intrusions go unchecked. Moreover, the current legal requirements, such as the mandatory notice period under the SMA and the involvement of the District

Magistrate in matters of conversion, exemplify state interference that can also impinge on individual freedoms. These provisions invite scrutiny and potential coercion from both the state and society, undermining personal autonomy. Therefore, the law must evolve to address intrusions not only from formal state mechanisms but also from informal societal bodies. Comprehensive legislative change is required to curb the influence of khap panchayats and similar entities, ensuring that individuals can make personal decisions free from undue external pressures. Attitude of lower judiciary towards adult women exercising autonomy in choosing their partners also needs a change so that coupes are protected better and a sense of hope is instilled in the minds of the applicants towards the efficacy of the system. By addressing both state and societal overreach, the law can better protect individual rights and promote a more equitable and just society.

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