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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provide dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

INTER-FAITH MARRIAGE LAW: A FRAUD ON FREEDOM OF CHOICE

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Abstract:

Conversations about religious marriages in India currently include various accounts ranging from opposition to rejection. These wrinkles should focus more on the diversity, challenges and daily conversations that are part of their lives. Based on this research introduces some of the areas of their lives and the space discussed in their families. And law governing over them which is not giving right to live a life of personal choice and freedom while not allowing them to use fundamental rights of decision making which are being provided to them by the supreme law of the land. These areas include the issue of transformation, protection of identity, celebration of diversity and social cohesion of children, their views on visiting other families and the views of parents on the union.

Law and Religion: The Veiled Alliance

It is well known that 'law' being a dynamic concept; it changes with the evolution of society under different socio-economic and political condition. Law in its most general and comprehensive sense means any rule of action and includes any standard or pattern to which actions are or ought to be conformed. In its judicial sense, 'law' means a body of rules of conduct, action or behaviour of persons, made and enforced by the state. Jurists have defined law differently from different point of views. It has been called *Dharma* in Hindu jurisprudence and *Hukum* in Islamic system. Romans called it *Jus* and in Germany and France it is called as *Richt* and *Droit* respectively¹. The ancient Hindu jurists held *law to be the King of Kings, far more powerful and rigid than they, nothing can be mightier than law, by whose aid, as by that of the highest monarch even the weak may prevail over the strong.*²

Religion is the basic of human life that follows not only a belief but also a way of life because

¹ Paranjape N.V.: Studies in Jurisprudence and Legal theory (8th ed.), p.201.

² Paranjape N.V.: Studies in Jurisprudence and Legal theory (8th ed.), p.201.

the followers of a particular religion follow a certain type of livelihood and with that moral duty to obey certain rules, the religion enters the legal limit by which a person is forced to follow or not to break the rules decided by a state (i.e. any country). Therefore, it is very obvious that the law and religion are independent, since before the concept of state or democracy, people were obliged to follow the religious duties and assert religious rights. In this way, religion played a very important role in maintaining law and order in ancient societies in different parts of the world.

In ancient time, religion exerted great influence on primitive societies. It contributed very largely to the growth of legal systems in most parts of the world. The ancient Roman and Greek laws were largely based on religion. In England, during the middle ages, law was mostly contained in religious testaments because of the dominance of Church over the State. The intimate relationships between law and religion have been constituted and constantly formed and transformed throughout history. According to natural law philosophy, a law driven by faith in God or divine forces, morality and legality are rooted in religion. Commenting on the nature of natural law, Blackstone³ observed: - *“The natural law being co-existent with mankind and emanating from God himself, is superior to all other laws. It is binding over all the countries at all times and no man-made law will be valid if it is contrary to the law of nature.”* In medieval period, the Christian Saints especially *Ambrose*, *St. Augustine* and *St. Thomas Aquinas* propounded a view that Divine law was superior to all others laws. *St Augustine* in his religious concept of *De Civitate Dei* has generated a religious normative model for the perfection of human society and expectations that political power in the ‘*City of God*’ should be legitimated through a religious faith. Among the theologians, *St. Thomas Aquinas*⁴ has been a very influential religious thinker over Western thought. He gave a fourfold classification of laws, namely, *Law of God or external law*, *Natural Law which is revealed through reason*, *Divine Law or the law of Scriptures* and *Human Law which we now called Positive Law*. He regarded Church as the authority to interpret the law.

The Hindu and Mohammedan law in India owe their origin to ancient holy treaties. They are divinely inspired laws. Right from the dawn of civilization till almost the middle of the 19th century, laws of Hindus derived their strength from customary law contained in *Shastras* and

³ Blackstone: Commentaries, Introduction p.39.

⁴ Paranjape N.V.: Studies in Jurisprudence and Legal theory (8th ed.), p.154.

ancient scriptures. Hindu system of laws is a code of duties. It has divine origin hence accepted by all beings as the words of God. It is for the reason that *Sruti, Smriti, Vedas, Upanishads* are considered as sources of Hindu law. The tenets of *Dharma* are to be found in Vedas- the sacred treaties consisting of four parts namely, *Rig, Sama, Yajur* and *Atharva*, all written in the form of hymns (*slokas*) in Sanskrit. *Vedas* are claimed to be of divine origin, their source bring *Brahma*, the creator of the Universe. The principles and code of conduct professed and propagated by *Vedas* came to be incorporated in Hindu law at their stage of development of Hindu society. The primary sources of Mohammedan law were *Quran, Sunnat and Ahadis* which meant traditions, *Ijma* (consensus of opinion) and *Qiyas, i.e.*, analogical deductions. Both these laws claimed transcendental origin and recognised King as a magisterial official. The *Sruti* as a source of Hindu law and the *Quran* as a source of Mohammedan law are supposed to be a direct revelation from God.

The common law of England was also derived from custom. The common law courts were customary in their origin and declared customary law, whose sanction was derived from long prevailing customs.⁵

Concept of Marriage in Indian society

Marriage is considered as one of the sacrament institution in our Indian subcontinent. It is an essential part and parcel of our life and culture. India, being a diverse nation has people from different religion, culture and tradition, all together coexist peacefully. The Indian society is based upon the principle of love, affection, respect, ethos and dignity. When we talk about marriage in Indian context, arranged marriages are considered the best way to tie the marital knot between the couple. The culture of arranged marriage is considered as a foundation stone of the Indian marriage system. The institution of marriage has been given a high esteem in the society by the people irrespective of their religion, race, region, culture and tradition. Looking upon the historical background of Indian society, one can clearly see that the marriage was regarded as a sacred religious union brought about by divine dispensation. It was an eternal and undissolvable relationship between the couple. The man's life has been divided into four stages: *Bramhacharya, Grishasta, Vanaspratha and Sannyasa* . Out of four stages, the *Grishasta* which means home and family includes the stage where a man is expected to get married and live a family life. It is considered as a matter of dharma to lead such a life. The concept of

⁵ Plucknet: A Concise History of Common Law p.272

marriage was first discovered in Smritis and Vedas.

For centuries, Indian society, especially Hindu society, has been divided on the basis of caste system and religion. When it comes to caste system, the Law of Manu includes four broad categories: *Brahmins*, *Kshatriya*, *Vaishya* and *Shudras*. Marriage was only allowed within one's caste and marriage outside one's religion was considered as a sinister act. It was believed that marriage was supposed to last afterlife and for the next seven births of the couple. There was no concept of divorce under ancient Hindu law. Those who dared inter-caste marriage in violation of the social norm had to face the consequences in terms of violence, social boycott, family boycott, and death (honour killing). Even in this 21st century, honour killing is a problem.

The concept of caste system and religious discrimination are like a nightmare on the road of progress in India. The problem of caste system was so ingrained that it took years for the Indians to get out of it. Even today also India is still struggling to get out of this social threat. In order to eradicate the caste system and racial discrimination, it is important that there should be inter-caste and inter-religious marriages, which are considered the most important social custom and the best means to eliminate the barrier of the caste system. Today we can see inter-caste marriages in Indian society, but mostly this is part of urban culture and they make up a small proportion of all marriages. The rural parts of the country are by and large dominated by and still are dominated by the same caste marriage.

Hindu marriage: Indologists consider Hindu marriage as a *sanskara*, with three purposes of *dharma* (to perform religious duties), moderation (sexual gratification), and *praja* (fertility). A wedding performed for dharma was called a *dharmik* wedding, while a one for sexual pleasure was considered an *adharmik* wedding. "Hindu marriage continues to be a sacrament; it is only raised in a moral sense." Simply put, a Hindu marriage is a spiritual union between a man and a woman so as to achieve spiritual fulfilment.

Marriage between Muslims: The Muslim community is mainly divided between Shias and Sunnis. Muslim marriage, called *nikah*, in contrast to the Hindu sacramental marriage, is considered a social contract. Its key objectives are: sexual control, childbearing and family continuity, parenting, and ordering home life. USC Sarkar also concluded that marriage between Muslims is a public agreement. But it would be wrong to say that a Muslim marriage

has no religious function. But it is certainly not a sacrament like the Hindus.

Christian marriage: As between Hindus and Muslims, we find divisions among Christians as well. Two divisions in which Christians were divided: Protestants and Catholics. The latter are classified as Latin and Syrian Christians. All of these groups and small groups are isolated. A key element of marriage among Christians, such as Hindus and Muslims, is gaining public recognition for sexual relations and procreation. In addition, religion is a vital part of Christian marriage. Christians believe that marriage is an act of God's will, and after marriage a man and a woman immerse themselves in each other. The three elements of a Christian marriage are believed to be: procreation, abstinence from fornication (extramarital sex), and mutual help and comfort.

Post-Independence and Constitution of India

The Constitution of India holds a unique place in the country's history. This is because it created a sovereign republic that is the modern state of India. The history of the Constitution offers some interesting insights into the state of affairs before Independence. It took persistent efforts for several years to draft and enact our Constitution.

Constitution of India

The Indian Constitution is one of the most comprehensive documents of its kind. Apart from being the longest, it is also famous for containing all minute details governing the Indian state. Before independence India consisted of two entities: the British government and the princely states. It is the Constitution which formally ended these two distinctions and created the Union of India. The Constitution of India is its *lex loci*, i.e. the parent of all laws in India. This basically means that all laws of Parliament and state legislatures derive their authority from the Constitution. Even the three pillars of the Indian state – legislature, executive and judiciary- derive authority from the Constitution. Without the Constitution, we would not have the administrative machinery which runs India. Even the fundamental rights and duties of the people would not exist without the Constitution.

Fundamental Rights and Duties

As a citizen of India, we are entitled to certain rights as well as obliged to certain duties. It is our duty as responsible citizens that we abide by these laws and carry out our duties. Similarly,

knowledge of our fundamental rights is important so as to prevent injustice. Let us update ourselves about the Fundamental Rights and Duties laid down by the constitution of India.

The Fundamental Rights of an Indian Citizen

The fundamental rights definition says that these are the basic human rights of all citizens, defined in Part III of the Constitution. These are applicable irrespective of race, place of birth, religion, caste, creed, or gender. They are enforceable by the courts, subject to specific restrictions. Following are some of the important rights of the citizens of India in accordance with the Constitution.

- Right to Equality
- Right to freedom
- Right against exploitation
- Right to freedom of religion
- Cultural and Educational Rights
- Right to Constitutional Remedies

Right to Choose Life Partner

The Supreme Court of India and various High Courts, through various landmark judgments, have enunciated that the 'Right to choose own life partner is a Fundamental right' and this right is an essential component of right to a dignified life guaranteed under Articles 19 and 21 of the Indian Constitution. When two adults marry out of their volition, they choose their path; they consummate their relationship; they feel that it is their goal and they have the right to do so. Any kind of torture or torment or ill-treatment in the name of honour, that tantamount to atrophy of choice of an individual relating to love and marriage by any assembly, whatsoever nomenclature it assumes, shall be adjudged illegal. The Courts have time and again highlighted the fear of breach of security and personal liberty of men and women and the increasing atrocities perpetrated by Khap Panchayats. Several instances have come to their knowledge regarding harassment, threat and violence against young men and women who marry outside their caste. The Courts feel that our nation is passing through a crucial transitional period where they cannot remain silent in matters of great public concern. Thus, while terming the caste system 'a curse' on the nation and that there is a need for it to get destroyed, the Apex Court, through following judicial pronouncements, has expressed its concern over caste system, honour killing, importance of intercaste marriages and the right of adults to choose their life

partner.

- In the case of **Lata Singh vs. State of Uttar Pradesh**⁶: The Honourable Supreme Court viewed the right to marry as a component of right to life under Article 21 of Indian constitution the court observed that: *“This is a free and democratic country, and once a person becomes a major he or she can marry whosoever he/she likes. If the parents of the boy or girl do not approve of such marriage the maximum they can do is that they can cut off social relations with the son or daughter, but they cannot give threats or commit or instigate acts of violence and cannot harass the person who undergoes such marriage.”*
- In **Arumugam Servai v. State of Tamil Nadu**⁷, The Supreme Court Bench, comprising of Justices Markandey Katju and Gyan Sudha Misra, observed that, *it is illegal to interfere in marital choices of individuals and such interferences have to be ruthlessly stamped out. In essence, the Bench criticized an institution/ideology that suppresses inter-caste marriages and upheld the choice of an individual, as such choice is a deeply personal act.*
- **Justice Chandrachud** in the landmark judgement, **Shafin Jahan v. Asokan K.M.(Hidiya Case)**⁸ observed that, *“The choice of a partner whether within or outside marriage lies within the exclusive domain of each individual. Intimacies of marriage lie within a core zone of privacy, which is inviolable. The absolute right of an individual to choose a life partner is not in the least affected by matters of faith. The Constitution guarantees to each individual the right freely to practise, profess and propagate religion. Choices of faith and belief as indeed choices in matters of marriage lie within an area where individual autonomy is supreme...Neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. They form the essence of personal liberty under the Constitution. Deprivation of that freedom which is ingrained in choice on the plea of faith is impermissible. Faith of a person is intrinsic to his/her meaningful existence. To have the freedom of faith is essential to his/her autonomy; and it strengthens the core norms of the Constitution. Choosing a faith is the substratum of individuality and sans it, the right of choice becomes a shadow.”*

⁶ AIR 2006 SC 2522

⁷ (2011) 6 SCC 405

⁸ AIR 2018 SC 357

- ***Shakti Vahini v. Union of India***⁹, The three judge Bench of Supreme Court, comprising of the then Chief Justice of India Dipak Misra, along with Justices AM Khanwilkar and Dr DY Chandrachud, while delivering a landmark judgement ruled that, *any attempt by Khap Panchayats or any other assembly to scuttle or prevent two consenting adults from marrying is absolutely “illegal”*. The Court also ruled that, *consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into wedlock. The couple’s consent has to be given primacy.*
- **Right to marry person of choice a fundamental right:** In a recent judgement, the *High Court of Karnataka* while dealing with the inter religion marriage case observed that *“It is well settled that the right of any major individual to marry the person of his/her choice is a fundamental right enshrined in the Constitution of India and the said liberty relating to the personal relationships of two individuals cannot be encroached by anybody irrespective of caste and religion,”*
- **Right to choose partner a fundamental right irrespective of religion:** The *Allahabad High Court* held that *“Interference in a personal relationship would constitute a serious encroachment into the right to freedom of choice of the two individuals. We fail to understand that if the law permits two persons even of the same sex to live together peacefully then neither any individual nor a family nor even State can have an objection to a relationship of two major individuals who out of their own free will are living together. We do not see Priyanka Kharwar and Salamat as Hindu and Muslim, rather as two grown up individuals who out of their own free will and choice are living together peacefully and happily for over a year.”*
- **Safiya Sulthana v State of UP**¹⁰, In a landmark judgement, the *Allahabad High Court* has held that *publishing a notice and inviting objections before a couple decides to marry under the Special Marriage Act are no longer mandatory. The court observed that these rules went against fundamental rights and infringed upon one’s ability to choose to marry without intervention.*

Justice Vivek Chaudhary observed that, *“making such notices mandatory invades the fundamental rights of liberty and privacy, and the freedom to choose whom to marry without interference from state and non-state actors. It will now be optional for those entering a marriage to publish such a notice. A couple will now have to*

⁹ AIR 2018 SC 1601

¹⁰ 2021 SCC OnLine All 19

make a written request to the marriage officer if they want such a notice to be published.”

Anti-Conversion Laws in India

India's actions on Religious Freedom or "anti-reform" laws are state-of-the-art laws enacted to change religious reform. Some of the laws provide for severe penalties if women, children, or members of organized organizations or organized organizations (SC / ST) are changed. The need for anti-reform legislation has been raised on a number of occasions, and political statements on national anti-reform legislation have also been tabled in Parliament.

What is legal against reform?

Although all states forbid forced conversion, fraud or lure and lure of money, only the laws of Himachal Pradesh, Uttarakhand and Uttar Pradesh are the only ones that prohibit marital conversion. Uttar Pradesh has strong provisions, requiring a person wishing to be converted to give a 60-day notice to regional authorities. The priest is required to give notice one month in advance. Uttarakhand has set a one-month notice period for both of them. There is a provision in this law that addresses the period of notice in respect of conversion. Arunachal Pradesh law is considered to be the most relaxed law requiring notice of conversion. It makes it compulsory only for the priest, who has already converted, to hand over to the District Magistrate or similar authorities after the conversion. It does not take a convert to make such an announcement. In all other provinces, a preliminary notice of a priest or a "religious reformer" and a convert is required. In terms of violations of this law, there are also provisions that deal with punishment. Odisha and Madhya Pradesh, with the oldest laws, also determine the minimum prison term - one year for forced conversion. Himachal Pradesh and Uttarakhand were sentenced to five years in prison for forced conversion. In the case of a minor or a woman, the punishment is higher in all provinces.

Conclusion

After going through the concept of inter religion marriage law and its legal implication, one can clearly see that the supreme law of the land, the Constitution of India has given the fundamental rights to all the citizens of the country. These rights represent the basic values cherished by the people of India since vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality

to the fullest extent. They are most essential for the attainment by the individual or his full intellectual, moral and spiritual status. The new anti-conversion laws in India are more of political nature than legal. They have no locus standi as these laws are against the very fundamental rights enshrined under Part III of the Indian Constitution. Freedom of choice is a vast cherished right and any violation of it leads to the encroachment of personal life and liberty of an individual. A new trend of 'vote bank politics' has been seen in recent times. It refers to the political transfer that takes place against voters in racial, linguistic, religious and sectarian processes. Over the years, this has become a reality and political parties in all sectors have used it to their advantage to grow groups of dedicated voters who adhere to their ideology, agenda and support them during elections. The courts across the India have stood up for the protection of individual's freedom, liberty and choice. In the month of November, 2020, alone the Allahabad high court had granted protection to 125 interfaith couples. Thus, it is not wrong to say that these anti-conversion laws are more political in nature than legal.

