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FREEDOM OF RELIGION: LAW AGAINST LOVE JIHAD

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Date: 24-09-2021

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DECLARATION

I declare that this dissertation titled “**FREEDOM OF RELIGION: LAW AGAINST LOVE JIHAD**” is researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional Law and Administrative Law, under the guidance and supervision of Mrs. Sheeba S. Dhar, Assistant Professor. It is an original, bona fide and legitimate work pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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ABBREVIATIONS

1. & - And
2. AIR- All India Report
3. Anr. – Another
4. CEDAW- United Nations Convention on the Elimination of All Forms of Discrimination Against Women
5. ed. – Edition
6. eds. – Editors
7. e.g. - Example
8. etc. - Et cetera
9. HC – High Court
10. ICCPR- International Covenant on Civil and Political Rights
11. ICESCR- International Covenant on Economic, Social and Cultural Rights
12. ISBN- International Standard Book Number
13. ISSN- International Standard Serial Number
14. MP- Madhya Pradesh
15. No. – Number
16. Ors- Others
17. PIL – Public Interest Litigation
18. SC – Supreme Court
19. SCC- Supreme Court Cases
20. SCW - Supreme Court Weekly
21. SCR – Supreme Court Report
22. SLP – Special Leave Petition
23. SMA 1954 - Special Marriage Act 1954
24. UDHR - Universal Declaration of Human Rights
25. UN- United Nations
26. UOI – Union of India
27. UP- Uttar Pradesh
28. v. – versus
29. WP (C) – Writ Petition (Civil)

LIST OF CASES

1. Rev Stanislaus v. State of Madhya Pradesh 1977 SCR (2) 611.
2. K.S. Puttaswamy (Retd) v. Union of India 2019 10 SCC 1.
3. Salamat Ansari and Ors vs. State of Uttar Pradesh and Ors (Cri. Misc. W.P No. 11367 of 2020).
4. Kesavananda Bharati v. State of Kerala (1973) 4 SCC 225.
5. S. R. Bommai v. Union of India AIR 1994 SC 1918.
6. State of Karnataka v. Dr. Praveen Bhai Togadia. (2004) 9 SCC.
7. The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar. AIR 1954 SC 282.
8. 19 March 2021. High Court of Bombay. Ratilal Panachand Gandhi v The State of Bombay 1954 AIR 388, 1954 SCR 1035.
9. 26 March 2021. Rev Stanislaus v Madhya Pradesh, 1977 SCR (2) 611.
10. Martin v. City of Struthers. 319 U.S. 141.
11. Marsh v. Alabama: 326 U.S. 501 (1946).
12. Watchtower Bible and Tract Society v. Village of Stratton. 122 S. Ct. 2080 (2002).
13. Nadeem v. State of UP (CMWP No. 16302 of 2020).
14. Simran Sagar v. GNCT Delhi S.L.P. (Criminal) Nos. 7153-7154/2013).
15. Sarla Mudgal v Union of India AIR 1995 SC 1531.
16. Lily Thomas v Union of India (2000) 6 SCC 224.
17. RC Cooper v. Union of India AIR 1970 SC 564; 1970 SCR (3) 530.
18. DC Wadhwa v. the State of Bihar 1987 AIR 579, 1987 SCR (1) 798.
19. Krishna Kumar Singh v. State of Bihar CIVIL APPEAL NO. 5875 OF 1994.
20. Shafin Jahan v Asokan KM (2018) 16 SCC 368.
21. Lata Singh v State of Uttar Pradesh (2007) 1 GLH 41.
22. Sony Gerry v Douglas Gerry (2018) 2 KLT 783.

23. Shakti Vahini v Union of India 2018 AIR SC 1601.
24. Justice K.S. Puttaswamy (Retd) v. Union of India 2019 10 SCC 1.
25. Salamat Ansari v. State of UP (Cri. Misc. W.P No. 11367 of 2020).
26. Smt. Safiya Sultana v. State of UP (HABEAS CORPUS No. - 16907 of 2020).
27. Joseph Shine v Union of India 2018 SCC Online SC 1676.
28. Rev Stanislaus vs. Madhya Pradesh 1977 SCR (2) 611.

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CHAPTER 1

INTRODUCTION

"A people and their religion must be judged by social standards based on social ethics. No other standard will have any meaning if religion is held to be necessary good for the well-being of the people."

- **B R Ambedkar**

India is a secular country, which means that there is no state religion, and the state is neutral and unbiased between different religions. For centuries, Indian society has consistently remained secular, and has been a melting pot of culture where all the world's major religions have co-existed in harmony, despite intermittent religious prosecutions and communally fanatic movements. The Fundamental Rights (Part III), which are guaranteed by the Indian Constitution, are regarded as pivotal for safeguarding the liberties and rights of the people against infringement by the power conferred on the government and other bodies; it covers all the civil and political rights enumerated in the Universal Declaration of Human Rights and also the basic values cherished by the citizens of our country.

Thus, Fundamental Rights are essential for an individual to attain his full intellect, moral and spiritual status. It also implies that citizens are free to profess, practice, and propagate any religion of their choice, elucidated under Articles 25 to 28 of the Indian Constitution. Guaranteeing to all persons the right to "freely profess, practice, and propagate religion", Article 25 is the bedrock of religious freedom under the Constitution. However, in practice, these rights are often bifurcated, and most people do not object as they have been made to believe that such conduct is to protect them and for their best.

Recently, religious conversions have been in the limelight, leading to passionate debates about freedom of religion. Several states in India have recently enacted laws regulating religious conversion, particularly conversions for the purpose of marriage. This has fuelled debates among supporters and critics about the state's role in matters of religion and marriage. "The Prohibition of Unlawful Religious Conversion Ordinance, 2020," passed by the Uttar Pradesh government, maintains a special focus on conversions to Islam in particular. While the original

focus behind anti-conversion laws was concerned with all religions, the revived interests appear to be entirely centred on conversion to Islam.

The new Ordinance, which obtained the Governor's assent in late November, has already resulted in the arrest of two people. Following Uttar Pradesh, states like Madhya Pradesh, Haryana, Karnataka, and Assam are preparing similar 'anti-Love Jihad' legislation to criminalize religious conversions through marriage. An interesting aspect of the Ordinance is that it still does not define what 'Love Jihad' is but attempts to criminalise it. Despite the fact that the goal of such legislation was to combat purported attempts to convert Hindu women to Islam through marriage, the Ordinance makes no reference of any specific faith. So, does this Ordinance apply to non-Hindu-Muslim relationships? It is still unclear and we will only know as more cases come up before the Courts.

The provisions of the UP Ordinance, on the face of it, appear to violate fundamental rights of the individual by putting restriction on their freedom to convert. The aim of the Ordinance is to limit forceful conversion but the provisions give too much power in the hands of the state which might lead to arbitrariness in enforcement.

However, in the landmark judgment of **Rev Stanislaus v. State of Madhya Pradesh**¹, the Supreme Court assessed the question of whether the right to practice and propagate one's religion includes the right to convert. Chief Justice A N Ray adopted a mixed approach in interpreting Article 25 of the Constitution. Article 25 expressly lays down that subject to public order, morality and health. To the other fundamental rights guaranteed in the Constitution, all citizens are equally entitled to exercise freedom of religion freely. He remarked: "It has to be remembered that Article 25(1) guarantees 'freedom of conscience' to every individual, and not merely to the followers of one specific religion, and that, in turn, suggests that there is no fundamental right to convert another person to one's religion because that would influence on the freedom of conscience guaranteed to all the citizens of the country. There may not be a fundamental right to religious conversion as held in Stanislaus case. Nevertheless, it is undoubtedly a right to convert one's religion if there is no element of fraud, coercion, and allurement.

In the historical judgement of Justice **K.S. Puttaswamy (Retd) v. Union of India**², the Supreme Court held that the right to privacy is an intrinsic part of Article 21. Although the

¹ Rev Stanislaus v. State of Madhya Pradesh 1977 SCR (2) 611.

² K.S. Puttaswamy (Retd) v. Union of India 2017 10 SCC 1.

right to freely profess, practice, and propagate religion may be an aspect of free speech guaranteed under Article 19(1)(a), the freedom of faith or the belief in any religion is a matter of conscience that falls within the ambit of purely private thought process and is also an aspect of liberty. Other than religious beliefs, there are other aspects of an individual's freedom of conscience, such as political beliefs protected by Article 21.

In the recent case of **Salamat Ansari and Ors vs. State of Uttar Pradesh and Ors**³, a Division Bench of Allahabad High Court held that, "The freedom to live with a person of their choice, regardless of religion, is inherent in right to life and personal liberty provided by Article 21." Interference in a personal relationship would constitute a severe encroachment into the two individuals' right to freedom of choice.

Indian Constitution and International Human Rights Law provide ample guarantees to the right to freedom of religion, belief, or conscience by enacting several provisions for its protection and specifying the grounds on which such right can be limited or curtailed. The freedom of religion or belief comes into conflict with other rights. The settled convention decides each dispute on a case-by-case basis and concludes which right would take precedence in that particular situation. All the principal international instruments explicitly mention the right to conversion as implicit in the right to freedom of religion. Even solicitation has been held lawful in the USA, and any Ordinances or orders passed to ban such solicitation have been reversed by Courts. The Constitution guarantees the right to freedom of religion, but, unlike ECHR and UDHR, it does not expressly include the right to convert. Our Constitution has similar rights and guarantees as international law in other aspects of the freedom of religion.

This Ordinance has the potential to become a powerful weapon in the hands of bad elements in society who can use it to implicate someone wrongly, and there is a possibility of falsely implicating citizens who are not involved in any such actions. If this Ordinance is enforced strictly, it will be a grave injustice. Thus, it is the duty and responsibility of the state to safeguard and protect each individual from any infringement on their fundamental right guaranteed under Article 25 of the constitution. Each such act of infringement that violates Article 25 of a person illustrates the failure of the state to safeguard the right guaranteed under the said Article.

³ Salamat Ansari and Ors vs. State of Uttar Pradesh and Ors (Cri. Misc. W.P No. 11367 of 2020).

In some cases, our Constitution even goes to more extraordinary lengths to protect the right to freedom of religion under Article 25. Our Constitution makers recognized the need to include this right as one of the Fundamental Rights but thought it unnecessary to enumerate it in great detail. Instead, they left it to the Courts to interpret the right as they deemed fit and appropriate in the changing circumstances that India would be subject to. Therefore, it is in the hands of the judiciary to interpret these provisions and protect the rights of individuals.

1.1: SCOPE AND RELEVANCE OF THE STUDY

- This study aims to trace out the causes and the reasons for the time immemorial enforced anti-conversion laws primarily against Muslims.
- This paper focuses on a detailed study of Constitutional safeguards and International mechanisms dealing with freedom of religion.
- This study will analyze the constitutional validity of anti-conversion laws in India.
- The detailed study of laws and regulations of the Special Marriage Act, 1954, meant for interfaith couples who want a secular marriage.
- This research would be a catalyst to give awareness on Constitutional and legal rights of conversion with respect to their religious rights.

1.2: OBJECTIVES OF THE STUDY

- To understand the nature and extent of religious freedom in India.
- This study focuses on understanding the anti-conversion laws and whether they affect the free practice of the right to freedom of religion.
- To analyze the efficiency of Constitutional provisions in safeguarding religious practices and conversion.
- To analyze the efficiency of anti-conversion laws in the light of International law.
- Detailed analysis of landmark judgments pertaining to lawful conversion.
- This study would be a mechanism for the recognition of constitutional and legal conversion rights.

1.3: RESEARCH QUESTIONS

- Do the anti-conversion laws violate the right to freedom of religion or any other rights under the Constitution?
- Do anti-conversion laws place unreasonable restrictions on individuals who voluntarily convert or enter into inter-religious marriage?

- Is the current Ordinance discriminatory against the rights of the women, ignoring their choice and agency?
- Whether the current Ordinance is in consonance with the provisions of the Special Marriage Act, 1954?

1.4: HYPOTHESIS

The anti-conversion laws lag behind the fundamental right to freedom of religion in India.

1.5: RESEARCH METHODOLOGY

Due to limitations of time, the methodology employed in conducting this research is doctrinal. The reliability and dependability of the study mainly depends upon the methodology adopted.

The Doctrinal study is based on the collection of data from primary and secondary sources. The primary sources of data used include statutes, regulations, declaration, notifications, guidelines and committee reports. The secondary sources of data used are books, dictionaries, encyclopaedia, journals, newspapers and websites.

1.6: CHAPTERIZATION

- **CHAPTER 1: INTRODUCTION**

It introduces readers to this paper, and elaborates the research design, scope, objectives, and methodology used to answer the research questions.

- **CHAPTER 2: CONCEPT OF RELIGION, RELIGIOUS CONVERSION, AND ANTI-CONVERSION LAWS; HISTORICAL AND SOCIOLOGICAL PERSPECTIVE**

This chapter intends to explain the scope of the right to freedom of religion elucidated under the Indian Constitution and the right to conversion. The chapter also tries to understand the religious, historical, and sociological perspectives behind conversion in early India and its issues.

- **CHAPTER 3: RIGHT TO FREEDOM OF RELIGION AND RIGHT TO CONVERSION: CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE**

The objective of this chapter is to discuss the tensions between freedom of religion or belief and the right to conversion through the study of numerous documents on Constitutional Law and International Human Rights law that concern this issue.

- **CHAPTER 4: ANALYSIS OF ANTI-CONVERSION LAWS; SPECIAL REFERENCE TO UP ORDINANCE**

This chapter aims to analyse the anti-conversion laws and gives special reference to the current Ordinance of UP. This chapter compares the UP Ordinance with the anti-conversion laws of other states and discuss its unconstitutionality with the help of landmark judgements.

- **CHAPTER 5: CONCLUSION AND SUGGESTIONS**

This chapter deals with the conclusion, suggestions, and the findings made in the research, followed by a bibliography.

CHAPTER 2

CONCEPT OF RELIGION, RELIGIOUS CONVERSION, AND ANTI- CONVERSION LAWS; HISTORICAL AND SOCIOLOGICAL PERSPECTIVE

"Religion, as it is generally taught all over the world, is said to be based on faith and belief, and in most cases, it consists only of different sets of theories, and that is the reason why we find all religions quarrelling with one another. These theories are based upon faith and belief."

: Swami Vivekananda⁴

2.1 INTRODUCTION

Religion plays a huge part in a person's life and influences many of their decisions, right from the food they eat to how they dress, talk and think. Religion influences people's culture, their opinions, their behaviour, and their approach to life. For most people, though, their religion was not their conscious choice. Most people follow the religion of their birth and they are taught to follow and adhere to that religion's traditions and customs from a very young age. This is one of the reasons why most people do not consider changing their religion to another, even if they do not agree with their religion and its customs. In India, it is even harder to make the choice to convert from one religion to another. Social and family pressures are high, and they dictate that one must remain within the same religion and community that one was born into. Despite this and many other obstacles to conversion, religious conversion does take place in India. It is a constitutional and fundamental right of every citizen to choose their religion, of their own free will and volition. Most conversions are influenced by a hope of change or lure of benefit, either physical, mental or spiritual. The nature of religious conversion has a complex nature, and it is a process of changing one's basic beliefs and traditions. Conversion has taken place in India and around the world for centuries but this subject has gained prominence in the public eye in the recent months, due to the laws passed by several states to regulate religious conversions for marriage.

⁴ Rastogi Vasundhara." Conversion and Reservation: Christian Dalits and the obstacles to social mobility". Legal ServicesIndia.legalservicesindia.com/article/1385/Conversion-and-Reservation:-Christian-Dalits-and-the-obstacles-to-social-mobility.html.

2.2 CONCEPT OF RELIGION

There is no agreement on the definition of religion. Etymologically, the expression religion combines the two Latin expressions, "re" meaning back and "ligare" meaning to bind.⁵ According to Merriam-Webster's Comprehensive Dictionary, religion means a belief binding man's spiritual nature to a supernatural being involving a feeling of dependence and responsibility, together with the emotions and practices that naturally flow from such a belief.⁶ The German philosopher **Immanuel Kant** defines religion as "religion is the recognition of all our duties as divine commands". **Milton Yinger**, American sociologist defines religion as "a system of beliefs and practices by means of which a group of people struggles with the ultimate problems of human life."⁷

As every religion is founded upon specific ideas and beliefs and adheres to certain practices, the question of the extent to which freedom of religion should be permitted is of great importance in a democratic society founded upon the principle of Rule of Law. In a theocratic state, law and religion are not separated from one another and therefore, freedom for those professing a faith other than the state religion is always minimal. Such people are treated as second class citizens and denied equality in many respects with persons belonging to the state religion. In countries which have the notions of Western Democracy, the society is more open and freedom of religious belief has become as an established value as well as a basic human right. In different democracies this freedom manifests itself in different ways.⁸

No individual, community, society, or nation can be without religion. Man and religion have been attached since time immemorial. People follow different religions in the world. Religion is an indivisible part of human life. It is not independent or distinct from human life or human practices. It also helps manage human life. Individuals cannot imagine human life without religion. And therefore, religion teaches values like truth, pity, giving alms, justice, kindness towards other creatures, love, righteousness, tolerance, sympathy, emotions, righteous deeds, devotion, faith, compassion, etc. Man tries to follow her/his religion by practicing devotional activities, prayer, and worship. Every religion has its scripture like Geeta, Kuran, Bible, Avesta

⁵ A. Parthasarthy: Vedanta Treatise, at p. 106.

⁶ Recovery Dictionary, uana.com/croc/recovery/dictionary/r.htm.

⁷ Rai Diva, "Right to Freedom of Religion: Articles 25-28 of the Indian Constitution," iPleaders, January 21 2020. blog.ipleaders.in/right-to-freedom-of-religion-articles-25-28/.

⁸ 5M N Rao. "Freedom of Religion and Right to Conversion". Eastern Book Company. 2003. ebc india.com/lawyer/articles/706.htm#:~:text="Article%2025(1)%20guarantees,of%20another%20person%20to%20his.

etc. which point the direction to righteousness and make human beings' man' in the proper sense of the term.

India being a secular country giving a home to all the religions, implying it does not have any state religion. Religion is quite simply a matter of personal preference, faith, or sets of beliefs. Everyone should be left free to practice the religion of their choice. To guarantee this, the Indian Constitution grants all citizens the right to profess, practice, and propagate any religion.

2.3 DEFINING CONVERSION

Religious conversion, which can be defined as accepting another religion or set of beliefs by withdrawing others, i.e., renouncing one religion and embracing another, is one of the most controversial issues in society and politics.

Religious conversion is a multifaceted and multidimensional phenomenon. Indian society is pluralist and heterogeneous society with a diversity of races, religions, cultures, castes, and languages, and many others. The non-secular conversion has continuously been a problematic issue in India. Each incident of conversion causes a lot of hues and cries in society. Recently religious conversions have received unwanted popularity leading to passionate debate all over the world. Several states in India have enacted laws regulating religious conversion and thereby fuelling people's sentiments regarding their relation to the supreme creator by whatever name he is called - Bhagwan, Allah, or God.

In relation to freedom of religious conversion, it may be worth glancing through the debates and discussion in the constitutional assembly. The fundamental rights subcommittee dealt with the issue of conversion. Several drafts were submitted on the subject of religion, out of which only two directly were linked with the conversion. One view was of Shri K.M Munshi, who included in his draft preventive measures on conversion in the section on "The right to religious and cultural freedom": 'Conversion between religions brought about by coercion, undue influence, misrepresentation or the offering of material inducement is illegal and prohibited and is therefore, punishable by the law of the union.'⁹

⁹ Claerhout Sarah, "Religious Freedom and the Limits of Propagation: Conversion in the Constituent Assembly of India," 5 March 2019, mdpi.com/2077-1444/10/3/157/pdf.

2.3 I: DEFINING LOVE JIHAD

Love Jihad, also known as Romeo Jihad, is an Islamophobic conspiracy theory propounded by right wing/Hindutva organisations,¹⁰ stating that Muslim men entrap Hindu women by means such as seduction, faking love, deception, kidnapping, and marriage, in order to convert these women to Islam as part of an extensive "campaign" by Muslims against Hindu women.

There is no particular definition of the word Love Jihad. A conspiracy theory purports that Muslim men try to befriend Hindu women for marriage and try to convert them to Islam. There is no proof of such incidents taking place but merely allegations against Muslim men. The recent Ordinance titled "The Prohibition of Unlawful Religious Conversion ordinance, 2020," passed by the Uttar Pradesh government, puts a special focus on conversions, in particular conversions to Islam, and declares any conversion for marriage void. Although the Ordinance was enacted to combat alleged attempts to convert Hindu women to Islam by marriage, the Ordinance does not specify any religion. Is this rule applicable to relationships other than Hindu-Muslim relationships as well? There is no certainty regarding that.

Two people have already been charged as a result of the current Ordinance, which was signed by the Governor in late November. After Uttar Pradesh, other States like Madhya Pradesh, Haryana, and Karnataka, Assam plan to develop similar 'anti-Love Jihad' laws to criminalize religious conversions for marriage. An interesting aspect of the Ordinance is that it still does not define the term 'Love Jihad' but attempts to criminalize it.

The idea behind 'love jihad' was first mooted in 1927. In the beginning of 20th century, several Hindu reformers talked about how Hindu women were being forcibly married to Muslims and converted to Islam. The belief was spreading that Muslims were taking away Hindu women. In recent years, a rumour spread in Uttar Pradesh's Muzaffarnagar that a Hindu woman married a Muslim man and converted to Islam after the marriage. Later, similar rumours emerged in Kerala that many Christian girls were also being converted to Islam in the guise of marriage. Between 2006 and 2012, allegedly 447 Christian girls had been converted to Islam on the pretext of marriage. In Kerala, the then Congress CM, Oommen Chandy, admitted in the assembly that between 2006- 2012, 2,667 women from other faiths had converted to Islam because they married Muslim men.

¹⁰ Hindutva (transl. Hinduness) is the predominant form of Hindu nationalism in India. As a political ideology, Hindutva was articulated by Vinayak Damodar Savarkar in 1923.

2.3 II: MAJOR EVENTS OF CONVERSION IN INDIA

Significant conversion events are not reported unless the media highlight them or religious organizations make a hue and cry. Following are the significant incidents of religious conversion in post-independence India.

- i. Nagpur (Maharashtra):** The first and most prominent mass conversion, which the country has ever witnessed, took place on 14th October 1956 in Nagpur, Maharashtra. About half a million Dalits renounced Hinduism as their religion. They embraced Buddhism under the leadership of the social reformer and visionary, Dr. B.R. Ambedkar, who is known as the prophet of Dalit emancipation.
- ii. Dulina (Haryana):** Another significant event of religious conversion which created a lot of hue and cry in the society took place at Gurgaon, Haryana 2002. This conversion took place after the shocking incident of a mob of upper caste people burning Five Dalits alive, in a police station at Dulina in Jhajjar District in Haryana. The Police remained a silent spectator. The families of these massacred Dalits were left with no choice but to renounce the religion which led to such a violent and hateful crime. All five families of the massacred Dalits converted into Buddhism at Rabidas Mandir, Gurgaon, and Haryana on 28th October 2002 under the banner of All India Confederation of Scheduled Caste/Scheduled Tribe organization and the Lord Buddha club. The conversion took place in the presence of a famous film director, the All India Christian Council, the Jamiat Ulma-I Hind and in the presence of Media Persons. Another dimension of this event of conversion is that after this event, some right-wing Organizations rushed to these families and threatened them with dire consequences on account of the above-said conversion. Due to assaults and threats and under the pressure of these right-wing organizations, ultimately, the five Dalit families broke down and had to make a public statement that they did not leave the Hindu religion; and that they did not convert.
- iii. Guntur (Andhra Pradesh):** In July 2002, another incident of religious conversion took place in Guntur district, Andhra Pradesh, where 70 Dalits converted into Christianity.
- iv. Delhi:** In the year 2002, Udit Raj, the Chairman of All India Confederation of Scheduled Caste/Scheduled Tribe Organizations and the Lord Buddha Club, gave a nation-wide call for conversion. This conversion ceremony was supposed to be performed at Ramlila Maidan of Delhi. Around one million Dalits were supposed to convert to Buddhism.

The preparations for this massive conversion were still going on. This nationwide call for conversion got unprecedented coverage in national and international media. Opposition by saffron, right-wing organizations to this massive programme of conversion was obvious. These organizations resorted to a clampdown on media organisations to ensure that this call does not get much publicity. The Ramlila Maidan, where the programme was supposed to be organized, was declared a prohibited area. Section 144 of CrPC was imposed in and around the area; and the borders of Delhi which would facilitate the arrival of a large number of Dalits to take Diksha, were sealed. The right-wing groups, which had opposed this programme, were determined to ensure by hook or by crook that the event is not organized. Finally, the organizer had to change the location of the proposed event. The right-wing groups could not succeed in curbing the conversion by Dalits, and ultimately more than 10,000 Dalits converted to Buddhism, after renouncing Hinduism.

2.3 III: HISTORICAL ASPECTS OF CONVERSION

If we look at the history of religious conversion in India, it can be observed that religious conversion has taken place under different circumstances over time. It is also apparent that the process of conversion to another religious faith often attracts those people who feel disillusioned or lost in their existing religion or in life. Thus, it is generally observed that those people who are socially oppressed, politically isolated, and economically weaker in the society, resort to conversion for their self-gratification and amelioration.¹¹

M.N. Srinivas has envisaged the term "**Sanskritization**" for denoting the process where lower-caste Hindus, tribes and Dalits imitate the customs, rituals, and norms of the Hindu upper-castes as an attempt to enter into the world of Hinduism for their social mobility. However, as a result of a split in the Hindu tradition, new independent religions like Buddhism and Jainism arose. During the sixth century B.C., many Hindus accepted Buddhism and Jainism, which had their deep roots in Hindu tradition, as their faith. These two religions emphasized Hinduism's inherent values, like the theory of predestination, transmigration of soul, and rebirth. Nevertheless, these two religious traditions undermine the principle of hierarchy based on Caste and Varna, which is one of the factors that attract many communities to embrace these

¹¹ Gogoi, Kukil. "Religious conversion in India and its different modes". Mssv Journal of Humanities and Social Sciences. VOL. 3 NO. 1 [ISSN 2455-7706].mssv.co.in/Journal/Vol3no1/5._KUKIL.pdf.

two religions, as a means of escape from the chains of caste oppression and supposed inferiority. In the later Vedic era, many kings adopted Buddhism as their state religion, by rejecting Hinduism due to its complexity and orthodoxy in prescribing various rituals.

Thus, adoption of Buddhism and Jainism was a method to accept and follow the ideas and values connected with these two religious faiths, especially to escape from the shackles of orthodoxy, dogma and customs of Hinduism. To counter the wake of Buddhism and Jainism in the post-Gupta period, many Hindu religious reform movements broke out, especially in the Southern part of India, to keep the basic ideas of Vedas intact among the Indian people. Some of the influential figures who promulgated these orthogenetic changes in tradition through re-formulation and re-interpretation of the basic tenets of Hinduism's cultural and ritual structure and made it approachable to the lives of the people were Shankaracharya, Ramanuja and Madhava.

- i. **Conversion to Islam:** The contact of India with Islam began from the 18th century due to the Arab conquest of the Sind. Engraved inscriptional pieces of evidence in Kerala indicated the presence of Muslims by the 9th century. But significantly from the 13th century onwards, the conquest of Islamic rulers had made an overpowering effect on the socio-economic and political perspectives of Indian individuals. Many social scientists consider conversion to Islam in India by force as an extraordinary case rather than a rule or a widespread assumption. Moreover, the widespread prevalence of Hinduism, even after the advent of Islam, is testament to the fact that there was no mass conversion to Islam under the Islamic rulers.

One of the significant features of Islam in India is that it included mainly converts from Hinduism. While high caste Hindus converted to Islam for obtaining political benefits, lower-caste Hindus adopted Islam as their religion to escape from the degraded status they had in the Hindu social order. As opposed to "Sanskritization", a parallel process called "**Islamization**" took place during the British and post-British era, which was a revivalist movement in Islam emanating from the purported risk of being exterminated by Hindus. In Islamization, efforts were made by groups of people belonging to the lower strata of Muslims to adopt the rituals, symbols, lifestyle, names, custom, and manners of High caste Muslims, i.e., Ashraf's, for status enhancement.

The relationship between Hindu and Muslim reached a stage of extreme hatred and anger towards each other from the year 1920 onwards. Both religious groups tried to emphasize their respective strength through two movements, i.e., the Shuddhi movement of Arya Samaj and the Tabligh movement of Muslim missionaries, to counter the

former. Arya Samaj missionary aims to bring people who had converted from Hinduism, back into the fold of Hinduism. Though in standard practice, conversion is not possible in Hinduism, scholars classify such re-conversion drives as conversion on the ground that those who were brought back to Hinduism from religions like Islam and Christianity were themselves out of Hindu hierarchical order.

- ii. **Caste Division based on Occupation**: Caste is a division that supposedly was based on a person's karma, created a division based on deeds of a person. The person doing preaching became Brahmin, the person defending people and fighting wars became Kshyatriya, the person involved in business became Vaishya and person providing service to others was called Shudra. Even though it was dependent on a person's occupation, a hierarchy was still observed. Preaching was regarded a pious or spiritual occupation. Hence, Brahmins were at the top of the system than came Kshatriya, Vaishya and the Shudras, who were at the bottom of the system. A code of conduct was also followed and observed, unlike that of today. The code of conduct also prescribed the punishment of being cast out of society, if any person committed a crime. The quantum of punishment differed based on a person's position in the social hierarchy, i.e., if a Brahmin and a Shudra committed similar crimes, the punishment prescribed will be more severe for a Brahmin and less severe for a Shudra. A Brahmin was considered a person knowing the Vedas, and a Shudra does not possess such spiritual knowledge. Therefore, according to this code of conduct, if a Brahmin commits a heinous crime he will be debarred from being a Brahmin and will be declared an outcast. But this caste division based on occupation did not last long as the persons on the top of the structure or hierarchy began to consider their position as a possession. Thus, the rules of caste division were altered or mended to become a rigid structure. And the system which was earlier based on occupation started becoming a system based upon patriarchy.

The lowest of the four Varnas of the caste system were regarded so ritually polluted that all contact with them was to be avoided. 'Untouchable' and 'Antyaja' are two names that Dr. Ambedkar used for these categories. Shri Sant Ram called them 'the Depressed Classes.' And Mahatma Gandhi called them 'Harijans' ('Children of God'), and nowadays, they are called as Dalits ('Oppressed').

- iii. **Patriarchal System**: The rule of patriarchy brought a rigid code of conduct in the present caste system. Under this caste system, heirs of a person were made to take up the same occupation which their ancestors were doing, i.e., a Brahmin's son will become a Brahmin, and son of a Shudra will remain a Shudra. So, this system forced an

occupation upon a particular group of persons. This change to the patriarchy system also brought changes in other aspects of society such as Shudras' movement being restricted to their villages only, their occupation being limited only to menial tasks, etc. Such behaviour of upper caste people towards the lower castes gave rise to a feeling of anger and repression amongst them.

- iv. **Dalits:** Caste has always been present in India. As the historian, John Webster has said: "Caste is generally independent of religiosity, for both Hindu and Christian members of untouchable castes are often treated as equally inferior. It is within this context that the term "Dalit," meaning "oppressed" or "broken," takes its form. What unifies the wide range of work on Dalit experience and religiosity is an acknowledgment of caste as a construct that is not bound to a single religious community or institution."¹²

Still, as it never got channelized, India has not witnessed any significant Dalit upliftment movement though certain attempts have been made. While these attempts were being made, people noticed the introduction of different religions and beliefs. Such religions were of both foreign and Indian origin such as Buddhism, Jainism, and Christianity. As these religions were unknown to Indians, the word regarding these religions began to spread, i.e. propagation. The followers of these religions started to propagate their religion to increase the number of followers. The gospel worked for a few, among those who were already frustrated with the present system or practices. The main reason for the propagation of these religions was that these religions did not have any place for caste discrimination.

These religions preached that there is no discrimination and every follower of their religion is equal and in the same level as that of another follower.

The Dalits, who were already struggling to get equal status in society, found a new ray of hope in these new religions. Regarding conversion, it was already apparent from the established precedents that the lower castes could forego their low status in the social hierarchy but still retain their rights and privileges as Dalits (or Scheduled Castes/Scheduled Tribes) conferred by the Constitution of India.

- v. **Tribal Conversion:** Tribes in India were often in an ambiguous situation when asked about their religion. It is believed that most of the tribes in India practice Animistic religion. However, due to the non-existence of their written historical records, they often

¹² Rastogi Vasundhara." Conversion and Reservation: Christian Dalits and the obstacles to social mobility". Legal ServicesIndia.legalservicesindia.com/article/1385/Conversion-and-Reservation:-Christian-Dalits-and-the-obstacles-to-social-mobility.html.

become the victims of misrepresentation of their earlier religious faith and undergo the process of conversion. Due to intermingling with the various religious communities, their earlier religious practices have gone extinct and immersed gradually into another religious faith through conversion. However, re-conversion also occurs among the people on spiritual, political, economic, and social grounds.

In the Indian framework, convenience is the most fundamental reason for religious conversion. Often religious conversions are devious and prompted not by any change in beliefs but for trivial reasons such as gaining admission to institutions that favour people of a particular religion. A vast percentage of religious converts in India belong to the lower castes, such as Hindu Dalits. They convert to caste-less faiths such as Christianity or Islam to escape the caste division and all the other problems that accompany it.

2.3. IV: SOCIOLOGICAL ASPECT VIS-À-VIS REASONS FOR CONVERSION

The phenomenon of "Religious Conversion" creates issues in converts' socio-economic and political life at the individual and communal level. In India, religious conversions are often controversial because political parties have politicized it for accomplishing their interests of gaining political power. Thus, it often fabricates tension in the society which can damage the social fabric.

Reason for conversion has been a subject matter of many disciplines, viz. psychology, sociology, theology but not law. Law is only concerned with the legality or illegality of the reasons but not the reasons per se. Even so, it is essential to mention various reasons that precede conversion briefly. One of the most significant factors credited with motivating individuals to convert to other religions is "relative deprivation." Various social studies on conversion conducted in the 1960s and 1970s reveal that economic, social, moral, spiritual, and psychological deprivation has been described as the critical factor behind a person's decision to change their religion. It is also possible that gravitation towards other religions may be a consequence of brainwashing or persuasion through coercion. There are various reasons which drive people to convert their religion such as:

- Voluntary Conversions, i.e., conversions by exercise of free choice or because of change of beliefs.
- Forceful Conversions, i.e., conversions by coercion, undue influence, or inducement.
- Marital Conversions, i.e., conversions due to marriage.

- Conversion for convenience

In modern India, government assessments of the legitimacy of conversions tend to rely on two assumptions: first, that people who convert in groups may not have freely exercised their choice of conversion, and second, that certain groups are more vulnerable to being lured into conversion. These assumptions, which pervade the anti-conversion laws and related court decisions and government committee reports, reinforce the social construct of women and lower castes as being inherently inferior and susceptible to manipulation. It refuses to accept that such groups can make a choice based on their free will and do not need the State's hand-holding or protection. Like "protective" laws in many other contexts, such laws restrict a person's freedom in highly personal matters and thus must be carefully scrutinized.

Conversion from a religion like Hinduism, in which Caste plays a pivotal role to religions like Islam and Christianity, which supposedly do not differentiate on the basis of Caste, has both advantages and disadvantages.

The primary advantage is the freedom from limitations imposed by Hindu society on the lower castes, which prevents them from finding their true potential and limit their opportunities in the name of tradition that do not let them rise from their life of poverty, deprivation, and exploitation.

Conversion permits them to break free of the chains that bind them to their misery and the feeling of being unworthy and lower than others, being treated as second-class citizens and being made to carry on menial work, generation after generation, without any appreciation or recognition from society.¹³ A Dalit convert in Orissa expressed his opinion:

"We did not convert because we are poor. If I am poor but accepted by my community, there is no social terror in that poverty... We did not convert for money. We converted because of the society that saw us as lesser, not worthy. We were 'lower caste', 'untouchable', 'and lowly'. Now we are Christian. Our god wants us. We can walk into his temple. We are worthy. You understand?"¹⁴

Nevertheless, conversion has its disadvantages also. Hindu Dalits who convert to other religions lose many of their Constitutional and legal privileges. They are not entitled to the seats reserved for them in Government offices and Government funded educational institutions.

¹³ Pratik Astha. Religious Conversion. Academike. 19 March 2015.lawctopus.com/academike/religious conversion/.

¹⁴ Spoken by a Dalit convert in Orissa. Quoted in Violent Gods by Angana P. Chatterji, Three Essays Collective, Gurgaon, 2009.

Jobs and admissions granted to them under the government quota shall be taken back on conversion.

Therefore, it is evident that conversion to another religious faith often attracts those who feel incomplete in their previous worldview or life. So, it can be seen that most often, those sections of people who are socially depressed, politically ignorant, and economically weaker in the society resort to converting because they do not feel accepted in the society.

2.4 ANTI-CONVERSION LAWS

The Freedom of Religion Acts, also known as "anti-conversion" laws, are enforced at the state level in India to govern religious conversions. In eight of the twenty-nine states, the laws are in effect. For example, Arunachal Pradesh, Odisha, Madhya Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, and Uttarakhand. While some variations exist between the state laws, they are very identical in their content and structure. All the anti-conversion laws seek to prevent any person from converting or attempting to convert, either directly or otherwise, another person through "forcible," "fraudulent" means, or by "allurement" or "inducement." Some of the laws provide stiffer penalties if women, children, or members of scheduled castes or scheduled tribes (SC/ST) are being converted.¹⁵

Anti-conversion laws have been enacted to regulate religious conversions carried out by force, fraud, or other inducements at the state levels. Therefore, the main objective of these laws to protect innocent people from forceful conversions. However, some provisions violate the individual liberty to propagate any religion.

2.4 I: HISTORY OF ANTI-CONVERSION LAWS

In order to understand the objective and scope of the anti-conversion laws, it is important to throw some light on the history of enactments of these laws in various states. Initially, the Hindu princely states introduced laws restricting religious conversions during the British Colonial period, mainly during the latter half of the 1930s and 1940s. These states passed anti-conversion laws to protect Hindu religious identity in the face of British missionaries. Several

¹⁵ "State Anti-conversion Laws in India." The Law Library of Congress, Global Legal Research Center. October 2018. <https://www.loc.gov/law/help/anti-conversion-laws/india-anti-conversion-laws.pdf>.

princely states, including Kota, Bikaner, Jodhpur, Raigarh, Patna, Surguja, Udaipur, and Kalahandi, had such laws. Some of the anti-conversion laws from that period include:

- The Raigarh State Conversion Act, 1936;
- The Surguja State Apostasy Act, 1942; and
- The Udaipur State Anti-Conversion Act, 1946.

After India's independence, the Parliament introduced several anti-conversion bills, but none of them were approved.

Firstly, the Indian Conversion (Regulation and Registration) Bill 1954 was introduced, which sought to impose licensing of missionaries and the registration of conversion with government officials. This bill could not collect majority support in the lower house of Parliament, and it was rejected by the members. This was followed by the introduction of the Backward Communities (Religious Protection) Bill in 1960.¹⁶ It directed at checking Hindus' conversion to 'non-Indian religions' which, as per the definition in the Bill, consisted of Islam, Christianity, Judaism, and Zoroastrianism, and the Freedom of Religion Bill in 1979, which sought "official curbs on inter-religious conversion." Parliament did not pass these bills due to the absence of parliamentary support.

The Orissa Freedom of Religion Act of 1967 and the Madhya Pradesh Dharma Swatantraya Adhiniyam of 1968 are examples of anti-conversion laws that are still in existence. The Orissa Freedom of Religion Act 2 of 1968 prohibited forcible conversion, stating that, "no person shall convert or attempt to convert, either directly or otherwise, any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion."¹⁷ Under this Act-

- Conversion defined as "renouncing one religion and adopting another."
- Force was defined as "a threat of injury of any kind including the threat of divine displeasure or social ex-communication."
- Fraud was defined as "misrepresentation or any other fraudulent contrivance."
- Inducement was defined as "the offer of any gift or gratification either in cash or in kind, including the grant of any benefit, either pecuniary or otherwise."

In 1989, Orissa Freedom of Religion Rules was enacted which amended the previous Act.

¹⁶ State Anti-conversion Laws in India. <https://www.loc.gov/law/help/anti-conversion-laws/india.php>.

¹⁷ Huff, James Andrew. "Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws ." Rutgers Journal of Law and Religion, vol. 10, no. 2, 2009, p. 1-36. HeinOnline.

Similarly, Madhya Pradesh also enacted the Madhya Pradesh Dharma Swantantrya Adhiniyam (Freedom of Religion Act) in 1968, which was amended in the year 2006. Under this Act allurement was defined as an "offer of any temptation in the form of:

- Any gift or gratification in cash or kind;
- Grant of any material benefit, monetary or otherwise.

The Act required that a person overseeing the religious ceremony of a convert shall inform the district magistrate by completing a form prescribed in the Act.¹⁸

The states of Arunachal Pradesh, Tamil Nadu, Himachal Pradesh, Gujarat followed the same tradition and passed similar laws, but with different penalties, in 1978, 2002, 2006, and 2003. However, Tamil Nadu eventually repealed the law in 2006, and the law in Arunachal Pradesh has never been implemented. With these laws as a foundation, more Indian states have recently begun to pass their anti-conversion laws. However, all these laws are harsher in forced conversion of women, children, Dalit's, and other tribal outcasts. The reasoning behind this being that all these groups are considered "inherently naive and vulnerable to manipulation. Innately weak and innocent."

The state of Uttar Pradesh promulgated the "Uttar Pradesh Prohibition of Unlawful Religious Conversion Bill, 2020". In February, the Uttar Pradesh legislative assembly passed the bill; the bill will now be sent to the state legislature's upper house and later to the Governor for approval and; after that, the Ordinance will become an act.

The potential of these laws is that they have made forced conversion a cognizable offense under sections 295A¹⁹ and 298²⁰ of the Indian Penal Code stipulates that, malice and deliberate intention to hurt the sentiments of others is a penal offense punishable by varying durations of imprisonment and fines. The state legislatures and the state governors have played a prominent role in whether these bills will be enforced, amended, or repealed. Although, the Apex Court has created a precedent for these laws, one can see from the diversity of action that anti-conversion laws are very controversial and that religious conversion has inflamed passions.

¹⁸ Ibid

¹⁹ 295A. Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs.—Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of citizens of India, by words, either spoken or written, or by signs or by visible representations or otherwise], insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment of either description for a term which may extend to 4[three years], or with fine, or with both.

²⁰ 298. Uttering, words, etc., with deliberate intent to wound the religious feelings of any person.—Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places, any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

2.5 CONCLUSION

The issue of conversion has created significant debates in India, and it should be noted that changing one's religion should be a personal choice and not influenced by others. Looking at the history of conversion, the reasons for conversion are many. Conversions take place either due to allurements or due to the threat of divine displeasure. Another motive for conversions is poverty and social inequalities, including untouchability, to which Dalits are subjected in the society.

Conversion is often an ennobling act, allowing individuals to escape persecution from their existing religion and acting as a reforming force for religion as a whole. There is no better example of this than Ambedkar, who spent many years pushing Dalits to convert away from Hinduism. In a powerful speech to the Bombay Presidency Mahar Conference in 1936, Ambedkar declared that "religion is for man and not man for religion. For getting humane treatment, convert yourselves. Convert for getting organized. Convert for becoming strong. Convert for securing equality. Convert for getting liberty. Convert so that your domestic life should be happy."

Many people convert as an effort to gain divine consciousness or to achieve some other spiritual goals. There is no need to penalize each and every conversion, more so on false allegations and accusations. Some states like Madhya Pradesh and Uttar Pradesh have enacted freedom of religion laws aiming to criminalize conversion for the purpose of marriage. The scope of these laws should only be limited to illegal conversions by illegal means such as fraud and allurements. It must be kept in mind that not all conversions are illegal.

Due to these laws, individuals are legally tied down to their religion of birth and do not have the freedom to convert out of their own volition, even though the Constitution guarantees such a right to all. Therefore, the question remains whether such laws are in consonance with the provisions of the Constitution or do they go beyond the Constitutional brief and invade into people's personal and intimate choices.

CHAPTER 3

RIGHT TO FREEDOM OF RELIGION AND RIGHT TO CONVERSION: CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE

“This glorious land of ours is nothing if it does not stand for the lofty religious and spiritual concepts and ideals. India would not be occupying any place of honour on this globe if she had not reached that spiritual height which she did in her glorious past,”

: H V Kamath

3.1 INTRODUCTION

India has always been a secular country and has been home to many religions. However, the issue of religious freedom gets murky when it comes to religious conversion. The Indian Constitution has expressly mentioned the right to freedom of religion, as enumerated in Article 25-28. Though the Constitution does not explicitly mention the right of conversion as a fundamental right incorporated in Article 25, it certainly gives the freedom to convert without any ill intention. The question of conversion can not only be argued on national basis but also under the grounds of International Human Rights Laws. Apart from the Indian Constitution, International Conventions such as UDHR, ICCPR define the scope of freedom of religion and the right to conversion. In a democratic country like India, prohibiting a person from converting to a different religion out of his own will is akin to restricting their fundamental rights. It can also be inferred that right to freedom of religion would be delusive if one were not permitted or empowered to change their religion without any element of coercion or allurements. Since every religion is established upon certain tenets and beliefs and adheres to specific practices and rituals, the question to what extent freedom of religion should be allowed presumes great importance in a democratic society built upon Rule of Law. In a theocratic state, law and religion are intermixed, and freedom for persons professing a religion other than the state religion is always minimal and restricted. They are treated as second-class citizens and denied equality in many respects when compared to persons belonging to or following the state religion. It is only in countries where the concepts of Western Democracy have taken root that the society is more open, and freedom of religious belief has been recognized as an established value. This freedom manifests in different dimensions in different democracies.

This chapter makes an attempt to analyse the application of Constitutional Law and International Law on the freedom of religion and the right to conversion. The objective of this chapter is to discuss the tensions between freedom of religion or belief and the right to conversion through the study of numerous documents on Constitutional Law and International Human Rights law that concern this issue.

3.2 INDIA AS A SECULAR COUNTRY

India is celebrated for its cultural and religious diversity, which is unmatched in the world. Many religions have been formed or have taken root in India, including Buddhism, Jainism, Hinduism, and Islam. For centuries, Indian society has consistently remained a secular one. All the world's major religions have co-existed in harmony, despite intermittent religious prosecutions and communally fanatic movements. That the soul of India always remained secular is clear from the fact that after independence, India deliberately chose to be a secular welfare state accepting the multi-religious nature of pluralistic society.

Secularism implies that the state is only concerned with relations between various citizens and not concerned with man's relations with God. In simple terms, Secularism means a form that does not recognize any religion as the state religion, and it treats all religions equally. Secularism relates to understanding and developing respect towards various religions. It is believed that the word 'Secularism' originated in late medieval Europe. In 1948, during the Constituent Assembly debates, a demand was made by KT Shah to include the word 'Secular' in the Preamble, but the suggestion was not accepted as the members of the assembly opined that the Constitution was secular in nature. Hence, the term was not incorporated in the Preamble or the Constitution until 1976 when the Parliament, with Indira Gandhi as Prime Minister, enacted the 42nd Amendment Act, and the word 'Secular' was added to the Preamble. This Amendment is also known as the 'Mini Constitution,' and it is the most comprehensive amendment to the Constitution.²¹

Indian secularism relies heavily on Mahatma Gandhi's idea of '**Sarv-dharma-sambhava**', which means that the state shall treat all religions equally and even make policies for a religious community to protect the rights of its citizens. The Constitution of India has a secular model and provides that every person has the right and freedom to choose and practice any religion.

²¹ Rai Diva, "Right to Freedom of Religion: Articles 25-28 of the Indian Constitution," iPleaders, January 21 2020. blog.iplayers.in/right-to-freedom-of-religion-articles-25-28/.

In several cases, the Supreme Court has held that "secularism" is the basic feature of the Indian Constitution, the most important being the *Kesavananda Bharati* and *S. R. Bommai* case.

In ***Kesavananda Bharati v. State of Kerala***²², the Supreme Court reiterated that secularism was a part of the Constitution's basic structure. Enumerating the basic features of the Constitution, Justice Jaganmohan Reddy stated clearly that "Liberty of thought, expression, belief, faith, and worship" could not be amended at any cost as they form intrinsic part of the basic feature of the Constitution.

The nine-judge bench in ***S. R. Bommai v. Union of India***²³ ruled that "Secularism is the basic feature of Indian Constitution. It also observed that religion and politics could not be combined together. If the State follows unsecular policies or courses of action, such actions are contrary to the constitutional mandate. In a State, all men are equal and should be treated equally. Religion has no place in the matters of State. Freedom of religion is provided as a fundamental right to all the citizens in India, but from the State's point of view, religion, faith, and belief are immaterial."

Donald E. Smith opines that "to most Indians, secular means non-communal, or non-sectarian, but it does not mean non-religious. The basis of secular state is not a 'wall of separation' between state and religion but rather 'no preference doctrine' which requires that no special privilege be granted to any one religion. The secular state includes the principle that the function of the state must be non-religious."²⁴

Therefore, secularism entails the separation of religion from the government and social, economic and cultural aspects of life. In India religion is an entirely personal matter. All religious groups have the same powers without any discrimination. In the case of ***State of Karnataka v. Dr. Praveen Bhai Togadia***²⁵, the Supreme Court held that secularism means that State has no religion, the individual must get an assurance from the state that he has the protection of law to freely profess, practise and propagate his religion and freedom of conscience.

²² *Kesavananda Bharati v. State of Kerala* (1973) 4 SCC 225.

²³ *S. R. Bommai v. Union of India* AIR 1994 SC 1918.

²⁴ Donald E. Smith. "India as a Secular State" 381 (Princeton University Press, New Jersey, 1963).

²⁵ *State of Karnataka v. Dr. Praveen Bhai Togadia*. (2004) 9 SCC.

3.2 I: FREEDOM OF RELIGION UNDER THE INDIAN CONSTITUTION

Part III of the Indian Constitution guarantees various fundamental rights including right to freedom of religion. Article 25- 28 of the Constitution recognises the rights relating to freedom of religion in India. This freedom is not granted to citizens alone but to anyone who resides in India. **Article 25** deals with freedom of conscience and free profession, practice and propagation of religion. Article 25(1) states that “Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.” It is evident from the words of Article 25(1) that this right is not restricted to Indian citizens only but extends to all persons, including aliens, individuals exercising their rights individually or through institutions; and to religious minorities or not. Further, the Indian state is also empowered to regulate matters incidental to religion or, in other words, secular activities associated with religious practices. However, the state is not permitted to interfere with religious matters as such. Under Article 25(2) (a), the state can regulate the economic, commercial, or political character activities though these may be associated with religious practices.

The crystal clear wordings of Article 25 have guaranteed freedom of religion to all, not limited to any particular faith's followers. Freedom of conscience envisages an individual's freedom to follow the path of a specific religion or to follow none and thereby remain atheist/agnostic. It refers to man's subjective sense of right or wrong. On the other hand, freedom to propagate envisages liberty within limits to transmit or spread one's religion by expounding its tenets or one's ideas or convictions. Freedom of religion has two facets, which are; right to freedom of conscience, and the right to propagate, and the two aspects have always been at loggerheads. Freedom of religion is not just limited to freedom of conscience and to freely profess, practice, and propagate religion, but it is much more comprehensive. As per **Article 26**, every religious denomination or any section thereof has been given the right:

- To establish and to maintain institutions for religious and charitable purposes;
- To manage its religious affairs;
- To own and acquire property;
- To administer such property in accordance with the provisions of law.

Although our Constitution guarantees the freedom of conscience, and the right to freely profess, practise and propagate religion there are certain restrictions imposed by the State. These restrictions are as follows:

- Public order, morality and health, and other Constitutional provisions (Clause 1 of Article 25).
- Laws concerning or restricting any economic, financial, political, or other secular activities associated with religious practices. (Clause 2(a) of Article 25).
- Social welfare and reform that might interfere with religious practices.²⁶

The Supreme Court has discussed the limitations placed on the right to freedom of religion in the case of **The Commissioner, Hindu Religious Endowments, and Madras v Sri Lakshmindra Thirtha Swamiar**:²⁷

"Religion is indeed a matter of faith with individuals or communities, and it is not necessarily theistic. Both in the American and Australian Constitutions, freedom of religion has been declared in general terms without any limitation whatsoever. Therefore, the limitations have been introduced by courts of law in these countries on the grounds of morality, order, public policy and protection. However, our Constitution-makers have incorporated the limitations that have been evolved and developed by judicial pronouncements in America or Australia in the Constitution itself. The language of articles 25 and 26 is sufficiently precise to allow us to determine without the aid of foreign authorities as to what matters come within the purview of religion and what do not."

Article 27 mandates that no person shall be compelled by the state to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of particular religion or religious denominations. Article 28 states that no religious instruction shall be imparted in state-funded educational institutions.

To conclude, every individual has right to freedom of religion. However, the Indian position on the freedom of religion entails non-interference of the state in religious matters. The only permissible interference is confined to matters incidental to religion. This is a skeletal model of Indian secularism.

²⁶ Rai Diva, "Right to Freedom of Religion: Articles 25-28 of the Indian Constitution," iPleaders, January 21 2020. blog.iplayers.in/right-to-freedom-of-religion-articles-25-28/.

²⁷ The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar. AIR 1954 SC 282.

3.2 II: WHETHER FREEDOM OF RELIGION INCLUDES RIGHT TO CONVERSION?

The question of whether the ‘right to convert’ comes under the scope of ‘right to propagate any religion’ holds fundamental significance to determine the constitutionality of anti-conversion laws. Article 25 of the Constitution lays down the freedom of conscience and to freely profess, practice, and propagate religion. Article 25 talks about the term “propagate,” which means promoting or transmitting or merely freedom of expression. While drafting the Indian Constitution, drafters used the word “conversion.” However, in the final draft, they went with the recommendations made by the Sub-Committee on Minorities. They used ‘propagate’ in place of ‘conversion’ and left the debate open about whether the right to propagate comprised conversion. Today, it cannot be said with absolute certainty that the right to propagate any religion includes the right to conversion. There is no express or explicit provision in the Constitution that talks about ‘conversion’. There are some who contend that the right to conversion is implicit under Article 25, which emerges from freedom of conscience. On the other hand, there are others who believe the opposite view.

i. Meaning of Propagation

The Constitution has guaranteed every citizen the right to propagate one's religion. Propagation or propagating one's religion broadly means to cause something to increase in number or amount or spread and encourage an idea, theory, knowledge, etc. It is related to conversion, as some people opine that propagation leads to forced conversion or that in the process of propagating one's religion, one indirectly asks the opposite person to follow one's religion.

Propagation, as mentioned in the Constitution, does not in itself deal with the conversion of religion, but it certainly guarantees religious freedom of choice. Freedom of choice cannot exist in the absence of awareness of a person's options. There can be awareness only when there is free and fair dissemination of information. The concept of propagating one's religion is commonly confused with proselytizing. Proselytizing means converting or attempting to convert someone from one religion, belief or opinion to another. The Anti-Conversion Laws seek to stop activities of proselytizing. Propagation is also frowned upon because some persons equate propagating one's religion with causing disgrace to another religion. Some people believe that propagating one religion results in the belief that other religions are inferior to this religion.

ii. Meaning of Conscience

The freedom of conscience has been framed independently of the right to freedom of religion, which means that one can be non-religious and still exercise the right to freedom of conscience. According to the dictionary meaning, conscience involves "a knowledge or sense of right or wrong, moral judgment that opposes the violation of previously recognized ethical principles and leads to feelings of guilt; if one violates such principles." Therefore, an individual's exercise of conscience cannot be restricted because it does not conform to religion's ethics and morals. If an individual feels a religious principle violates his or her ethical beliefs, and if the individual's ethical beliefs are not violating any laws or restricting the exercise of another person's rights, the right to conscience cannot be restricted.²⁸

Right to freedom of religion becomes controversial when it comes to the subject of religious conversion. What makes the controversy greater is the absence of any explicit mention of a right to convert in the provisions of the Constitution. The Supreme Court has, in many cases before it, been presented with an opportunity to delve upon whether the right to propagate entails the right to convert because the former is a fundamental right, and the latter becomes illegal if done forcibly. The Supreme Court's judgment in the 1954 case of **Ratilal Panachand Gandhi v. the State of Bombay**,²⁹ has given greater clarity to the provision of Article 25 by validating that every individual has a fundamental right, under our Constitution, to not merely entertain such religious beliefs as may be accepted of by his judgement or conscience but also to exhibit his faith and propositions in such overt acts as are encouraged or sanctioned by his religion and further to even propagate his religious views for the improvement of others.³⁰

However, in **Digyadarsan Rajendra Ramdassji v. State of Andhra Pradesh**,³¹ the Supreme Court adjudged that "the right to propagate one's religion means the request to communicate one's own beliefs to another person or to disclose the tenets of that faith, but would not include the right to convert another person to the former's faith." Therefore it came to be judicially established that although propagation enjoys constitutional protection under the right to freedom of religion, conversion does not.

²⁸ Singh Adeeti, "Is anti-Love Jihad Law constitutional?" *Sabrang*, 05 Dec 2020, sabrangindia.in/article/anti-love-jihad-law-constitutional.

²⁹ 19 March 2021. High Court of Bombay. *Ratilal Panachand Gandhi v The State of Bombay* 1954 AIR 388, 1954 SCR 1035.

³⁰ Dr. Cheema Iqtidar Karamat. "Constitutional and Legal Challenges Faced by Religious Minorities in India," U.S.CommissionOnInternationalReligiousFreedom,February2017.uscirf.gov/sites/default/files/Constitutional%20and%20Legal%20Challenges%20Faced%20by%20Religious%20Minorities%20in%20India.pdf.

³¹ 19 March 2021. High Court of Andhra Pradesh. *Digyadarsan Rajendra Ramdassji v State of Andhra Pradesh & Anr*, 1970 AIR 181, 1970 SCR (1) 103.

In another landmark judgement of **Rev Stanislaus v. State of Madhya Pradesh**,³² the Supreme Court assessed whether the right to practice and propagate one's religion includes the right to convert. The Court upheld the earliest anti-conversion statute's validity: the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968, and the Orissa Freedom of Religion Act, 1967. The Court stated that "it is to be noted that Article 25(1) guarantees freedom of conscience to every citizen and not merely to one particular religion's followers. That, in turn, suggests that there is no fundamental right to convert another person to one's religion because if a person purposely assumes the conversion of another person to his religion, as distinguished from his effort to transmit or increase the tenets of his religion, that would influence on the freedom of conscience guaranteed under Article 25 to all the citizens of our country." In simple terms, the Supreme Court held that conversion through inducement, fraud or force is a violation of a person's conscience as it forces them to do something against their conscience. However, the Court in Stanislaus judgement did not emphasize on conversions for the sake of marriage.

While upholding the validity of these laws, Chief Justice A N Ray adopted a mixed approach in interpreting Article 25 of the Constitution. Article 25 expressly lays down that subject to public order, morality and health, and to the other fundamental rights guaranteed in the Constitution, all citizens are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.³³

Justice Ray interpreted the word "propagate" to mean "to transmit or spread one's religion on account of its tenets," but not incorporate the right to convert another person to one's own religion. He remarked: "It has to be remembered that Article 25(1) guarantees 'freedom of conscience' to every individual, and not merely to the followers of one specific religion, and that, in turn, suggests that there is no fundamental right to convert another person to one's own religion because if a person intentionally undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would influence on the 'freedom of conscience' guaranteed to all the citizens of the country."³⁴

Justice Ray's reasoning, however, makes the issue more complex. If a person's right to propagate his religion does not include a right to freedom of speech aimed at seeking

³² 26 March 2021. Rev Stanislaus v Madhya Pradesh, 1977 SCR (2) 611.

³³ Parthasarathy Suhrith. "Conversion and freedom of religion". The Hindu. December 23, 2014 01:13 IST Updated:07April2016.06:14.IST.thehindu.com/opinion/lead/conversion-and-freedom-of-religion/article6716638.ece.

³⁴ Ibid

conversions, would not such a right be purely illusory? As the constitutional law scholar, H.M. Seervai, observed, in response to the decision in *Stainislaus*, "to propagate religion is not to impart knowledge and to spread it more widely, but to produce intellectual and moral conviction leading to action, namely, the adoption of that religion. Successful propagation of religion would result in a conversion." So, when a person converts to another religion, based on speech, which aims at producing such conversion, he or she is exercising a general right to freedom of conscience.³⁵

Therefore, the judgement in *Stainislaus* case needs to be reconsidered not merely due to its tangible and concrete consequences. The case relates to a fundamental and more nuanced issue of intervention by the state and its courts in religious affairs. The concept that freedom of religion in India does not include the right to religious conversion seems a little absurd. There may not be a fundamental right to religious conversion as held in *Stanislaus* case, nevertheless, it is undoubtedly a right to convert one's religion if there is no element of fraud, coercion, and allurements. To deny and withhold this right to citizens of a democratic country or to give a restrictive meaning to it would be an injustice in today's context.

3.3 FREEDOM OF RELIGION AND CONVERSION: INTERNATIONAL PERSPECTIVE

In the Constitution, India has made a commitment to respect and adhere to international law, especially when it comes to Human Rights. Article 51 of the Indian Constitution states that India will "foster respect for international law and treaty obligations."³⁶ The Supreme Court of India has said, "Our Constitution guarantees all the fundamental rights set out in the Universal Declaration of Human Rights 1948, to its citizens and other persons." Although the Declaration is not legally binding, the Supreme Court has suggested that the Indian Constitution contains articles that have created the same rights as the Declaration.³⁷

The right to freedom of religion or belief is a fundamental human right recognized in all the major human rights treaties and conventions under international law. Under international human rights law, freedom of religion or belief has two components:

³⁵ Ibid

³⁶ Susan L. Karamanian, *India and International Law*, Edited by Bimal N. Patel. Leiden: Martinus Nijhoff Publishers, 2005, 101 AM. J. INT'L L. 538, 540 (2007) (book review).

³⁷ P.C. Rao. *The Indian Constitution and International Law*. 140 (1993).

- The first is the right to freedom of thought, conscience, and religion, which means the right to hold or to change one's religion or belief; and this right cannot be restricted under any circumstances.
- The second is the right to manifest one's religion or belief, which means the right to preach, propagate and spread one's religion or belief.³⁸

The significant treaties or conventions that deal with the right to freedom of religion or belief are:

1. Universal Declaration of Human Rights, 1948 (UDHR)
2. International Covenant on Civil and Political Rights, 1966 (ICCPR)
3. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR)
4. U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981 (the 'Declaration on Religion or Belief')

These treaties and conventions form the basis of international human rights law, particularly the law relating to the right to freedom of religion.

1. Universal Declaration of Human Rights (UDHR):

Article 18 of the UDHR states that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship, and observance."³⁹

Article 18 UDHR does not mention any limitations to the right. Still, **Article 29(2)** UDHR allows for restrictions in the exercise of the rights and freedoms which are determined by the law and are solely to secure due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.⁴⁰

2. International Covenant on Civil and Political Rights 1966 (ICCPR):

³⁸ Donald Alice. "The right to freedom of religion or belief and its intersection with other rights." *ILGA-Europe*. January 2015.

³⁹ 22 U.S. Code § 6401 - Findings; policy | U.S. Code | www.law.cornell.edu/uscode/text/22/6401.

⁴⁰ Hague, Cliff. "Planning for the Many, Not the Few." *Planning, Haymarket Business Publications Ltd.*, Aug. 2017, p. 14.

Article 18(1) of the ICCPR states that "Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching."

Article 18(2) states that "no one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."⁴¹ The ICCPR is more comprehensive and detailed in defining the right to freedom of religion than the UDHR.

The ICCPR also contains limitations that may be imposed on the freedom of religion or belief. For example, **Article 18(3)** of the Covenant states that "Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."⁴² Therefore, the States that are Parties to the Covenant may place restrictions on the right to freedom of religion or belief, but these limitations must be limited to those mentioned in Article 18(3).

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (ECHR):

Article 9 of the ECHR states that "Everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance."

Similar to **Article 19(3)** of the ICCPR, the ECHR also contains limitations or restrictions under Article 9(2). This Article states that "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others."⁴³ The ECHR has held that 'necessary in a democratic society' means that the interference must fulfil a pressing social need and must be proportionate to the legitimate aim pursued. This means that there must be a reasonable

⁴¹ Religions | Free Full-Text | 'Non-Religion' as Part of the .mdpi.com/2077-1444/11/2/79/html.

⁴² International Human Rights Standards: Selected Provisions .uscirf.gov/international-human-rights-standards-selected-provisions-freedom-thought-conscience-and-religion-or.

⁴³ Bird, Brian. "Are All Charter Rights and Freedoms Really Non-Absolute?" Dalhousie Law Journal, vol. 40, no. 1, Dalhousie University on behalf of the Schulich School of Law, Apr. 2017.

relationship between the aim of the restriction and the means used to achieve that aim (i.e., the principle of proportionality).⁴⁴

Member states of the ECHR enjoy a margin of discretion in deciding how to give effect to the Convention rights and freedoms, subject to the ultimate supervisory jurisdiction of the ECHR. The Court has established that, states enjoy a very wide margin of discretion in determining how to give effect to its responsibilities as the neutral and impartial organiser of religious life, whilst ensuring the fullest possible enjoyment of the freedom of religion or belief which is consistent with respect for the rights and freedoms of others.⁴⁵

4. U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, 1981 (the 'Declaration on Religion or Belief'):

This Declaration is worded in similar terms to the UDHR, but this Declaration is specific in its scope. Whereas the UDHR lists all the fundamental human rights that must be given to a person, this Declaration only focuses on the right to freedom of religion or belief. Hence, there is some overlapping by both the Declarations. For example, Article 1 of the Declaration on Religion or Belief states that "Everyone shall have the right to freedom of thought, conscience, and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice, and teaching." It also states that no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice.

Regarding limitations, the Declaration on Religion or Belief states the same as Article 18(3) ICCPR. **Article 1(3)** of the Declaration states that "Freedom to manifest one's religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others."

3.3 I: DOOR-TO-DOOR RELIGIOUS CONVERSION IN U.S.

⁴⁴ The right to freedom of religion or belief and its http://ilga-europe.org/sites/default/files/Attachments/the_right_to_freedom_of_religion_or_belief_and_its_intersection_with_other_rights__0.pdf.

⁴⁵ Donald Alice. "The right to freedom of religion or belief and its intersection with other rights." *ILGA-Europe*. January 2015.

Various cases involving "Door-to-door solicitation" have been brought before the federal Supreme Court in the United States. **Martin v. City of Struthers**,⁴⁶ was one such case. The Court struck down an ordinance forbidding solicitors or distributors of literature from knocking on residential doors in a community. The ordinance aims to protect privacy, protect the sleep of many who worked night shifts, and to protect against burglars posing as canvassers. The five-to-four majority bench concluded that on balance, "the dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas."⁴⁷

In **Watchtower Bible and Tract Society v. Village of Stratton**,⁴⁸ the Court struck down an Ordinance that criminalized door-to-door advocacy by persons, whether it is religious, political, or commercial, if the person did not first register with the mayor and obtained a permit. The Court held that "it is offensive to the very notion of society that a citizen must inform the government of their desire to speak to their neighbours and then obtain a permit to do so."

Therefore, in the U.S., the judiciary's attitude amply says that the right to propagate, which is a part of freedom to religion, is not deprived of the right to convert somebody through the exposition of one's religious tenets and not through force, fraud, allurements, or coercion or solicit somebody to one's religion.

Even international instruments like the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), and even ICCPR (International Covenant on Civil and Political Rights) explicitly recognize that the right to conversion is implicit in the right to freedom of religion.

3.3 II: OVERVIEW OF ANTI-CONVERSION LAWS

Anti-conversion laws have taken hold in countries where the dominant religious and often ethnic majority feels threatened by an active and growing religious minority. These laws are found in India, Nepal, Myanmar, and Bhutan. Sri Lanka has considered anti-conversion bills

⁴⁶ Martin v. City of Struthers. 319 U.S. 141.

⁴⁷ Marsh v. Alabama: 326 U.S. 501 (1946): [Justia US.//supreme.justia.com/cases/federal/us/326/501/](https://supreme.justia.com/cases/federal/us/326/501/).

⁴⁸ Watchtower Bible and Tract Society v. Village of Stratton. 122 S. Ct. 2080 (2002).

but has not enacted any. One province in Pakistan has introduced a bill that aims to protect religious minorities, unlike in other countries that protect from forced conversions.

India's anti-conversion laws have been enacted without basis. Firstly, there is little evidence for the unstated but obvious premise of the laws, which is that Muslims and Christians are forcibly converting the poor and disadvantaged away from Hinduism. The laws do not recognize that "converts" have any agency in their conversions; all conversions away from Hinduism are presumed as problematic and open to investigation.

Secondly, these laws that prohibit conversion are overly broad in their scope and reach, especially considering the lack of detailed definitions of important terms, including 'force,' 'allurement,' 'inducement,' and 'fraud.' The ICCPR recognizes in Article 19 the freedom to express one's beliefs. In combination with Article 18's guarantee of freedom of religion, people have every right to share their religious beliefs. The anti-conversion laws aim to criminalize a wide range of speech by those sharing their religious beliefs with others, whether they hope their listeners convert or not; and this has a chilling effect on religious speech. For example, praying for the healing of sick persons or offering help in the form of food or water after a natural disaster could be considered allurement or inducement, making the charitable activities of religious groups criminal, which are often essential components of their faith.

The ICCPR also recognizes in Article 18 that nothing may restrict the freedom to have or adopt a specific belief or religion—the forum internum—but these laws are designed to curtail this very choice. The Human Rights Committee made clear in General Comment No. 22 that no one should be compelled to reveal the religion he adheres to. The requirement in some states that a person planning to convert must apply for permission from a magistrate subjects the intended convert to the will of an official who is likely under pressure from extremists to prevent conversion from Hinduism but to ignore mass conversions to Hinduism. Even having only to notify rather than request permission from a magistrate in advance of conversion may deter potential converts, especially if the magistrate does not favour the conversion. In addition, magistrates may pass on the names of potential converts to extremists/anti-social elements, who may then intimidate the potential convert to prevent conversion.

These laws also target people traditionally viewed as 'weak', such as women, Scheduled Tribes, and Scheduled Castes. One scholar notes that:

"Conversion laws construct women, Scheduled Tribes, and Scheduled Castes as victims, and construct converts (particularly group converts) as passive dupes of the machinations of active

converters. Such language reduces the convert to a victim, particularly converts from groups seen as vulnerable, commonly referred to as the “weaker sections” in Indian society. These laws perpetuate a longstanding tendency to see converts or potential converts as victims.”

Furthermore, Indian lawyers and social scientists say that India already has criminal laws to prevent forced conversions, such as a provision on criminal intimidation in the penal code.

Asma Jahangir, United Nations Special Rapporteur on freedom of religion or belief from 2004 to 2010, visited India in 2008 and reported on the state anti-conversion laws. She recognized that the laws were targeted at Christians and Muslims and noted that ‘they have been criticized on the ground that the failure to clearly define what makes a conversion improper bestows on the authorities unfettered discretion to accept or reject the legitimacy of religious conversions.’ She lamented that provisions requiring advance notice to or permission granted by the government are ‘unduly onerous’ and that ‘state inquiry into the substantive beliefs and motivation for conversion is highly problematic since it may lead to interference with the internal and private realm of the individual’s belief.’ She emphasized that only the alleged victim should be able to lodge complaints.

Despite criticism of India’s anti-conversion laws, some human rights bodies have acknowledged that these laws have resulted in few arrests and no convictions. However, some observers note that the laws create a hostile, and on occasion violent, environment for religious minority communities because such laws do not require any evidence to support accusations of wrongdoing.

3.4 CONCLUSION

As stated above, the Indian Constitution and International Human Rights Law provide ample guarantees to the right to freedom of religion, belief or conscience by enacting several provisions for its protection and specifying the grounds on which such right can be limited or curtailed. Where the freedom of religion or belief comes into conflict with other rights, the settled convention is to decide each dispute on a case-by-case basis and conclude which right would take precedence in that particular situation. All the principal international instruments explicitly mention the right to conversion as implicit in the right to freedom of religion. Even solicitation has been held lawful in the USA, and any Ordinances or orders passed to ban such soliciting have been reversed by Courts. The Indian Constitution guarantees the right to freedom of religion but, unlike ECHR and UDHR, it does not expressly include the right to convert. Our Constitution has similar rights and guarantees as international law. In some cases,

our Constitution even goes to greater lengths to protect the right to freedom of religion under Article 25. Our Constitution makers recognised the need for including this right as one of the Fundamental Rights, but thought it unnecessary to enumerate the right in great detail. Instead, they left it to the Courts to interpret the right as they deemed fit and appropriate in the changing circumstances that India would be subject to. Unfortunately, various States have hastily enacted laws to regulate and prohibit conversions, in the guise of protecting ‘vulnerable’ and ‘weaker sections’ of society, particularly conversions for marriage between inter-religious couples. The laws are justified by the Government on false premises, which are not backed by evidence or factual information. But more and more States in India are enacting laws to regulate conversions. The Ordinance enacted by the Legislature of Uttar Pradesh has set off a ripple-effect, with several other States such as Madhya Pradesh following a similar route as Uttar Pradesh. The High Courts and Supreme Court are yet to adjudge the constitutional validity of these laws and it is believed that the Court will consider the Constitutional provisions and international human rights laws, when the laws come up before the Court for judicial review.

CHAPTER 4

ANALYSIS OF ANTI-CONVERSION LAWS; SPECIAL REFERENCE TO UP ORDINANCE

“No secular State is or can be merely neutral or impartial among religions, for the State defines the boundaries within which neutrality must operate.”

- Marc Galanter

4.1: INTRODUCTION

Anti-conversion laws have become an important subject of debate now because certain state governments with right-wing influences have begun to enact and enforce anti-conversion laws under the Indian Penal Code and other statutes. At the same time, there have been reports of violence against Christians and Muslims based on conversion activities. Certain political parties are attempting to preserve the Hindu caste system by preventing Dalits, untouchables, from converting away from Hinduism. They feel that conversion is a serious threat to the population of Hindus, to the Caste System, to the Hindu religion, and the power of Hindus in India, and hence, these parties and its followers feel the need to fight against conversions to achieve their goal of making India a Hindu-dominant state.

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 (hereinafter referred to as the Ordinance) has been a topic of debate and discussion in recent times. From being called 'discriminatory against Muslims' to 'a law akin to Hitler's regime', every fanciful word in the dictionary has been used to describe it. The Ordinance contains 14 sections and three schedules. The objective of this Ordinance is to prohibit unlawful conversion from one religion to another by the use of misrepresentation, force, undue influence, coercion, allurement, or by any fraudulent means or by marriage and for the matters connected in addition to that.

However, several persons and organisations have stated that the Ordinance casts an unnecessary burden over a person trying to convert as well as the person performing such a conversion by compelling both these persons to make a declaration before the district magistrate that such conversion is being done out of free consent and not out of

misrepresentation, force, undue influence, coercion, allurement or any fraudulent means or by marriage. This declaration has to be made twice - not only before conversion but also after the conversion takes place. Further, the burden of proof that the inter-religious marriage is not affected by misrepresentation, force, undue influence, coercion, allurement, or any fraudulent means or by marriage is on the person who caused the conversion.

The effect of such a rigmarole of procedure coupled with punishment on the ground of such loosely drafted provisions is that it dissuades people from entering into inter-religious wedlocks and sets up a deterrent against involving in any inter-religious marriages. Therefore, this paper aims to analyse the provisions of UP Ordinance, conduct a comparative analysis with the anti-conversion laws of other states and discuss the constitutional validity of the UP Ordinance.

4.2: CONTROVERSIAL PROVISIONS OF THE UP ORDINANCE

i. Wide Definition of Religion:

The definition of religion has been criticized for including traditional religions and different faiths, thereby increasing the ambit of the Ordinance. Due to this, the definition of religion is claimed to be vague and ambiguous. However, the objective behind doing so is of preventing conversion of tribal people by use of unfair means. These tribal people do not have any religion, nor do they follow animism. It has been observed that missionaries and different groups target gullible tribal people to convert them to their own religion. It is for this purpose that the definition of religion has been drafted to include not only traditional religion but also several faiths.⁴⁹

ii. Section 3:

Under section 3, it is alleged that the use of the word marriage without any qualification leaves a severe scope of mischief on the part of the executive. It makes every marriage in which conversion is done illegal and punishable. However, if we read the section in totality, it appears that the word marriage is not unqualified. The word 'marriage' has to be read with the primary clause that is "No person shall convert or attempt to convert either directly or otherwise any other person from one religion to another by use or practice of." Thus, the whole sentence

⁴⁹ Kaul Rahul, Srivastava Siddhartha. "Analysis of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020." *ILI Law Review*. Winter Issue 2020.

means that "No person shall convert or attempt to convert any person by use or practice of marriage."

It is already known that any conversion for the sole purpose of marriage is void and illegal. Thus, this clause makes no mischief but punishes marriage for the sole purpose of conversion. Also, every other word in the section involves a negative connotation like misrepresentation, force, undue influence, coercion, allurement, or fraudulent means. Therefore, it can be well concluded that 'marriage' would also have some negative connotations. The rule of **ejusdem generis** also states the same. However, under section 3, reconversion to one immediate previous religion is not deemed conversion under the Ordinance. The question which arises in light of this exception is that what if such reconversion is effected by misrepresentation, force, undue influence, coercion, allurement, or by any fraudulent means or by marriage. Thus, the Ordinance leaves a scope of mischief to emanate in the name of reconversion.

iii. FIR against the conversion (Section 4):

Section 4 enables any person who is related to the converted person by blood or marriage to lodge an FIR against the conversion. Under the Ordinance, a First Information Report (FIR) against unlawful religious conversion may be filed by any aggrieved person, his/her parents or siblings, or any other person related to them by blood, marriage, or adoption. Now, in most cases, it is the family members who are against the conversion of an individual. This section allows the disgruntled family members to cause impediments in such conversion by lodging FIR in each case wherein the person and family are not on the same page.

However, it has to be remembered that lodging an FIR will not annul the conversion; police will investigate into the fact whether such conversion was free or not. Further, the investigation is time-bound by way of section 57 and section 167 of the Criminal Procedure Code, 1973, and in standard cases, it will not exceed the period of 60 or 90 days as the case may be. Nevertheless, registration of FIR under pressure, haste is not abnormal, and chances of false FIR are not uncommon. There needs to be a check on such abuse. Moreover, being a cognizable and non-bailable offense, FIR and arrest can also be made, and indeed arrest has been made in few cases that could have been avoided. The arrested person, in such cases, had to move to the High Court to secure personal liberty.

For instance, The High Court of Allahabad in **Nadeem v. State of UP**⁵⁰ and Delhi High Court in **Simran Sagar v. GNCT Delhi**⁵¹ protected personal liberty and protection from any coercive action against the individuals who sought relief from the Ordinance under scrutiny. Therefore, it has the potential of leading to unnecessary harassment of such individuals.

iv. Section 5:

Section 5 makes provision for punishment for violation of section 3. It makes punishment severe in cases of contravention against minors, women, or persons belonging to scheduled caste or scheduled tribe. It has been stated that by making such a provision, the section violates Article 14, which is the Right to Equality. The law has to treat everyone equally.

Nevertheless, in making this argument, one must not forget that article 15(3) and Article 15(4) of the Constitution of India empowers the state to make special provisions for women, children, and scheduled caste and scheduled tribe. Moreover, it is not unknown that scheduled caste and scheduled tribe people, due to their socio-economic status, are targeted by fringe elements from other religions. Also, a similar kind of provision is present in other states' Anti-conversion law. Thus, severe punishment is provided for an offense against these categories of people.

v. Marriages involving religious conversion (Section 6):

Section 6 enables Courts to declare any marriage done for the sole purpose of unlawful conversion or vice versa void. Under the Ordinance, a marriage can be declared as a void marriage if it was done for the sole objective of unlawful conversion, or vice-versa, and the religious conversion was not carried out as per the procedure mandated in the Ordinance. Therefore, Section 6 provides that marriage for the sole purpose of conversion or vice-versa will be declared void by courts. The provision is nothing but a reiteration of the Supreme Court's judgement in **Sarla Mudgal v Union of India**,⁵² case and **Lily Thomas v Union of India**,⁵³ case. However, the catch in this provision is that the marriage can be annulled only on the petition filed by the parties and not relatives.

vi. Section 7:

Section 7 of the Ordinance makes the offences cognizable and non-bailable. This is the first act to make such a provision. When this provision is coupled with the fact that any aggrieved

⁵⁰ Nadeem v. State of UP (CMWP No. 16302 of 2020).

⁵¹ Simran Sgar v. GNCT Delhi S.L.P. (Criminal) Nos. 7153-7154/2013).

⁵² Sarla Mudgal v Union of India AIR 1995 SC 1531.

⁵³ Lily Thomas v Union of India (2000) 6 SCC 224.

person, brother/sister, parents, or any person related by blood, marriage, and adoption can file an FIR, it leaves tremendous scope for harassment and victimization of the converted individuals. Moreover, such provision of offences being made non-cognizable and non-bailable had not been made in the Draft Bill. The draft bill was silent on the offences being made bailable/non-bailable and cognizable/non-cognizable.

vii. Procedure for religious conversion (Section 8 and 9):

The Ordinance requires the individuals seeking to convert and the religious convertors (i.e, those who perform the conversion) to submit a declaration of the proposed religious conversion to the District Magistrate (DM) in advance. The declarations have to be submitted with a mandatory notice of

- 60 days by the individual and
- 30 days by the convertor

A violation of this procedure shall attract punishment of minimum imprisonment of six months but up to three years, and also a fine of at least Rs 10,000 (for the individuals undergoing conversion), and imprisonment between one and five years, and a fine of at least Rs 25,000 (for the convertors). A violation will also render the conversion as illegal and void. On receiving both declarations, the DM must conduct a police inquiry into the intention, purpose, and cause of the proposed conversion.

Within 60 days of the conversion date, the converted person must submit a declaration to the District Magistrate. The declaration must contain details, including the name, address, and the old and new religion of the person. The DM will then exhibit a copy of the declaration publicly till the date of confirmation of the conversion and record any objections related to the conversion. The converted person must also appear before the DM to establish his/her identity within 21 days of sending the declaration and confirm the contents of the declaration. Violation of any of these procedures will render the conversion illegal and void.

The Ordinance prohibits conversion of religion through:

- force, misrepresentation, undue influence, and allurement, or
- fraud, or
- marriage

It also prohibits the abetting, convincing, and conspiring to such conversions. However, a person reconverting to his/her immediate previous religion is allowed.

Therefore, Section 8 and 9 lay down the procedure that needs to be followed pre- and post-conversion. It mandates a notice of 60 days to the District Magistrate before the intended conversion, which has to be followed by a police inquiry into the circumstances of conversion. The religious priest/converter doing the conversion must also give prior notification to the District Magistrate. After the conversion has taken place, the person has to appear before the District Magistrate for confirmation. Again, the authority will notify the conversion and will invite public objections before confirming the conversion.

All this rigmarole for unforced marriage undermines a person's liberty and autonomy and it also gives State and legal support to the threats and societal pressures that most interfaith couples have to face. The courts have acknowledged the hostility that couples have to face as such marriages are viewed from the prism of a conspiracy theory instead of a personal choice.

viii. Section 11:

Section 11 talks about the parties to the offence and puts several people on the same footing as those who committed the offence. The problem in this section is that it punishes the person who not only 'does' but also those who 'omits to do any act to enable or aid any person to commit offense.' The main issue is in using the word 'omits.' How can an omission of one person enable or aid another to commit an offence? Enabling or aiding is always by way of active participation. By including 'omits to do any act,' the Ordinance leaves a scope of mischief in the hands of the executive. Further, section 11(iv) makes 'counsel', 'convinces' or 'procures' for conversion as punishable. These are very mild words; making them punishable will be very hard to reconcile with the freedom to propagate one religion. How can one propagate his religion if he/she is not allowed even to counsel or convince anyone?

ix. Section 12:

Section 12 is also one of the most criticized sections of the Ordinance wherein the burden of proof that a religious conversion was not effected through misrepresentation, force, undue influence, coercion, allurement, or by fraudulent means or by marriage, lies on the person who has caused the conversion and where such conversion has been facilitated by any person, on such person.

Traditionally, in a Due process model of Criminal Law, the prosecution has to prove the case, and an accused is presumed to be innocent until proven guilty. This traditional burden of proof is shifted on the accused only in circumstances of the likelihood that the accused seems guilty or when the criminal act occurs within the four walls of the house and is never unqualified. There are several circumstances where the burden of proof is on the accused, like cases of Dowry death, custodial rape, the suicide of a married woman, etc. In each such case, the shifted burden of proof on the accused is accompanied by specific circumstances like dowry death; it must be shown that soon before her death, such woman was a subject of cruelty or harassment by the accused or his family in connection with a demand for dowry and the marriage was solemnized not later than seven years of death, further, in cases of rape caused in the custody of a police officer it must be shown that where sexual intercourse if proved. Women agree that she did not consent; it will be deemed that there was no consent. Also, in cases of abetment of suicide by a married woman, it must be shown that the suicide was within seven years of marriage, and her husband or relatives of the husband had subjected her cruelty. Nowhere is it unqualified like the present section. Moreover, the offences under the Ordinance are cognizable and non-bailable, and even relatives can file an FIR, thereby subjecting the converted person to unnecessary harassment.

4.3: NEED TO PROMULGATE AN ORDINANCE

The Ordinance has been questioned as to why it was passed as an Ordinance because an Ordinance is enacted only when urgent action is required. Furthermore, it encompasses no debate or discussion like that of a Bill as time is of extreme importance. Article 213 of the Indian Constitution entitles the Governor to promulgate an Ordinance during the recess of the state legislature if circumstances exist which render it necessary for him to take immediate action. He may promulgate such Ordinance as the events appear to him. These are the following prerequisites to promulgate an Ordinance -

- the Parliament/ State Legislature should not be in session,
- such circumstances should exist to promulgate such an ordinance and,
- those circumstances should require immediate or urgent action.

While enacting the current Ordinance, the state legislature was not in session, but were there grounds that justified the promulgation of an Ordinance? And more so, were these

circumstances prompt enough to promulgate an Ordinance? The Uttar Pradesh government needs to answer a few questions in this regard. The UP Law Commission submitted its report in 2019, and the Report showed no such circumstances that too many religious conversions or mass conversions were happening in the state. Skeptics have argued that inter-faith marriages account for only 2 percent of total marriages in India, which is too minuscule a number to affect any public order.

Though there is no convention of mentioning the immediate circumstances for promulgating an Ordinance, the courts try to delve into it. But it has been held by the Supreme Court in **RC Cooper v. Union of India**⁵⁴ that the President's decision or choice to promulgate an Ordinance could be challenged because immediate action was not required, and the Ordinance was primarily enacted to bypass debate and discussion in the legislature. The Apex court used a similar tone in **DC Wadhwa v. the State of Bihar**,⁵⁵ that the legislative power of the executive to promulgate or enact Ordinances is to be used only in exceptional circumstances, and it is not to be used as a substitute for the law-making power of the legislature. The same was also reaffirmed in **Krishna Kumar Singh v. State of Bihar**⁵⁶ that issuing ordinances is not an absolute entrustment. However, it is "conditional upon satisfaction that circumstances exist rendering it necessary to take immediate action." A similar rule would also apply in the case of the Governor. Moreover, a healthy convention should mention the immediate circumstances existing to promulgate an Ordinance, as an Ordinance does not involve any debate and discussion as the ordinary law does.

4.4: COMPARISON BETWEEN THE UP ORDINANCE AND MADHYA PRADESH DHARMA SWATANTRYA ADHINIYAM, 1968 AND ORISSA FREEDOM OF RELIGION ACT, 1967

The Madhya Pradesh Dharma Swatantrya Adhinyam, 1968 and the Orissa Freedom of Religion Act, 1967 were enacted to deal with the increasing activities of Christian missionaries in the states of Madhya Pradesh and Orissa. Both the Acts of these states were made on similar lines and contain similar provisions. In comparison, the UP Ordinance is made with a different intention to regulate conversions made for the purpose of marriage. Hence, the UP Ordinance

⁵⁴ RC Cooper v. Union of India AIR 1970 SC 564; 1970 SCR (3) 530.

⁵⁵ DC Wadhwa v. the State of Bihar 1987 AIR 579, 1987 SCR (1) 798.

⁵⁶ Krishna Kumar Singh v. State of Bihar CIVIL APPEAL NO. 5875 OF 1994.

has special provisions related to this intention, such as giving pre-conversion declaration to the District Magistrate, police inquiry and post-conversion declaration being made public.

- i. **Bail:** The Ordinance also differs from the two Acts of Madhya Pradesh and Orissa in other key aspects. The UP Ordinance is stricter in the sense that it has a greater quantum of punishment and the offences committed under this Act are non-bailable and cognizable. In comparison, the offences punishable by the MP and Orissa Acts are bailable offences.
- ii. **Police Inquiry:** The Ordinance contains provisions for conduct of police inquiry at the pre-conversion stage. After a person intending to convert gives a declaration of his/her intention to the District Magistrate, a police inquiry must be conducted to ascertain the circumstances of conversion. After the conversion, the person must appear before the District Magistrate for confirmation. This pre-conversion and post-conversion declaration are accompanied by a public exhibition of the declarations and invitation of objections from the public against the conversion. These stringent provisions of pre- and post-conversion and police inquiry before conversion are absent in the MP and Orissa Acts.
- iii. **Conversion by Marriage:** The Ordinance explicitly punishes conversions for the purpose of marriage or vice-versa. But the MP and Orissa Acts do not explicitly cover marriage by conversion but have a more general provision that makes conversion by fraudulent means a punishable offence.
- iv. **Pre-Conversion Declaration and Punishment:** The quantum of punishment for offences under the Ordinance are more severe than the punishment for offences under the MP and Orissa Acts. Under the Ordinance, the punishment is imprisonment for not less than one year and up to five years and a fine of not less than Rupees Fifteen Thousand. If the offence is committed against a minor, women from the scheduled castes (SCs) or Scheduled Tribes (STs), then the punishment is imprisonment of not less than three years but up to ten years and fine not less than Rupees Fifty Thousand. Whereas, under the MP and Orissa Acts, the punishment is imprisonment of one year or fine of Rupees Five Thousand or both and in case of offences against minors or women from the scheduled castes (SCs) or Scheduled Tribes (STs), imprisonment of two years or fine of Rupees Ten Thousand or both.
- v. **Burden of Proof:** Another difference between the Ordinance and the two Acts is that in the Ordinance, the burden of proof is on the person who caused such conversion but in the two Acts of MP and Orissa, the burden of proof is on the Prosecution. In case of

offences under the MP and Orissa Acts, the prior sanction of the District Magistrate is required before prosecution but under the Ordinance, no such prior sanction is required.

- vi. **Violation Effect:** In case of violation of the provisions, the MP and Orissa Acts provide for punishment but the conversion done under the Acts is valid. But in case there is a violation of the provisions of the Ordinance, it provides for punishment and also makes the conversion void and illegal.
- vii. **Liability:** Under the MP and Orissa Acts, only the converter is made liable for offences under the Acts but under the Ordinance, both the converter and the person getting converted are liable for violation of its provisions.
- viii. **Re-conversion:** Another major difference between the Ordinance and the Acts is the aspect of reconversion. The MP and Orissa Acts do not allow reconversion to the previous religion and such reconversion will have the same effect as if there was a new conversion. But the Ordinance has carved out an exemption for reconversion and allowed the person to revert to their previous religion.

Thus, it can be seen that the UP Ordinance is significantly different from the MP and Orissa Acts in the sense of being wider and stricter and in making the process of conversion lengthier and more tedious by adopting a greater number of procedures to be followed by anyone intending to convert.

4.5: DOES THE UP ORDINANCE VIOLATE FUNDAMENTAL RIGHTS?

The UP Ordinance is controversial in many ways. The Ordinance aims to criminalize forced conversion and conversion for the sake of marriage. The ordinance assumes that women and persons belonging to the SC/STs cannot make decisions of their own volition and therefore need extra protection from the State. This approach undermines the free will and decision-making powers of women in general, particularly women belonging to the SC/ST communities. Thus, the Ordinance violates Article 14 and attempts to put a restriction on Article 21 and 25 of the Constitution. Restriction of such right is violation of fundamental rights.

i. Liberty and Autonomy:

Liberty is guaranteed under the Preamble of the Constitution of India. The concept of liberty refers to the freedom of the activities of Indian nationals. This means that there are no

unreasonable restrictions on Indian citizens regarding what they think, their manner of expression, and how they wish to follow their thoughts in action. Autonomy is when a person can make an informed, uncoerced decision. Individual autonomy is an idea that is commonly understood to refer to the capacity to be oneself and live one's life according to reasons and intentions taken as one's own and not the product of manipulative or distorting factors.

All these provisions of the Ordinance give power to the State to police personal relationships and throttle a citizen's freedom of choice. In **Shafin Jahan v Asokan KM**⁵⁷, a Hindu girl named Athira converted to Islam and married to Shafin Jahan, hiding these facts from her parents. Her parents filed a petition in high court alleging forceful conversion and marriage. The High Court held that the marriage of Athira alias Hadiya was a sham. Her husband Shafin Jahan appealed before the Apex Court, which after intense deliberation by both sides, held that "The right to marry a person of one's choice is an integral part of Article 21 of the Constitution. The Constitution provides the right to life and personal liberty, and this right can be taken away only through a law that is substantively and procedurally fair, just, and reasonable. The freedom of each individual to make decisions on subjects vital to the pursuit of happiness is intrinsic to the liberty guaranteed by the Constitution as a fundamental right. Matters relating to belief and faith, including whether to believe, are the heart of constitutional liberty. The Constitution exists for both believers and agnostics. The right of each individual to pursue a way of life or faith to which he or she wishes to adhere is protected by the Constitution. Matters of dress and food, ideas and ideologies, love and partnership are within the central aspects of identity. The law may govern the elements of a legitimate marriage, as well as the instances in which a marital bond can be ended or annulled (subject to constitutional adherence). These remedies are given to parties to a marriage, and they are the ones who decide whether they should accept each other into a marital tie or continue in that relationship. The society has no role to play in determining our choice of partners."

In **Lata Singh v State of Uttar Pradesh**,⁵⁸ the Supreme Court observed that "Parents of the boy or girl cannot give threats or commit or instigate acts of violence and they cannot harass the person who undergoes such inter-caste or inter-religious marriage." Despite these and other precedents, social and religious groups continue to take the law into their own hands, with the tacit or active approval of Police and government authorities. Threats and harassment

⁵⁷ Shafin Jahan v Asokan KM (2018) 16 SCC 368.

⁵⁸ Lata Singh v State of Uttar Pradesh (2007) 1 GLH 41.

are common against inter-faith couples and it forces young people to flee their communities and hometowns and to live in fear.

Although the Supreme Court has upheld the right to marry a person of one's choice under Article 21, the Ordinance creates a rigmarole of procedure that makes it difficult to enter into an inter-faith marriage. The provisions of the Ordinance also empower family members and religious groups to oppose the voluntary inter-faith marriage on flimsy grounds. The Ordinance gives State and legal backing to the threats of persons and groups who want to prevent inter-faith couples and others from converting from one religion to another.

ii. Consent:

Even though the courts have repeatedly emphasized that if two persons have reached the age of majority, they are free to marry and live with whoever they choose, the Ordinance disregards the decision of two consenting adults.

In **Sony Gerry v Douglas Gerry**⁵⁹ the Apex Court said that, "It needs no special emphasis to state that attaining the age of majority in an individual's life has its own significance. They are entitled to make their choice. As long as the choice remains, the courts cannot assume the role of parent's patriae. The daughter is entitled to relish her freedom as the law permits, and the Court should not assume the role of a super guardian being moved by any kind of sentiment of the mother or the egotism of the father."

The former CJI Dipak Misra, in **Shakti Vahini v Union of India**,⁶⁰ had remarked, "When two adults marry out of their own will, they choose their own path; they consummate their relationship; they feel that it is their goal and they have the right to do so. And it can be clearly stated that they have the right and any infringement of the said right is a constitutional violation."

The present Ordinance, by involving provisions like pre-post conversion declaration, putting the burden of proof on accused, and allowing person even related by blood, marriage, and adoption apart from parents and brother/sisters to file FIR enables an element of unreasonableness to creep in. Given the Supreme Court's emphasis on freedom to choose a life partner, it will be interesting to see the Court's reaction to the Ordinance, which has been challenged before.

⁵⁹ Sony Gerry v Douglas Gerry (2018) 2 KLT 783.

⁶⁰ Shakti Vahini v Union of India 2018 AIR SC 1601.

iii. Right to Privacy

An exciting development in the Indian Constitutional jurisprudence is the extended dimension given to Article 21 by the Supreme Court after the Maneka Gandhi era. The Supreme Court has asserted that Article 21 is the heart of Fundamental Rights. It is asserted that treating a right as a fundamental right does not need to be explicitly stated in the Constitution as a Fundamental Right. Changes in the country's political, social, and economic landscape necessitate the recognition of new rights. In its infinite youth, the law develops to satisfy the needs of society. The right to privacy is one such right that has come into existence after widening up the dimensions of Article 21.

In the historical judgement of Justice **K.S. Puttaswamy (Retd) v. Union of India**,⁶¹ the Supreme Court held that "as far as religious beliefs are concerned, a good deal of the misery our species suffer owes its existence to and centres on competing claims of the right to propagate religion. The Constitution of India protects the liberty of all subjects guaranteeing the freedom of conscience and the right to freely profess, practice, and propagate any religion. While the right to freely "profess, practice and propagate religion" may be a facet of free speech guaranteed under Article 19(1)(a), the freedom of faith or the belief in any religion is a matter of conscience that falls within the zone of purely private thought process and is also an aspect of liberty. Other than religious beliefs, there are other aspects of an individual's freedom of conscience, such as political beliefs, which are protected by Article 21."

The Supreme Court, while stating that the right to choose a life partner was a facet of the right to privacy, it went on to state that any invasion of the right to privacy by the State must meet the following requirements:

- Legality, which postulates the existence of law.
- Need, defined in terms of legitimate social need.
- Proportionality, it secures a rational nexus between the objects and the means adopted to attain those objects.

The Ordinance may fare well on legality aspect, but the need would be questionable and proportionality even more so because the law makes every conversion per se illegal and casts a burden on the converted person to not only make a declaration but also prove that such conversion was not unlawful.

⁶¹ Justice K.S. Puttaswamy (Retd) v. Union of India 2019 10 SCC 1.

Further, the Ordinance also seems to be at loggerheads with the recent Allahabad High Court judgment in **Salamat Ansari v. State of UP**,⁶² case wherein the court stated that:

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 object to the relationship of two significant individuals who, out of their own free will, are living together. The decision of an individual of the age of majority to live with an individual of their choice is strictly a right of an individual. When this right is infringed, it will constitute a breach of their fundamental right to life and personal liberty. It encompasses the freedom of choice, the right to choose a spouse, and the right to live with dignity, as established in Article 21 of the Indian Constitution. Though the judgement is of a High Court, it will have a high persuasive value considering that it is from the same state as that of the Ordinance.

Similarly, the Lucknow bench in the recent case of **Smt. Safiya Sultana v. State of UP**,⁶³ stating that laws should change with time and circumstances, made issue of public notice under the Special Marriage Act, 1954 as directory. The court said that, the procedure of publication of notice and inviting objection to the intended marriage has to be to uphold the fundamental rights and not violate the same. If the simplistic readings are held mandatory, they will invade the fundamental rights of liberty and privacy from state and non-state actors. Thus, the court mandated that it shall be optional for the parties to the intended marriage to request to the Marriage Officer in writing to publish or not to publish a notice and follow the procedure of objections. Suppose they do not make such a request for publication of notice in writing while giving information, the Marriage Officer shall not publish any such notice or entertain objections to the proposed marriage and proceed with the solemnization of the marriage. Therefore, it was held that “Mandatory Publication of Notice of Intended Marriage under Special Marriage Act, 1954 violates the Right to Privacy.”

iv. **Proportionality**

Some may claim that conversion for the only purpose of marriage or marriage for the sole intent of conversion may be morally and ethically incorrect. Nevertheless, is it proportional to criminalize such conversion?

⁶² Salamat Ansari v. State of UP (Cri. Misc. W.P No. 11367 of 2020).

⁶³ Smt. Safiya Sultana v. State of UP (HABEAS CORPUS No. - 16907 of 2020).

In landmark judgement of **Joseph Shine v Union of India**,⁶⁴ Justice Indu Malhotra opined that, “the component of public censure, visiting the delinquent with penal consequences, and overriding individual rights would be justified only when the society is directly affected by such conduct. A stronger justification is required where an offense is punishable with imprisonment. The State must obey the minimalist approach in the criminalization of offenses, considering the respect for the autonomy of the individual to make their personal choices.”

The Ordinance also fails to address the requirement and justification for declaring such weddings null and void and forcing couples to make difficult commitments to go through something as personal as marriage. It also shifts the burden of proof under Section 12 to the accused to prove the marriage entered into by the two people was not forced, in contrast to the typical practise followed in criminal law, which sets the burden on the prosecution and accepts the accused as innocent until proven guilty.

This makes it simpler for disapproving parents and family members to file spurious charges against a couple that defies their parents' marriage ban. Such a law would also lead to disproportionate results of acting like a barrier for interfaith couples. Section 7 makes the offense of illegal/forced conversion a cognizable and non-bailable offense. This means that a police officer can arrest an alleged offender without a warrant and hold him for days at the discretion of the Court.

v. **Right to Conscience:**

Article 25 of the Indian Constitution guarantees religious freedom and the right to free profession, practice, and propagation of religion. The right to conscience has also been defined separately from the right to religion. This indicates that one can be non-religious and exercise the freedom of conscience. According to the dictionary meaning, conscience involves "a knowledge or sense of right or wrong, moral judgement that opposes the violation of previously recognized ethical principles and leads to feelings of guilt if one violates such principles."

As a result, an individual's exercise of conscience cannot be limited simply because it does not conform to the ethics and morals established by religion. If an individual believes a religious principle is violative of his or her ethical beliefs, and if the individual's ethical beliefs

⁶⁴ Joseph Shine v Union of India 2018 SCC Online SC 1676.

do not violate laws or impede the exercise of another person's rights, the right to conscience cannot be restricted. So, the critical question to ask here is how can a State impose restrictions on a person's right to a conscience which involves religious conversion?

In the controversial judgment of **Rev Stanislaus vs. Madhya Pradesh**,⁶⁵ the Supreme Court looked into the constitutional validity of two anti-conversion legislations in Orissa and Madhya Pradesh. The Supreme Court in 1975 backed the interpretation of anti-conversion law by the High Court of Madhya Pradesh. The MP Court accepted the argument that the anti-conversion law is primarily a law protecting public order and thus falls under the reasonable restriction on the right to religion and conscience enumerated in Article 25 (1) of the Constitution, which upholds the state legislation. The Supreme Court examined religious conversion through the lens of public order.

To frame personal autonomy as that of public order would hollow out the right to liberty and privacy. Suppose communal elements create a public order problem because two individuals chose to marry. In that instance, the state must keep tabs on intimidation and violations of rights rather than embarking on a digging expedition to discover the veracity of someone's belief. While the 1975 decision affirmed the legality of anti-conversion statutes, it did not state that a person should not convert for the purpose of marriage.

Thus, the provision of publishing notice of marriage under the Special Marriage Act, 1954 was held to be intrusive of liberty and privacy rights. The UP Ordinance also has a similar procedure, in fact, a more advanced procedure. The judgement is sure to be appealed in the Supreme Court, which will have to decide about both the procedure in the Special Marriage Act and the Ordinance.

4.6: CONSTITUTIONAL VALIDITY OF THE UP ORDINANCE

State anti-conversion laws should be held to be unconstitutional because states are using them to prevent people from converting to other religions by criminally penalizing converts who are exercising their constitutional rights to propagate and exercise their religions. These anti-conversion laws have the potential to abuse innocents since they are interested in maintaining

⁶⁵ Rev Stanislaus vs. Madhya Pradesh 1977 SCR (2) 611.

and expanding the power of Hinduism in India and are abusing anti-conversion laws to prevent Dalits, low caste Hindus, from converting.

- i. **Restriction on freedom of religion:** To investigate the importance of religious freedom in India, one should analyse Article 25 of the Constitution which guarantees freedom of conscience and free profession, practice, and propagation of religion. This article falls under (Part III) Fundamental Rights, the right to freedom of religion. As Article 25 falls under the Fundamental Rights section, it ought to be one of the most fundamental rights that Indian Citizens have. Indeed, Article 32, remedies for enforcement of rights conferred by this part, also exists under Part III to allow people a unique method for an appeal to the Indian Supreme Court when there is a concern over the abridgment of a fundamental right. In addition, the preamble itself speaks of liberty of belief, faith, and worship, which are all associated with the fundamental right of freedom of religion. The preamble of a Constitution reflects the rest of the document and, it can be read as the spirit of the entire document. Therefore, the right to freedom of religion should hold a significant place in Indian constitutional jurisprudence.

On their face, most anti-conversion laws appear to be unconstitutional. However, the Supreme Court has ruled in favour of some anti-conversion laws in the past. The Supreme Court has construed the meaning of the words "public order" in Article 25 of the Constitution in a broad sense. It has also created a jurisprudence that regards Hinduism as a way of life and not merely a religion. By granting Hinduism a special status apart from a pure religious status, the Supreme Court has opened a door for Hindu nationalists. This has led to local authorities arresting missionaries and converts for violating anti-conversion laws. Even after local citizens have attacked Christian missionaries and recent converts, the missionaries, and converts have been penalized rather than the attackers. In these cases, the victims are subject to criminal sanctions. The National Investigation Agency back in 2018 found that no "Love Jihad" was in play when it investigated cases of possible forced conversions for marriage in Kerala. The investigating agency closed the cases citing no evidence of "coercion" in the conversion of individuals.

These abuses may be why some states have not enforced their anti-conversion laws and why some governors have refused to sign them. This shows that some decision-makers in India believe that anti-conversion laws are invalid and, perhaps, contrary to the promise of religious freedom in the Indian Constitution.

The official report of a special investigation launched by the UP police into allegations of allurement and forced conversion of Hindu women has concluded that most Hindu-Muslim relationship cases probed were consensual. Reportedly, there were barely nine recent cases of marriages between a Hindu girl and a Muslim boy. Moreover, these too were limited to just five of UP's 75 districts, namely Kanpur, Meerut, Aligarh, Lakhimpur-Kheri, and Ghaziabad. Out of nine in five cases, the Hindu girls openly refuted 'love jihad' accusations based on their respective parents' complaints.

- ii. **Constitutional Competence:** While forcible conversion ought to be prevented, state anti-conversion laws are not designed for that purpose. Anti-conversion laws were held constitutional in the Rev Stanislaus. But the Court should not have done so because Orissa and Madhya Pradesh did not have the constitutional competence to pass their anti-conversion laws. Anti-conversion laws are constitutionally within the competence of the Union Government rather than the state governments because they are religious matters rather than public order matters. Similarly, the state of UP also has no competence to pass such an Ordinance.

Although the Supreme Court has found anti-conversion laws to be constitutional, the reasons for finding so are not convincing. They do not adequately support the Court's holding in Stanislaus case. These anti-conversion laws are unconstitutional because they deal primarily with religion rather than public order. Therefore, Indian states do not have the legitimate constitutional competence to pass these anti-conversion laws.

- iii. **Violation of International Law:** Furthermore, the Supreme Court has also decided that the Universal Declaration of Human Rights is substantially espoused in the Indian Constitution. The declaration provides for the freedom of religion, as explained previously in Part IV. Although the UDHR is not considered binding on its signatories, the writers of the Indian Constitution provided a special place for international law in the Indian Constitution. The Indian Constitution states explicitly that it respects international law in Article 51. In addition, the Universal Declaration of Human Rights has arguably attained the level of customary international law. This means that even if the Universal Declaration of Human Rights is not binding itself, the principles it espouses are generally binding. India has also signed onto the International Convention for Civil and Political Rights, discussed previously in Part IV, which provides freedom of religion and is binding on its signatories.

International instruments like the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), and even ICCPR (International

Covenant on Civil and Political Rights) explicitly recognize that the right to conversion is included in the right to freedom of religion and any law which restricts this freedom would violate the international norms.

- iv. **Special Marriage Act:** It is argued that the Ordinance penalizes interfaith marriages, religious conversion, and freedom of choice, all of which are guaranteed by the Constitution. In most criminal proceedings, the prosecution has the burden of proof. However, under this Ordinance, the burden of proof is on the converted individual and the person who causes the conversion under these statutes. Thus, this makes it easy for family members and mala fide third parties to file false complaints without evidence to harass inter-faith couples.

The Allahabad High Court in Salamat Ansari case held that the Special Marriage Act 1954's 30-day public notice time and objections procedure could not be made mandatory. The notice period also unnecessarily harassed interfaith couples. The Allahabad HC is yet to hear petitions filed against the UP ordinance (the Supreme Court recently refused the UP government's plea to move the petitions to the SC). However, this judgement against the SMA could be indirectly decisive for interfaith couples. The judgement could allow interfaith couples to opt for the SMA route since the notice period has been adjudged non-mandatory. Hence, not requiring any conversion for the sake of marriage since conversion is the fundamental element of the UP Ordinance. Secondly, the arguments based against the Ordinance could also use this as a judicial precedent against any notice period and subsequently refer to this particular judgement to prove that the UP ordinance is indeed ultra vires of the Constitution.

- v. **Uncertainty:** Without a doubt, the legislation contains some amount of uncertainty. Communication and interpretation of laws lie in the competent hands of the Indian judiciary. However, it is equally clear that ordinances about Love-Jihad remain unequivocally biased towards punishing Muslim youth. The intention of protecting women is a clever euphemism for the perceived incompetence of women when it comes to handling themselves in social situations. The fact that the said ordinances encourage this notion of incompetence while also providing an opportunity to target a selected community is a matter of concern for the judiciary. The Ordinance, therefore, is an intrusion into multiple fundamental rights, all at once.

Another aspect of the law has to be the camouflage of “protecting” women. In Joseph Shine case, the Supreme Court had earlier ruled that policies “perpetuating destructive sexual stereotypes that view women as inferior cannot be preserved in the name of being

apparently “beneficial” to women under Article 15(3) of the Constitution. Article 15(3), which allows for special provisions to be made for women and children, cannot save laws whose entire rationale is discriminatory.

This, however, would not be the first instance of such a law. The Himachal Pradesh High Court, way back in 2012, struck down a similar law, namely the Himachal Pradesh Freedom of Religion Act, 2006. The Act, in an irony of what the name suggests, restricted religious conversions. It required that a magistrate be notified of all religious conversions and publicly recorded 30 days in advance. The law made exceptions to those reverting to their original faith, mainly Hinduism. Justice Deepak Gupta struck down the Act as ultra vires of the Constitution.

4.7: CONCLUSION

The UP Ordinance, 2020, has its share of controversies. Some are rightly placed, and some are misguided. There is no doubt that the Ordinance subjects the people converting to other religions under several rigors, but does it amount to regulation or unnecessary intrusion in people's lives is a question still to be decided by the courts.

Further, the Ordinance’s provisions have to be seen in the light of the triple test as laid down in the Puttaswamy case that for any law that affects the right to privacy, it has to satisfy that it is legal, it is needed and it is proportional. Also, the impact of the Ordinance on the freedom of religion enshrined under articles 25 to 28 of the Constitution has to be seen that whether it violates that freedom or merely regulates it.

Moreover, the Ordinance appears to be in confrontation with several Supreme Court judgements stating that the right to choose one's partner is a fundamental right protected under article 21 of the Constitution. Though the Ordinance prohibits and punishes when conversion and marriage lack free consent, the procedural requirement to inform the administration attracts the provisions under Article 21. The Ordinance, however, does not apply to those couples married under the Special Marriage Act, 1954, since it has its procedure to verify the circumstances. People of different religions wanting to marry each other can follow the procedure laid down by the Special Marriage Act, 1954, which does not involve any pre-marriage enquiry by the district magistrate. Suppose the couple married under the Special Marriage Act 1954. In that case, they have to inform the marriage officer about the same, who shall get it published at any conspicuous place in his office. If no objection is received, the marriage can be solemnized at the end of thirty

days period. However, the recent decision of the High Court of Allahabad has made the mandatory public notice of marriage under the Special Marriage Act, 1954 as directory, i.e., only if the couple wants to make a public notice of marriage, then only the Marriage Officer can do the same. The judgment is sure to be appealed, and Supreme Court's decision is awaited in this regard.

On the contrary, the UP government has placed its reliance on the judgment of Rev Stanislaus wherein the Apex Court ruled that there was no fundamental right to convert and the fundamental right to profess, practice, and propagate a religion can be reasonably restricted on the grounds of public order, morality, health and other provisions of Part III. The judgement also mentions that unlawful conversion can create law and order problems. The Ordinance is the culmination of the same reasonable restriction on the ground of public order. Furthermore, the Ordinance is not the first law to regulate conversion; the same has already been done in many states.

Although the Ordinance on the face seems to be against several fundamental principles of law and judicial precedents, that alone does not make it unconstitutional. It will be seen in the light of the reasonable restrictions which it tries to impose. It has already been witnessed before when the law made by states of Odisha and Madhya Pradesh were challenged very boisterously to be invalid, and the Supreme Court upheld their validity. Nevertheless, the present Ordinance is a considerable advancement over these laws. Moreover, these laws were declared constitutional in the light of article 25. UP ordinance will have to pass the test of article 14 and article 21 as well. The precedent of Stanislaus can be helpful, but it cannot be a binding precedent.

Moreover, the decision of Allahabad High Court is a jolt to the validity of the Ordinance in the sense that it has declared the procedure of public notice of marriage under the Special Marriage Act, 1954 as being not in line with rights of liberty and privacy. A similar a more advanced provision is there under the Ordinance. Though the judgment is of High Court and will not be binding, it will have a considerable persuasive value as it comes from the same state as the UP Ordinance.

CHAPTER 5

CONCLUSION AND SUGGESTIONS

“Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity. Neither the State nor the law can dictate a choice of partners or limit the free liability of every person to decide on these matters.”

- D Y Chandrachud

5.1: INTRODUCTION

The issue of conversion is not new, it has been a controversial topic for many years. Despite the provisions of Indian Constitution which guarantees right to freedom of religion and propagation, there are certain loopholes which need to be addressed as soon as possible. Our Constitution makers gave the power to the states to regulate rules dealing with religion and conversion because freedom of religion was not intended to be transitional, expecting that they would disappear as traditional India, and giving way to new modernism. The object of this constitutional compact was not to assimilate all Indians into a new kind of secular and scientific socialism. Instead, it was to protect the infinite variety and strength of group life so long as India's essential unity was not threatened and group life was not organized to permit or sustain the exploitation of any particular citizen or group.⁶⁶

The States were permitted to celebrate religion and enter into partnership with minority institutions over the education of the Indian people as long as it did not act in a discriminatory way. The autonomy of religious groups was respected, subject to various regulatory controls and programs of social reform. However, the states are taking this opportunity to harm the secular structure of the country over political benefits. Therefore, this paper's objective is to examine the various questions as to how the anti-conversion laws, specifically the Love Jihad law, violate the Constitutional Principles of our nation, and this paper also aims to provide suggestions to curb and limit the misuse of UP Ordinance.

⁶⁶ Dhavan, Rajeev. "Religious Freedom in India." American Journal of Comparative Law, vol. 35, no. 1, Winter 1987, p. 209-254. HeinOnline.

5.2: CONCLUSION

The issue of anti-conversion laws and ‘love-jihad’ have become a contentious issue in the present time. Although the subject of anti-conversion laws have been debated for many decades, the subject has now got a new dimension in the context of ‘love jihad’. Many States have been mulling over creating laws that specifically deal with ‘love jihad’ and UP has been the first State to promulgate an Ordinance to deal specifically with the issue of ‘love jihad’ and the broader issue of conversion. . The Ordinance has been enacted even in the absence of concrete evidence to prove the existence of the so-called ‘love jihad’ theory. Government agencies have denied the existence of a love jihad conspiracy but several States have been steadfast in calling for a law to regulate it. Other states such as Madhya Pradesh have already followed UP’s example and enacted laws to specifically deal with the issue of love jihad and religious conversion.

In their enthusiasm to curb a problem that even government agencies deny the existence of, states such as UP have enacted laws that curtail a person’s freedom, choice and privacy. The UP Ordinance has been enacted with stringent provisions that make it very difficult, time-consuming and tedious to undergo a religious conversion. The Ordinance applies to the persons who wish to convert as well as the persons facilitating the conversion such as priests or religious leaders. This paper has already listed the provisions of the Ordinance, the various pros and cons of such an Ordinance and the effect that it has on people’s Constitutional and legal rights.

When examined from the Constitutional perspective, the Ordinance appears to go against the Fundamental Rights enshrined in Article 14, 21 and 25. The Ordinance is patently biased against women and the marginalised communities in that it disregards the voluntary and conscious choices made by women and persons from SC/ST’s to convert from one religion to another and casts the burden of proving that their conversion was voluntary on the very person who is converting. The Ordinance also offends Article 21 by putting unreasonable restrictions on a person’s right to privacy by forcing every person who intends to convert to go through the formality of making a public declaration pre- and post-conversion, and also go through a police inquiry. Article 25 guarantees the right to freedom of religion, which includes the right to practice and propagate a religion of his/her choice. But the Ordinance severely restricts this right by making the process of conversion a tedious process and by making a converted person and the converter liable under the Ordinance for various vaguely defined and broad offences.

If the Ordinance is examined from a feminist perspective or a caste perspective, it appears to completely disregard the right of a women or a person from the SC/ST communities to make a

conscious choice for themselves. The Ordinance assumes that any conversion by a woman or an SC/ST person is not done out of their own volition and that such persons need the special protection and watchful eye of the State in conducting their religious affairs. It assumes that such persons are gullible and naïve, and therefore cannot make a voluntary choice of changing their religion without coercion or influence from an outsider. Giving a public declaration of the intention to convert, inquiry by the District Magistrate and by the Police make it more difficult for women and marginalised communities to undergo conversion, because of the greater social stigma and judgement that women and marginalised persons have to face.

If the Ordinance is examined from a social perspective, it presents another set of challenges. The Ordinance enables family members, relatives and others to file a complaint under the Ordinance if they suspect that a conversion was done involuntarily. The problem with this is that in most situations where a person converts, be it for marriage or any other reason, most of the opposition to such conversion comes from the family members or relatives. The Ordinance now gives a weapon to the family or relatives of the converting person to create hurdles in the process of conversion and to either delay or halt the conversion itself. The Ordinance can also be used by right-wing religious groups or extremists to threaten and intimidate people who willingly wish to convert, by filing frivolous complaints or by causing delays in the conversion process.

When examined from the perspective of international law or human rights, many international organisations are of the opinion that although anti-conversion laws do not explicitly ban conversions, in practice these laws both by their design and implementation, infringe upon the person's right to convert and favour Hinduism over minority religions. While the laws are enacted to apparently protect religious communities only from efforts to encourage conversion by inappropriate ways, the laws fail to clearly define what makes a conversion inappropriate and they also give state governments the unregulated discretion to accept or reject the legitimacy of religious conversions. International conventions such as UDHR, ICCPR and ECHR specifically include a right to convert as one of the rights under these conventions. Although India, under Art.51 of the Constitution, is obligated to adhere to international laws and conventions, it has not expressly included the right to convert under the rights to religious freedom. Moreover, apart from not adhering to the international conventions, by enacting such anti-conversion laws, India is actually going against the international conventions that it has ratified and vowed to follow.⁶⁷

⁶⁷ Fischer Meghan. "Anti-Conversion Laws and the International Response."(2018).

The Ordinance makes it mandatory to give declarations to the District Magistrate before and after conversion and also forces people who want to convert to undergo a police inquiry to ascertain whether the conversion is genuine and voluntary. Such provisions place unreasonable restrictions on persons who willingly convert or those who enter into inter-faith marriages, which may even discourage these persons from going through with their conversion. The Law should not become so cumbersome that regular persons are frustrated by its provision, even in exercising their choice and freedom.

Inter-faith couples who want to marry have two choices while choosing to get married – they can either get married under the Special Marriage Act without a religious conversion or they can choose to convert to the same religion and get married under the personal laws of that religion. The Ordinance makes the second option difficult as couples now have to endure the time delay and complicated process of conversion under the Ordinance. The Special Marriage Act has been made even more liberal in light of recent judicial pronouncements that made the notice period under the Act as merely advisory and not mandatory. Therefore, it is evident that the provisions of the Ordinance and the Special Marriage Act are conflicting with each other in certain aspects and are not in consonance with each other. It is now up to the Courts to harmonise the provisions of both laws when an issue arises before the Judiciary.

5.3: SUGGESTIONS

The UP Ordinance was enacted with the objective of preventing forced conversions by use of unfair or illegal methods. Though the objective is noble, the Ordinance has certain lacunae in its provisions, which can lead to misuse or abuse of the Ordinance. The Ordinance grants great power to the District Magistrate and the Police to deal with conversions under the Ordinance. The following are the suggestions/safeguards that can curb misuse of the Ordinance and prevent victimisation of innocents:

1. The public display of pre- and post-conversion declarations by the DM should be made advisory and not mandatory. These declarations are extremely personal and should not become an obstacle in the way of a genuine, voluntary conversion. Public display of these declarations also enables religious and civil society groups to intimidate and threaten prospective convertors and thus enable them to take the law into their own hands. Interfaith couples already feel victimised and threatened by their families and relatives, and the Ordinance enables more persons to interfere in this very personal decision of choosing to change one's religion.

2. Police Inquiry should not be carried out as a matter of routine in every case of conversion. The Ordinance makes Police inquiry mandatory after a pre-conversion declaration is given, to ascertain the genuineness of the details of the declarant and to ensure that the person intending to convert is doing so out of their own free will. Police Inquiry should only be conducted when there is a complaint given under the Ordinance that a certain conversion does not conform to the provisions of the Ordinance. If it is conducted before every conversion, it will discourage even voluntary conversions. Conducting of police inquiry as if every conversion is a criminal offence, not only infringes a person's rights under article 21 and 25 but also creates a stigma against those who intend to convert.
3. The Ordinance should make prior sanction by a judicial officer mandatory, before cognizance of an offence under the Ordinance. Under the Ordinance, no prior sanction is required before prosecuting a person for offences under the Act. The provision of prior sanction acts as a safeguard and ensures that a responsible officer of the State applies his mind to the alleged offence before any person is prosecuted. Before any person is charged under the Ordinance, cognizance should be taken by a Judge or other judicial officer. This will ensure fairness in the enforcement of the Ordinance.
4. The Ordinance should contain some mechanism to prevent frivolous complaints from family or relatives who are opposed to the conversion. The Ordinance contains provisions for any aggrieved family or friends or other persons to lodge a complaint under the Ordinance, if they believe that an intended conversion violates the provisions of the Ordinance. A person converting to another religion and a person facilitating the conversion can easily be termed as offenders under the Act and can be subject to severe punishment under the Ordinance. Therefore, governments should be very careful not to infringe on the Fundamental Rights of a person by creating such intrusive provisions.
5. The Ordinance casts the burden of proof on the person who has converted and the person who facilitates the conversion to prove that the conversion was done out of free will. This goes against the normal rule of jurisprudence in India which puts the burden of proof on the prosecution or on the person who refutes the existence of a fact. The Ordinance also differs from the general rule of jurisprudence in the fact that any person accused of an offence under the ordinance is presumed guilty till proven innocent. This goes against the accepted rule of presumption of innocence which is followed in almost every criminal trial.

6. The Ordinance should be neutral between genders and persons belonging to different castes. The ordinance assumes that women and persons belonging to the SC/STs are unable to make decisions on their own volition and therefore need extra protection from the State. This approach undermines the free will and decision-making powers of women in general and particularly women belonging to the SC/ST communities.
7. The Ordinance should not make a distinction between conversion and re-conversion. Both should be treated as a conversion. The Ordinance makes an artificial distinction between conversion and re-conversion and allows a person who has converted to re-convert to their previous religion without following any of the formalities under the Ordinance.
8. In all the cases registered under the Ordinance till date, all the persons arrested have been Muslim men. The Ordinance does not make a distinction between religions but the implementation of the Ordinance has been biased against Muslim men. This bias should not exist in the implementation of the Ordinance, as it violates the basic rights of equality and personal liberty. Arrests have been made even without investigation. The loss of personal liberty by an arrested person cannot be compensated by a subsequent release or bail.
9. Adopt the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Article 5 of the Convention creates an obligation on all States to guarantee the right to equality before law, regardless of race, colour, ethnicity or nationality. Conversion from one religion to another out of their own volition is every person's right and personal choice. State should not normally interfere in this aspect unless there are problems of law and order.
10. International Law recognises the right of an individual to convert from one religion to another voluntarily and without any form of coercion. The Ordinance, by placing restrictions on conversion and by making the process of conversion a tedious affair, practically restricts this right of conversion. The Ordinance criminalises conversions and victimises both the converts and convertors.
11. The Ordinance should prioritise religious freedom of individuals rather than try to protect the community's perception of public order. The assumption that conversions lead to disruption of public order is not based on facts and evidence. It is based on an assumption of protecting the population of religions and maintaining a religious status quo.

- 12.** The Ordinance should not be used by extremist religious groups to oppress or threaten minorities from exercising their rights guaranteed by the Constitution. Article 25 guarantees the right to practice and propagate religion, which intrinsically includes conversion so long as the conversion is not forced. But the Ordinance has scope for being misused by extremists to threaten minorities with dire consequences, even if they are not doing anything illegal per se. The Police and administrative authorities should exercise restraint while using the penal provisions under the Ordinance.
- 13.** The Ordinance should be reconciled with the Constitutional provisions that guarantee equality of all persons, irrespective of gender, religion and caste. Although the Constitution guarantees religious freedom, protection to minorities, equal treatment of all castes and religions, certain anti-conversion laws like the Ordinance contain provisions that directly or indirectly affect the rights of women, rights of minorities and freedom of choice and conscience. The Ordinance favours conformity to your existing religion and restricts the freedom of persons to choose or to change their religious belief.

These are some of the suggestions to overcome the drawbacks of the current Ordinance. Many of these suggestions are in line with the draft Bill, the MP and Orissa religious freedom Acts and judicial precedents. Whether the Ordinance will need suitable amendments in line with these suggestions or not, cannot be determined yet. Only time will tell how the Ordinance will be implemented and it will be up to the High Courts and Supreme Court to test the constitutional validity of the Ordinance against the provisions of the Constitution and to either uphold or strike down the Ordinance. The pros and cons of the Ordinance will become clearer as more cases are filed under the Ordinance, and the Ordinance will be judged not only for its provisions but also the manner of enforcement by the State.

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