

INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 4 | Issue 6

2021

© 2021 *International Journal of Law Management & Humanities*

Follow this and additional works at: <https://www.ijlmh.com/>

Under the aegis of VidhiAagaz – Inking Your Brain (<https://www.vidhiaagaz.com/>)

This Article is brought to you for “free” and “open access” by the International Journal of Law Management & Humanities at VidhiAagaz. It has been accepted for inclusion in International Journal of Law Management & Humanities after due review.

In case of **any suggestion or complaint**, please contact Gyan@vidhiaagaz.com.

To submit your Manuscript for Publication at **International Journal of Law Management & Humanities**, kindly email your Manuscript at submission@ijlmh.com.

The Notorious 'Love-Jihad' Law and its Constitutionality

SIDDEEQA IRAM¹ AND AISHANI CHAKRABORTY²

ABSTRACT

Anti-conversion laws are not new to India. In the colonial period, they were enacted by the princely states to preserve Hindu identity, and in the post-independence era to avert the influence of the Christian missionaries. Though the laws received severe criticism, their constitutionality was upheld by the Supreme Court.

The current controversial 'love jihad' law i.e. The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 prevents religious conversions not only through coercive or any fraudulent means but also by marriage, intervening in the personal lives of the individuals. Many states have passed similar laws that are against the international human rights standards as well as the Indian constitution, violating Articles 14, 21, and 25. The statute promotes gender stereotypes against women and also hits upon the rights of an accused by having a reverse burden clause without any valid justification. The freedom of religion has been curtailed taking advantage of the divide created between propagation and proselytism along with the liberty of the people.. Hence, the secular structure of the Indian democracy has been compromised to a great extent thereby pushing citizens at the mercy of the executive to exercise their human rights.

The paper hereby shall discuss the history of the Anti-conversion laws, analyse the concept of propagation of religion and view the U.P Act based on the essential facets of the International standards as well as the scope of the Indian constitution.

Keywords: *Constitutionality, Liberty, Privacy, Propagation, Proselytism.*

I. INTRODUCTION

“Liberty may be endangered by the abuse of liberty, but also by the abuse of power”

-James Maddison

India is a pluralistic society consisting of different ethnic and religious communities. It is a country that bases its foundation on democratic and secular grounds. Though the word 'secular' was added in the Indian Constitution through the 42nd amendment, the constitutional

¹ Author is a student at Damodaram Sanjivayya National Law University, India.

² Author is a student at Damodaram Sanjivayya National Law University, India.

philosophy and expressive Fundamental rights proved the presence of secularism in its framework and society. Secularism is held as a part of the basic structure of the constitution.³ It is not just passive religious tolerance but the treatment of all religions equally.⁴ Religion is an essential aspect of every human life and religious freedom is premised on the belief that every human has inherent dignity to explore their conscience and look for the truth.⁵

Article 25 of the constitution guarantees the freedom of conscience, and freedom to profess, practice, and propagate one's religion.⁶ It inherently allows a person to adopt a religion that appeals to his conscience guaranteeing the right to change religion.⁷ But the problem arises in determining if the conversion was out of free will or due to inducement by others. Referring to this issue, the word 'propagate' had been a subject of elaborate discussions in the constituent assembly as well as in the current scenario due to the thin demarcation between propagation and proselytism.

In order to curtail the religious conversions, in the post-independence period, many states like Madhya Pradesh, Orissa, etc had enacted Anti-conversion laws to prevent the religious conversion of people due to force, coercion, allurements or inducement, misrepresentation, or fraud which was upheld by the Supreme Court as well.⁸ But, the current Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 (hereinafter referred to as U.P Act) along with other states like Madhya Pradesh, Gujarat⁹, Himachal Pradesh, and Uttarakhand are subjected to scrutiny before the judiciary¹⁰ due to the existence of additional clause forbidding conversion of religion by marriage or solely for marriage.

The Indian idea of secularism, unlike the west, is equal protection of all religions and it bars the state from interfering in religious issues.¹¹ Secularism was mainly designed to ensure the safety of minority communities and to assure them that the country would not side with the dominant religion.¹² The Indian judiciary has been active in holding the liberty and

³ S.R. Bommai v. UOI, AIR 1994 SC 1918; (1994) 3 SCC 1; Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; AIR 1973 SC 1461.

⁴ M.P. JAIN, INDIAN CONSTITUTIONAL LAW, 1298 (8th ed. 2018).

⁵ Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017(4) BYU L. REV. 915, 942 (2018).

⁶ INDIA CONST. art. 25.

⁷ Sardar Syedna Taher Saifuddin Saheb v. State of Bombay, (1962) AIR SC 853.

⁸ Rev. Stanislaus v. State of Madhya Pradesh, AIR 1977 SC 908; (1977) 1 SCC 677.

⁹ Mahesh Langa, *High Court protects interfaith couple from Gujarat Law*, The Hindu, (Aug. 19, 2021), <https://www.thehindu.com/news/national/high-court-protects-interfaith-couples-from-gujarat-law/article35992948.ece>

¹⁰ *Laws against 'love-jihad': Wait for HCs to decide*, The Times of India, (Feb. 4, 2021), <https://timesofindia.indiatimes.com/india/laws-against-love-jihad-wait-for-hcs-to-decide-says-sc/articleshow/80679748.cms>.

¹¹ M.P JAIN, *supra* note 4, at 1305.

¹² FAIZ MUSTAFA ET AL., *supra* note 5, at 930.

fundamental rights of the citizens whenever the government tried to subjugate it. India is seen as an embodiment of religious tolerance and the largest democracy in the world but, recent times have lowered its status in the international community due to reported violence on minorities, communalism, mishandling of the Kashmir issue, and the enactment of the Citizenship Amendment Act.¹³

The increase in the enactment of similar ‘love jihad’ statutes in India has worried religious minorities.¹⁴ Hence, the crux of deliberation of the article is whether the ‘love jihad’ law is coherent and concurrent with the fundamental rights guaranteed by the constitution.

II. THE HISTORY OF ANTI-CONVERSION LAWS

The origin of anti-conversion ideology has a long history. It can be traced back to the late 1800s where the Arya Samajis, to protect the Hindu identity and their people from converting into other religions started a movement popularly known as the *Shuddhi (purification) movement*.¹⁵ It had two phases; from the 1880s to 1910s and another phase from the 1920s which witnessed a greater politicisation of religion and aimed at reconstructing Hinduism as a universal religion.¹⁶ Through this movement, the Arya Samajis aimed to convert Christians and Muslims into Hinduism and re-convert the people who converted into other religions due to the oppressive caste system existing in the Hindu community. The main contributing factor behind the expansion of such a revolutionary movement was the 1941 census which showed that the Muslims constituted a majority in many parts of the country creating unrest among the Hindu population.¹⁷ Moreover, the Britishers had introduced educational institutions and even industrialisation was at a pace causing worry to the Hindus regarding their nationality and culture being oppressed due to the increasing westernisation.¹⁸ Therefore, to spread the proper Hinduism and to re-integrate the converts into Hinduism, the shuddhi movement was initiated. Though the movement was a success, the Arya Samajis had difficulties in re-integrating the reverts in the Hindu community. By the end of the 1920s, the influential leader of the movement, Swami Shraddhananda was assassinated and the Arya Samaj faltered.¹⁹ During the 1930s and 1940s, fearing dominance in the face of British missionaries and to preserve Hindu

¹³UNITED STATES COMMISSION ON INTERNATIONAL RELIGIOUS FREEDOM, ANNUAL REPORT 2020-21, 2021 23 (2021).

¹⁴ *Id.*

¹⁵ Nirav Mehta, *The Inner Revolution: Shuddhi and the Reinvention of Hinduism*, 1 (1). SWARTHMORE UNDERGRADUATE HISTORY JOURNAL, (2020).

¹⁶ *Id.*, at 12.

¹⁷ James Andrew Huff, *Religious Freedom in India and Analysis of the constitutionality of the Anti-Conversion Laws*, 10(2) RUTGERS J. L. & RELIGION 1, 4 (2009).

¹⁸ NIRAV MEHTA, *supra* note 15, at 7.

¹⁹ *Id.*

religious identity, many Hindu princely states like Raigarh, Udaipur, Bikaner, Sarguja, Patna, Jodhpur Kota, and Kalahandi passed their anti-conversion laws, few of them being specifically against conversion to Christianity.²⁰

After Independence in 1947, many anti-conversion bills were enacted but none of them could become law. The Indian Conversion (Regulation and Registration) bill, 1954, which aimed at licensing of missionaries, the Backward Communities (Religious Protection) bill, 1960²¹ and the Freedom of Religion Bill, 1979 which aimed to curb the inter-religious conversions failed to get majority support in the parliament and failed to become a law.²²

In 1954, on allegations of forceful conversions being undertaken by the Christian missionaries of India, an inquiry committee was set up by the Madhya Pradesh government named 'The Christian Missionaries Activities Committee headed by Dr. Bhavani Shankar Niyogi, a former Chief Justice of Nagpur High Court. The report was criticised for being biased as well as for having many loopholes in it.²³ The first Prime Minister of India, Jawaharlal Nehru was against the anti-conversion laws and supported proselytism as a part of freedom of religion²⁴ but, regardless of it, based on the recommendations of the Niyogi report, the first anti-conversion laws of the post-independence era were enacted by the states of Madhya Pradesh (1967) and Orissa (1968).

The states like Chattisgarh (2006), Rajasthan (2006), and Gujarat (2007)²⁵ passed the anti-conversion bill prohibiting conversions from one's original religion to other. But, the governors of the respective states did not give assent to the bill and it could not become a law.²⁶ Tamil Nadu also passed a similar act which was repealed in 2016 due to protests by the people over it.²⁷ In 2015, the leaders of Bharatiya Janata Party (BJP) called out for national legislation to "criminalise the religious conversion without the government's consent"²⁸ but it could not

²⁰ JAMES, *supra* note 17.

²¹ Dr. Iqtidar Karamat Cheema, *U.S. Commission On International Religious Freedom, Constitutional And Legal Challenges Faced By Religious Minorities In India*, (Feb, 2017), <https://www.uscirf.gov/sites/default/files/Constitutional%20and%20Legal%20Challenges%20Faced%20by%20Religious%20Minorities%20in%20India.pdf>

²² Law Library of congress, *State's Anti-conversion Laws*, (2018), <https://www.loc.gov/law/help/anti-conversion-laws/india-anti-conversion-laws.pdf>

²³ Chad M. Bauman, *Postcolonial Anxiety and Anti-conversion sentiment in the Report of the Christian Missionary Activities Enquiry Committee*, 12(2) INTERNATIONAL JOURNAL OF HINDU STUDIES 1, 14 (2008).

²⁴ Bhagwan Josh, *Conversion, complicity and the state in post-Independence India*, in CHRISTIANITY AND THE STATE IN ASIA: COMPLICITY AND CONFLICT, 1, 109 (Julius Bautista eds., 2009).

²⁵ JAMES, *supra* note 17, at 11.

²⁶ *Id.*, at 7.

²⁷ *Id.*, at 6.

²⁸ *Indian Parliament Will Consider Criminalizing Religious Liberty*, Organization For Minorities of India (Nov. 5, 2015), <http://www.ofmi.org/indian-parliament-will-consider-criminalizing-religious-liberty/>

achieve its mission as the Ministry of Law and Justice thwarted the idea stating that it was not tenable as religion was completely a state subject under schedule seven of the constitution of India.²⁹

III. FREEDOM OF RELIGION: ARE LEGAL LIMITS ON RELIGIOUS CONVERSIONS VALID?

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021 was passed by the Uttar Pradesh Government because of alleged conversions taking place from Hinduism to Islam majorly³⁰ in the name of marriage. Despite the Supreme Court reiterating that the freedom of religion is an absolute right subject to restrictions provided by the constitution³¹, contradictory legislation continues to be enacted by the states of India. Article 25 guarantees “freedom of conscience and free profession, practice and propagation of religion”³² which is violated by the U.P Act due to its vague and ambiguous terminology.

The Madhya Pradesh Dharma Swantantra Adhiniyam (1967) and Orissa’s Freedom of Religion Act (1968) were challenged before the respective High Courts which led to conflicting opinions³³ creating a backdrop of appeals to the Supreme Court regarding its constitutionality. The Supreme Court upheld its validity in *Rev. Stanislaus v. State of Madhya Pradesh*³⁴ (hereinafter referred to as Stanislaus’s case) because it impinges ‘freedom of conscience’ and ‘public order’ and stated that “what the Article grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by an exposition of its tenets”. Through this judgment, the Apex court has created a divide between the right to convert a person to one’s religion and the right to transmit one’s religion. The leading scholars like H.M. Seervai criticised the judgment observing that successful propagation of religion ultimately can result in conversions.³⁵ Limiting propagation to just spreading the tenets of the religion is an attack at the freedom of the minority to practice and propagate their religions which are proselytising in nature.³⁶ Moreover, it is also criticised on the ground that the court failed to

²⁹Law Ministry says no to Anti-conversion Law, Deccan Chronicle (Apr. 15, 2015), <https://www.deccanchronicle.com/150415/nation-current-affairs/article/law-minister-says-no-anti-conversion-law>

³⁰Raising ‘Love-Jihad’ Bogey, Yogi threatens Death for men who ‘hide identities and disrespect sisters’, The Wire, (Nov. 1, 2020) <https://thewire.in/communalism/raising-love-jihad-bogey-yogi-threatens-death-for-men-who-hide-identity-disrespect-sisters>

³¹Shayara Bano v. Union of India, 2017 SCALE 1, 178.

³²INDIA CONST. art. 25.

³³Yulitha Hyde v. State of Orissa, AIR 1973 Ori 116; *Rev. Stanislaus v. State of Madhya Pradesh*, AIR 1975 MP 163.

³⁴*Rev Stanislaus v. State of Madhya Pradesh*, AIR 1977 SC 908: (1977) 1 SCC 677.

³⁵H.M SEERVAI, CONSTITUTIONAL LAW OF INDIA 1289 (4th ed. 2013).

³⁶*Id.*

discuss the aspect of conversions due to persuasion and re-conversions.³⁷

Hence, relying on Stanislaus's case, the U.P Ordinance was promulgated³⁸ and is now an Act.³⁹

The anti-conversion laws existing in the states of India have been condemned due to their vague meanings to the words 'allurement' and 'inducement' and the same is applied to the current 'love jihad' laws.⁴⁰ The U.P Act includes the term 'allurement' within which 'employment', 'free education', 'divine displeasure' are also added.⁴¹ The State has failed to recognize that the proselytising religions like Christianity undertake charitable acts as it is fundamental to their religion.⁴² The ambiguous terminology used is dangerous as any educational facilities or medical facilities or services provided by them can be termed as temptation⁴³ intended to induce conversions. Also, the term 'divine displeasure' is not defined in the Act and is bound to be interpreted widely leading to mischief.

Misuse of these laws to deter religious conversions is the issue in the present scenario. Instances in the past have been reported wherein the police had arrested people on grounds of coercive conversion even though the converted people gave statements that their conversion was wilful.⁴⁴ Proving the motive of conversion due to illegitimate inducement is difficult as spiritual purity cannot be explained.⁴⁵ So, the state needs to look at a better solution to differentiate between legitimate and illegitimate conversions. Therefore, the criminalisation of religious conversions based on vague terms restricts the freedom to practice religion or religious beliefs of the proselytising faiths, violating Article 25 of the Indian Constitution.

Though it is argued by the state legislatures that Article 25 can be subjected to restriction under Article 25(1) and so, for maintaining public order anti-conversion law is necessary, the requirements that a law curtailing a fundamental right must be unambiguous and narrowly

³⁷ M.P JAIN, *supra* note 4, at 1304.

³⁸ STATE LAW COMMISSION OF UTTAR PRADESH, REPORT NO. 8: EIGHTH REPORT OF VII STATE LAW COMMISSION ON FREEDOM OF RELIGION (2019).

³⁹ *Uttar Pradesh Legislative Assembly passes 'Love Jihad' bill amidst opposition protest*, The Wire, (Feb. 25, 2021), <https://thewire.in/communalism/uttar-pradesh-legislative-assembly-passes-love-jihad-bill-amidst-opposition-protest>

⁴⁰ Justice A.P Shah, *'Love-Jihad' Ordinance is symbolic of Social Fabric being Aggressively Changed*, The Wire, (Jan. 31, 2021), <https://thewire.in/law/love-jihad-ordinance-communal-rhetoric-divisive-justice-ap-shah>

⁴¹ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §3, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

⁴² Sadiya Suleman, *Freedom of Religion and Anti-Conversion Laws: An Overview*, INDIAN LAW INSTITUTE LAW REVIEW 105, 120 (2010).

⁴³ *Id.*

⁴⁴ Laura Dudley Jenkins, *Legal Limits on Religious Conversion in India*, 71 (2) LAW & CONTEMP. PROBS. 109, 116 (2008).

⁴⁵ Bhagwan Josh, *supra* note 24.

defined,⁴⁶ specific and be proportionate to the issue at hand⁴⁷ has not been fulfilled. So, to understand the extent of the state's power to interfere in order to prescribe limits through Article 25(1), as the government has done in this case, clarity needs to be attained concerning the concepts of 'propagation', 'conversion' and 'proselytism'.

(A) The Controversy Around Conversion as Part of The Propagation of Religion

The Indian Constitution guarantees freedom of religion which is a basic human right including the right to adopt a religion also embodied in the International framework like Article 18 of the Universal Declaration of Human Rights (UDHR)⁴⁸ and the International Covenant for Civil and Political Rights (ICCPR). Article 18 of ICCPR acknowledges the right to convert along with the right not to be forced to convert.⁴⁹ The General Comment 22. on ICCPR explains that the "freedom to have or adopt" a religion means the freedom to choose, adopt, replace and retain one's religion.⁵⁰ It further states that if any limitations are to be imposed on the right to religion, it must be "directly related and proportionate to the specific needs on which they are predicated" and fulfill requirements of Article 18(3) of the ICCPR.⁵¹

According to Heiner Beiderfeldt, the UN special rapporteur, the freedom of thought, conscience, religion or belief can be divided into "(a) right to conversion (b) right not to be forced to convert (c) the right to try to convert others through non-coercive persuasion (d) the rights of the child and his parents in this regard".⁵² The people are guaranteed the right to convert into a religion of their choice and are to be protected from coercive conversions by the state or other agencies but, the right to convert others through non-coercive persuasion often known as missionary work⁵³ is considered to be legitimate and is accepted within the purview of expression of religion or belief under Article 18 of ICCPR and other instruments.⁵⁴

The controversy around the right to propagation is largely based on the thin demarcation between the propagation of religion and proselytism. The word 'conversion' means "renouncing one's own religion and adopting another religion".⁵⁵ Proselytism is defined as "an

⁴⁶ Heiner Beiderfeldt, (Special Rapporteur on Freedom of belief or religion), *Interim report of the special Rapporteur on freedom of belief or religion*, U.N. Doc. A/67/303, (Aug. 13, 2012).

⁴⁷ Justice K.S. Puttaswamy and Ors. v. Union of India, (2017) 10 SCC 1.

⁴⁸ G.A. Res. 217 A (III), (Dec. 10, 1948).

⁴⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁵⁰ Human Rights Committee, *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion (Article 18): 30/07/93*, U.N. Doc. CCPR/C/21/Rev.1/Add.4, (July 30, 1993).

⁵¹ *Id.*

⁵² HENIER BEIDELFELDT, *supra* note 46, ¶ 16.

⁵³ Asma Jahangir, (Special Rapporteur on Human right of freedom of religion or belief), *Report of the Special Rapporteur of the Commission on Human Right of freedom of religion or belief*, UN. Doc. A/60/399, (Sep. 30, 2005).

⁵⁴ *Id.*

⁵⁵ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §2 (c), No. 3, Acts of Uttar

act or process of inducing someone to convert to another faith"⁵⁶ whereas 'propagation' as per the Supreme Court is an expression of one's belief, communicating or exposing one's religious tenets for the edification of others.⁵⁷ The question as to whether the right to the propagation of religion includes proselytism can be answered through the intention of the constituent assembly members while incorporating the word 'propagate' in the constitution.

The constitutional debates around the incorporation of the word 'propagate' into Article 25 included the discussion on conversions along with it.⁵⁸ This shows that the members of the assembly were aware of the connection between the propagation of religion and conversions and hence, were divided in their opinion regarding its inclusion. But it was however incorporated as a compromise with the Christian minority promising to allow them to propagate their religion as it was a part of the basic tenets of their religion.⁵⁹ If a reductionist understanding of the term 'propagate' is to be looked at like the Supreme Court did, it would leave its incorporation in Article 25 as meaningless.⁶⁰ It is because the mere spreading of religion for the 'enlightenment' of others would anyway be covered under freedom of speech and expression under Article 19.⁶¹ Therefore the word 'propagate' was added with full knowledge of the possibility of conversions and with an intent to allow proselytism as well.

Even, the International law on freedom of religion accepts the notion of conversion through persuasion⁶² as it only induces the person towards the faith propagated and the choice remains with him to either get persuaded and convert to that religion or not get persuaded.⁶³ It is thereby linked to 'freedom of expression' which includes imparting information or ideas orally or through writings.⁶⁴ It is important to note that only when a person is exposed to choices can he pick the best one for himself and the same goes with religion as well.⁶⁵ Inducement through charitable work and propagation of one's faith cannot be considered as coercive or unlawful methods of conversion.

Pradesh State Legislature, 2021, (India).

⁵⁶ *Proselytise*, Merriam Webster, <https://www.merriam-webster.com/dictionary/proselytizing>

⁵⁷ Commissioner, Hindu Religious Endowments v. Srilakshmindra, A.I.R. 1954 SC 282; Ratilal Panachand Gandhi v. state of Bombay, AIR 1954 SC 388 : 1954 SCR 1055, 1062-63; Durgah Committee v. Hussain Ali, AIR 1961 SC 1402; Digyadarsan Rajendra Ramdassji v. State of Andhra Pradesh, 1970 AIR 181, 1970 SCR (1) 103.

⁵⁸ Lok Sabha Secretariat, Constitutional Assembly Debates, (Dec. 6, 1948), <http://164.100.47.194/loksabha/writereaddata/cadebatefiles/C06121948.html>, (last visited Aug. 27, 2021).

⁵⁹ *Id.*

⁶⁰ FAIZAN MUSTAFA ET AL., *supra* note 5.

⁶¹ *Id.*

⁶² UN Human Rights Office of the High Commissioner, *Rapporteur's Digest on Freedom of Religion and Belief*, 11 (2011), <https://www.ohchr.org/Documents/Issues/Religion/RapporteursDigestFreedomReligionBelief.pdf>

⁶³ SADIYA SULEMAN, *supra* note 42, at 113.

⁶⁴ HEINER BEIDERFELDT, *supra* note 45.

⁶⁵ H.M. SEERVAI, *supra* note 35.

It is pertinent to note here, that propagation of religion can act as an appeal or inducement to the mind leaving the person to choose.⁶⁶ The result of the same can be conversions but it is not the sole purpose of propagation of religion. Propagation can create a desire in a person to look out for a specific religion but if he changes his religion, it would be protected under freedom of conscience of Article 25.⁶⁷ Though the intent of the constituent assembly makes it clear, the existing law on the right to convert others to one's faith is not clear and lies in the grey area between propagation and proselytism allowing the legislatures to misuse it. The States by criminalising the propagation of religion which can lead to conversions have expressed their intolerance as well as interference in the affairs of religion.⁶⁸ It violates Article 25 of the constitution that guarantees "freedom to propagate" one's religion which is the freedom to exchange one's religious faith and opinions forming the sacred core of propagation.⁶⁹ Therefore, it is argued that the right to propagation includes the right to convert a person to one's faith as it is a basic tenet of religions like Christianity and Islam to proselytise.⁷⁰

IV. INFRINGEMENT OF ARTICLE 21 OF THE CONSTITUTION

Article 21 guarantees that "no person shall be deprived of his life and personal liberty except according to the procedure established by law". The words 'life' and 'personal liberty' post the Maneka Gandhi's case⁷¹ have been given a wide interpretation covering almost all aspects of life and a variety of rights. The Courts have reiterated in various judgments that the term 'life' of a human is something more than a mere animal existence⁷² and includes the right to "live with dignity and all that goes along with it".⁷³ The state is duty-bound to protect the people of the country against any discrimination and violation of human rights.

The U.P Act, 2021 violates Article 21 in various spheres. It infringes the right of a person to choose a spouse and the right to privacy as well which is a part and parcel of life under Article 21.⁷⁴ Section 3 of the Act prohibits conversion by marriage infringing the right of a person to choose a spouse.⁷⁵ Marriage is considered a strong social institution that can bridge societal

⁶⁶ SADIYA SULEMAN, *supra* note 42, at 113.

⁶⁷ V.P. Bharatiya, *Propagation of Religion: Stainislaus v. State Of M.P.*, 19(3) JOURNAL OF THE INDIAN LAW INSTITUTE 321, 330 (1977).

⁶⁸ R.Venkataramani, *Propagation without conversion: Can we invite Emperor Ashoka to our Legislature*, 51(1) JOURNAL OF INDIAN LAW INSTITUTE (2009).

⁶⁹ *Id.*

⁷⁰ V.P. BHARATIYA, *supra* note 67, at 321.

⁷¹ Maneka Gandhi v. UOI, 1978 AIR 597 1978 SCR (2) 621 197.

⁷² Confederation of Ex-servicemen Association v. UOI, (2006) 8 SCC 399 : AIR 2006 SC 2945; Munn v. Illinois, 94 US 113 (1877).

⁷³ Francis Coralie v. Delhi, AIR 1981 SC 746, 753: (1981) 1 SCC 608.

⁷⁴ Justice K.S. Puttaswamy and Ors. v. Union of India, (2017) 10 SCC 1.

⁷⁵ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §3, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

differences of caste and religion and bring people together. But this law is contradictory to it as it deters interfaith marriages by intervening in the private lives of the individual. Similar to Article 25 wherein religion is a private matter of the individual, the right to marry is also a personal affair of an individual embodied under Article 21.⁷⁶

Privacy is a human right recognized within International law under Article 12 of UDHR⁷⁷ and Article 17(1) of ICCPR.⁷⁸ The ICCPR through Siracusa principles provides for fulfillment of standards of legality, proportionality, evidence-based necessity, and gradualism⁷⁹ to restrict any human rights enshrined therein. The Indian judiciary has been proactive in upholding the human rights of the people and thereby observed in the infamous judgment of *Justice K.S. Puttaswamy and Ors. v. Union of India* (hereinafter referred to as Puttaswamy's case) that "Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation. Privacy also connotes a right to be left alone". It indicates that marriage being a private affair of an individual does not allow the state to interfere with the choices of the people without any valid rationale.

Article 16 of the UDHR recognizes inter-faith marriages as a part of human rights.⁸⁰ The courts have in various cases upheld the right of adults to choose a spouse and recognized it as an inalienable facet of liberty.⁸¹ The infamous Hadiya's case⁸² was a landmark judgment highlighting the importance of the right to marry a person of one's choice irrespective of the religion and observing that every individual has the right to make decisions on matters that are important in their pursuit of happiness including religion forming an important part of liberty.⁸³ Following the same path, recently the Allahabad High Court in *Salamat Ansari v. State of U.P* held that the right to live with a person of choice irrespective of their religion is intrinsic to the right to life and personal liberty and which if interfered with would violate Article 21.⁸⁴

The Puttaswamy's judgment opened a pathway for the citizens to exercise their human rights in the light of arbitrary legislative and executive actions. Following the international standards⁸⁵ laid and the interpretation of Article 21 as per Maneka Gandhi's case, the law

⁷⁶Lata Singh v. State of Uttar Pradesh, (2006) 5 SCC 475.

⁷⁷G.A. Res. 217 A (III), (Dec. 10, 1948).

⁷⁸International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

⁷⁹UN Commission on Human Rights, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, E/CN.4/1985/4, (Sept. 28, 1984).

⁸⁰G.A. Res. 217 A (III), (Dec. 10, 1948).

⁸¹Lata Singh v. State of Uttar Pradesh, (2006) 5 SCC 475; Shakti Vahini v. Union of India, (2018) 7 SCC 192.

⁸²Shafin Jahan v. Asokan K.M & ors, 2018 (4) SCALE 402, (2018) 16 SCC 408.

⁸³*Id.*

⁸⁴Salamat Ansari v. State of U.P, W.P. (Cri. Miscellaneous) 11367 of 2020 (Allahabad H.C, Nov. 11, 2020).

⁸⁵International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

violating human rights needs to be as per the procedure established by law which must be fair, just and reasonable, and free from the manifest arbitrariness of the state.⁸⁶ Based on it, the Apex Court in Puttaswamy's case stated that if privacy is to be violated it must fulfill the requirements of legality, need; defined in terms of a legitimate state aim, and proportionality which ensures a rational nexus between the objects and the means adopted to achieve them.⁸⁷

In the present case, the U.P government has failed to fulfill the criteria and thereby erred by introducing the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020. An Ordinance can be brought into force under Article 213(1) of the Indian constitution⁸⁸ if the governor believes that necessary circumstances exist in the state demanding immediate action. But there were no such illegal conversions in the name of marriage taking place to legitimise the immediate action. To probe the alleged 'love jihad' cases⁸⁹ a Special Investigation Team (SIT) was formed which concluded that all the conversions for marriage were done voluntarily and no proof of coercion or influence existed to prove 'love jihad'.⁹⁰ Even the National Investigation Agency in 2018 found no evidence of a larger criminal design of forceful conversion as alleged and closed its investigation⁹¹ which was ordered by the Supreme Court.⁹² Thus, there was no pressing issue or 'need' to create an ordinance or for that matter, such law to tackle 'love jihad' proving that there does not exist any legitimate state aim supporting the legislation.

Moreover, the U.P Act fails to satisfy the doctrine of proportionality on the rationale of 'public order' as alleged by the U.P government.⁹³ By relying on Stanislaus's case, they have argued that an anti-conversion law is constitutional on grounds of public order thus, giving them the authority to enact such a law.⁹⁴ But the current Act bars conversion for marriage as well which makes it more questionable and subject to criticism than the existing anti-conversion laws in the country. As discussed above, there have not been many reported cases of 'love jihad' causing issues of public order therefore, it makes the act highly disproportionate with the aim

⁸⁶ Maneka Gandhi v UOI, 1978 AIR 597 1978 SCR (2) 621 197.

⁸⁷ Justice K.S. Puttaswamy and Ors. v. Union of India, (2017) 10 SCC 1.

⁸⁸ INDIA CONST, art. 213, cl. 1.

⁸⁹ *Yogi Adityanath vows to put tough law against Love-jihad*, The Hindu, (Oct. 31, 2020), <https://www.thehindu.com/news/national/other-states/yogi-adityanath-vows-tough-law-against-love-jihad/article32992138.ece>

⁹⁰ Sreenivasan Jain, Mariyam Alavi, *With no credible evidences, Love jihad cases in Kanpur crumble*, NDTV, (Nov. 6, 2020), <https://www.ndtv.com/india-news/with-no-credible-evidence-love-jihad-cases-in-kanpur-crumble-2321766>.

⁹¹ *NIA ends Kerala probe, says there is love but no jihad*, Hindustan Times, (Oct. 18, 2018), <https://www.hindustantimes.com/india-news/nia-ends-kerala-probe-says-there-s-love-but-no-jihad/story-wlpWR7BMNcdJHkb1MUso4J.html>

⁹² Shafin Jahan v. Asokan K.M & Ors., (2018) 16 SCC 408.

⁹³ STATE, *supra* note 38.

⁹⁴ *Id.*

it seeks to achieve. The Act has made offences under it cognisable, non-bailable, and triable by court of sessions⁹⁵ indicating the strictness of the law which is not required due to no dire need of it. Thus, it is submitted that the U.P Act fails the tests propounded⁹⁶ and violates Article 21 of the constitution.

V. ANALYSIS OF THE PROVISIONS OF THE ACT

Section 8 of the U.P Act can be flagged as the provision which infringes an individual's right to privacy. It is because it requires a declaration form to be submitted to the District Magistrate or Additional District Magistrate by the person desiring to convert at least 60 days before conversion. The person performing the conversion must also give a month's notice to the magistrate after which an enquiry will be conducted to figure out the real intention, purpose, and cause behind conversion.⁹⁷ Through this, the person seeks the approval of the District Magistrate for the conversion only after which his marriage would be solemnized or else will be declared as null and void.⁹⁸ Further, the declaration form requires all the personal details of a person wanting to convert like name of parents, address, occupation, monthly income, caste, place of conversion, and name and address of the priest conducting the conversion, etc which can be misused to threaten, by people objecting to it.

In a landmark judgment of the Himachal Pradesh High Court which struck down the Himachal Pradesh Freedom of Religion Act, 2006⁹⁹ partially, questioned in the light of privacy the right of the authorities asking for a notice in advance for conversion. It held that a person has the right to change his belief and keep his belief a secret, and cannot be asked to disclose his choice of religion to the authorities.¹⁰⁰ It had also warned about the possibility of the person being psychologically and physically tortured in case of a notice being issued. It is because India is a country where people take pride in their religion and castes. It is a country where honour killings are more frequent¹⁰¹ and reported than 'love jihad' cases. Hence, section 8 of the U.P Act violates the right to privacy and can give rise to communal clashes between religious groups and increase the risk of honor killings as well which can lead to endangering the life of

⁹⁵The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §7, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

⁹⁶ Justice K.S. Puttaswamy and Ors. v. Union of India, (2017) 10 SCC 1.

⁹⁷The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §8, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

⁹⁸ *Id.*, at §6.

⁹⁹ The Himachal Pradesh Freedom of Religion Act, 2006, §4, No. 5, Acts of Himachal Pradesh State Legislature, 2006, (India).

¹⁰⁰ Evangelical Fellowship of India v. State of Himachal Pradesh., W.P. (Civil) No. 4716 of 2011 (H.P. H.C Aug. 30, 2012).

¹⁰¹ Shakti Vahini v. UOI, W.P. (Civil) No. 231 of 2010 (S.C. Mar. 27, 2018).

the convertees.

Section 4 of the U.P Act¹⁰² adds fuel to the fire by increasing the impediments in the life of the interfaith couples by allowing ‘any person’ related by blood, marriage, or adoption to file a First Information Report (FIR) if against any such conversion. The term ‘any person’ related by marriage or blood would include and allow a lot of relatives to register a case causing unnecessary harassment to the interfaith couple. Therefore, the U.P Act through sections 4 and 8 is inviting objection and criticism on a person’s life and further risking it as well violating Article 21.

(A) Shifting of the Burden of Proof

The legal principle in the arena of criminal law is that an accused is deemed to be “innocent until proven guilty”.¹⁰³ As per the adversarial criminal justice system of India, the legal burden of proof to prove the guilt of the accused always lies on the prosecution. However, through Section 12, the U.P Act¹⁰⁴ shifts the burden of proof to the person who has caused the religious conversion and where such conversion has been facilitated by any person on such other person, presuming that the conversion was unlawful.

The departure from the traditional principle of burden of proof being on the prosecution is called reverse burden and is often criticised for depriving the accused of his rights and contravening the principle of presumption of innocence.¹⁰⁵ Reverse burdens can result in mistaken convictions as the state agencies are more capable and are equipped with investigative resources most of the time, than the accused himself.¹⁰⁶ Though it is justified as an exception to the general rule of presumption of innocence for law enforcement in the community’s interest and to impose stricter liability on offenders to attain justice¹⁰⁷, it has to pass the test of proportionality and reasonability on basis of the objective the legislature seeks.¹⁰⁸

Reverse burden clauses are existing in many of the Indian legislations like the Narcotics, Drugs and Psychotropic Substances Act, 1985 (NDPS Act), Prevention of Sexual Offences against Children, 2012 (POCSO), Essential Commodities Act, 1955 (ECA), Prevention of Food

¹⁰²The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §4, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

¹⁰³G.A. Res. 217 A (III), art. 11(1), (Dec. 10, 1948).

¹⁰⁴The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §12, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

¹⁰⁵ Juhi Gupta, *Interpretation of Reverse Onus Clauses*, 5 NUJS L. REV. 49, 50 (2012).

¹⁰⁶ *Id.*, at 52.

¹⁰⁷ Noor Agha v. State of Punjab, (2008) 16 SCC 417.

¹⁰⁸ R v. Oakes, [1986] 1 SCR 103; David Hamer, *The Presumption of Innocence and Reverse Burdens: A Balancing Act*, 66 (1), THE CAMBRIDGE LAW JOURNAL, 142, 147, (2007).

Adulteration Act, 1954 (FAA), etc and were held constitutional in the view of public interest.¹⁰⁹ But, the constitutionality of section 12¹¹⁰ of the U.P Act needs to be reviewed with the objective the Act seeks to achieve and see whether an exigent threat to the society exists¹¹¹ and whether the reverse burden is proportionate to it.

Here, to regulate unlawful religious conversion, placing the burden of proof on the accused to prove his innocence is dangerous as it will act as a deterrence against inter-faith marriages violating the secular structure of the constitution. As the punishment is extendable from 2 years up to 5 or 10 years¹¹², it is highly risky that the accused will have to rebut the presumption of guilt. Moreover, as discussed above, the concept of love jihad is not currently an exigent threat to society which needs to be tackled harshly as there is no clear evidence of cases where conversions have happened unlawfully in the name of marriage.

Hence, section 12 of the Act is the most scathingly criticised one due to the absence of legitimate reasons¹¹³ and needs to be reviewed by the judiciary.

(B) Violation of Article 14

Section 5 of the Act¹¹⁴ is criticised as it treats women as a separate category with the punishment being extendable up to 10 years if the victim is a woman. Though it is argued that the constitution under Article 15(3) provides for special provisions for protecting the interests of women and children, it requires it to be reasonable.¹¹⁵ The separate class of women created by the legislation for enhancement of punishment, if looked at with the objective of the statute that is, to prevent illegal religious conversions including by marriage, diminishes the position of a woman in a relationship and strikes at her autonomy.¹¹⁶ It portrays her as a ‘weaker’ partner and deprives her of her dignity and personality.

Such categorisation of women under the garb of protection shows the patriarchal mindset of the legislature which prevents a woman to exercise her autonomy and take decisions for herself.

¹⁰⁹ Justin@ Renjith v. Union of India, W.P. (Criminal) 15564 of 2017 (Kerala H.C., Oct. 7, 2020); Noor Agha v. State of Punjab, (2008) 16 SCC 417.

¹¹⁰The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §12, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

¹¹¹ DAVID HAMER, *supra* note 107, at 158.

¹¹²The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §3, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

¹¹³Rahul Kaul & Sidhartha Shrivastava, *Analysis of the Uttar Pradesh Prohibition of the Unlawful Conversion Ordinance, 2020*, INDIAN LAW INSTITUTE LAW REVIEW 306, 316 (2020).

¹¹⁴The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, §5, No. 3, Acts of Uttar Pradesh State Legislature, 2021, (India).

¹¹⁵ M.P JAIN, *supra* note 5, at 974.

¹¹⁶ See Citizens for Justice and Peace v. State of Uttar Pradesh, W.P. (Criminal) No.____2020; *Woman’s Autonomy cannot be denied under the garb of protection*, The Wire, (Jan. 18, 2021), <https://thewire.in/law/women-autonomy-love-jihad-anti-conversion-ordinance-uttar-pradesh>.

It promotes the gender stereotypes about women being gullible and capable of being swayed by a man, in this case, for conversion. So, here the categorisation of women as a separate class even for conversion by marriage is unreasonable.

Regardless of the Supreme Court observing that the stereotypical understandings of sex cannot be entertained under the constitution,¹¹⁷ the states seem to be caught in the societal notions. The Supreme Court through progressive judgments has tried to break the societal stereotypes and gender discriminatory beliefs by promoting gender equality and upholding the rights of women.¹¹⁸ It also stated that “equality of humans can only be achieved when we are free of such dehumanizing effects of stereotypes”.¹¹⁹ But, the U.P Act contradicts the efforts of the judiciary and hits at the autonomy of a woman, lowering her position in a relationship.

VI. OPPORTUNITY TO MISUSE THE LAW

The ‘love jihad’ laws like the U.P Act can be widely misused to interfere in the lives of interfaith couples. The offence of religious conversion under the Act as per section 7¹²⁰ is cognisable and non-bailable, allowing the police to arrest without a warrant. Such accused may or may not be released on bail, based on the discretion of the court. Thereby it acts as a deterrence against inter-faith marriages as innocent partners can be arrested on suspicion of illegal conversion leaving a scar of arrest on their life lowering their reputation in society.

The misuse of these laws can be done on a wide scale which would result in curtailment of inter-faith marriages and also lead to harassment of the couples. Recently, the Allahabad High Court had temporarily stayed the operation of sections 3, 4A to 4C, 5, 6, and 6A of the Gujarat Freedom of Religion (Amendment) Act, 2021 in cases of inter-faith marriages done by adults having free consent until further hearings.¹²¹ But, it is high time that the constitutionality of the ‘love jihad’ laws is looked into. The court stayed the operation of sections that put the inter-faith couples in jeopardy noting that they interfere with the intricacies of marriage violating Article 21 of the constitution.

After the U.P. Ordinance came into force initially, many arrests were made under it.¹²² Some

¹¹⁷ Navtej Singh Johar v. UOI, AIR 2018 SC 4321; Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

¹¹⁸ Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1; The Secretary, Ministry of Defence v. Babita Puniya & Ors, 2020 SCC OnLine 200.

¹¹⁹ Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

¹²⁰ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021, No. 3, §7.

¹²¹ Jamiat Ulama-E-Hind Gujarat v. State of Gujarat, Special Civil Application No. 10304 of 2021, (Allahabad H.C., Aug. 19, 2021)

¹²² Sandeep Rai, *Eighty in jail, 21 absconding under Uttar Pradesh's 'love jihad' law*, The Times of India, (Jul. 18, 2021), <https://timesofindia.indiatimes.com/city/meerut/80-in-jail-21-absconding-under-ups-love-jihad-law/articleshow/84213845.cms>

of the cases were of nature where men were arrested based on mere suspicion of illegal conversion. In particular, in the first case of arrest under the U.P Ordinance, it was alleged that the accused tried to coerce a married Hindu woman to convert to his religion and marry him. But the accused denied the charges and revealed that the two were in a relationship in the past but had no connection after the woman married.¹²³ In another incident, a 24-year-old Muslim man and his brother were arrested while on the way to register his inter-religious marriage. The accused were assaulted by few fundamentalists before their arrest.¹²⁴ Though released on bail on the statement of the victim supporting them, they had to suffer unnecessary harassment. Similarly, in an incident, a teenager who was on an outing with his friend was arrested for allegedly trying to induce her to marry and convert her. The girl denied the charges and it was reported that the arrest was done on an FIR filed by the girl's father who denied the same.¹²⁵

Therefore, it is evident that the people are facing harassment due to the Act which was made to protect them, on grounds of suspicion of illegal conversions. The state governments to regulate illegal conversions are infringing the fundamental rights of the people with its remedy, causing more harm to society. Therefore, the U.P Act has to be declared unconstitutional along with such similar 'love jihad' laws in force in other states of India.

VII. CONCLUSION

The 'love jihad' laws are contradictory to the basic human rights of the citizens. They violate the fundamental rights of the individuals by giving states an upper hand in the decisions of their private affairs. Though no fundamental right is absolute, they cannot be curtailed without any proper justification. The origin of anti-conversion laws began with an aim to protect the Hindu religious identity but in the current Indian society which is known for its secular and democratic structure, laws like the U.P Act cause more harm than remedy.

Concerning proselytism as a part of propagation, clear lines need to be drawn to identify permissible limits of persuasion to differentiate between legitimate and illegitimate conversions on grounds of inducement, as it is difficult to find the reason behind conversion unless the government can read a person's mind. Marriage is considered a sacred institution

¹²³ *My career and image are ruined; I have a police case against me now says first man arrested under U.P's 'Love Jihad' law*, The Hindu, (Dec. 28, 2020), <https://www.thehindu.com/news/national/other-states/my-career-and-image-are-ruined-i-have-a-police-case-against-me-now-says-first-muslim-man-arrested-under-ups-love-jihad-law/article33432099.ece>

¹²⁴ MANISH SAHU, *1 MONTH OF UP 'LOVE JIHAD' LAW: 14 CASES, 49 IN JAIL, WOMAN 'VICTIM' COMPLAINANT IN ONLY TWO*, THE INDIAN EXPRESS, (JAN. 9, 2021), [HTTPS://INDIANEXPRESS.COM/ARTICLE/INDIA/LOVE-JIHAD-LAW-UP-POLICE-7124001/](https://indianexpress.com/article/india/love-jihad-law-up-police-7124001/)

¹²⁵ Ananya Bhardwaj, *UP Muslim teen meets Dalit girl for 'pizza outing', lands in jail under anti-conversion law*, The Print, (Dec. 23, 2020), <https://theprint.in/india/up-muslim-teen-meets-dalit-girl-for-pizza-outing-lands-in-jail-under-anti-conversion-law/572473/>

and any interference by the state in it would impinge Article 21. Therefore, privacy and liberty to choose religion as well as a spouse is an important aspect of a person's life that cannot be compromised due to ambiguity in legislation. Laws are made in society to protect the rights of the people. Therefore, when such laws rather, impair the rights of people and cause more harm, it is time to re-visit and rectify them.
