

ESSAY

Policing Interfaith Marriages: Constitutional Infidelity of the Love Jihad Ordinance

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Abstract

The Indian Constitution guarantees that individuals have the freedom to choose their partners free from state interference. However, the Uttar Pradesh Vidhi Virudh Dharma Samparivartan Pratishedh Adhyadesh, 2020 (Uttar Pradesh Prohibition of Unlawful Religious Conversion Law, 2020) prohibits religious conversion to the extent that it assumes all conversions are illegal, which may have a negative impact on interfaith marriages involving consenting adults. The author argues that the provisions of the Uttar Pradesh Ordinance forbidding religious conversion are vague and inadequate for addressing forceful or unlawful conversion for marriages, do not demonstrate any reasonable relation to the object of the legislation, and are constitutionally repugnant. The author concludes that by conferring police powers on state agencies to intervene in interfaith marriages, the Uttar Pradesh Ordinance erodes citizens' freedom to choose a partner and their individual autonomy, privacy, and personal liberty—rights that are enshrined under India's constitution.

Keywords: constitution; conversion; right to choose; love jihad; ordinance; privacy; religious freedom

Introduction

Right-leaning populists emphasize common descent and ethnicity.¹ They often resort to fear, insecurity, and social control to maintain religious and cultural hegemony.² In other words, populists tap into people's apprehensions to advance ideological or political agendas, turning them into anger and hatred against enemies.³ The trend to enact laws against what is called *love jihad*⁴ is such an attempt—in this case, one that exploits the

¹ See Jan Erik Grindheim, *Why Right-Leaning Populism Has Grown in the Most Advanced Liberal Democracies of Europe*, 90 *POLITICAL QUARTERLY* (2019).

² See Paul Chevigny, *The Populism of Fear: Politics of Crime in the Americas*, 5 *PUNISHMENT & SOCIETY* 1 (2003); Yotam Margalit, *Economic Insecurity and the Causes of Populism, Reconsidered*, 33 *JOURNAL OF ECONOMIC PERSPECTIVES* 4 (2019); see also Michele Gelfand, *Authoritarian Leaders Thrive on Fear. We Need to Help People Feel Safe*, *THE GUARDIAN*, January 2, 2020.

³ See Mikko Salmela and Christian von Scheve, *Emotional Dynamics of Right- and Left-Wing Political Populism*, 42 *HUMANITY & SOCIETY* 4 (2018).

⁴ *Love jihad* is used to delegitimize interfaith marriages and to promote a homogeneous Hindu-majority state. Although the main group purported to be protected in the public hysteria over love jihad is Hindu women (from Muslim men), some organizations and leaders in other religious communities (including Christian) have at times been convinced that their women, too, are at risk. See Gino Battaglia, *Neo-Hindu Fundamentalism Challenging the Secular and Pluralistic Indian State*, 8 *RELIGIONS* (2017); See also *Idea of "Homogeneous" Nation Problematic*:



insecurities of majority Hindus in India to discriminate against religious minorities, especially Muslims

Supporters allege that love jihad is an organized conspiracy by Muslim men to convert Hindu women to Islam.⁵ In contrast, liberals perceive it as an attempt to marginalize Muslims politically in a majority Hindu state.⁶ In reality, love jihad reflects the deep-seated anxieties of Hindutva politics, which is directed against Muslim minorities. The phrase *love jihad* is employed as a form of social and political control over Muslims and is also used to limit Hindu women's choices and exercise of free will,⁷ inhibiting their ability to choose partners and restricting their voluntary decision to change faith for marriage.⁸ The claims of love jihad institutionalize patriarchy, perpetuating the perception that Hindu women are incapable of looking after their interests and need state intervention to protect them.

Right-wing commentators have argued that laws designed to prevent love jihad, including the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 (the Uttar Pradesh Ordinance), are not adequate.⁹ To protect Hindus, they maintain, the constitution that destroys "group identity" and the "instincts of group preservation" requires amendment.¹⁰ On the other end of the spectrum, scholars have argued that love jihad is "a communally insidious and infantilizing construct."¹¹ Therefore, the Uttar Pradesh Ordinance is "fundamentally against the vital principle of free will"¹² and creates a "chilling effect on freedom of conscience."¹³ Such anti-conversion laws are a "creeping abridgment of fundamental rights of individuals guaranteed by the Constitution."¹⁴

Against this backdrop, I examine the content of the Uttar Pradesh Ordinance, which might infringe on the individual's freedom to choose a partner, breach privacy, and present a significant challenge to Indian secularism.

Hamid Ansari, *THE HINDU*, December 29, 2014; See also Fatima Khan, "They're Taking Our Girls to ISIS": How Church Is Now Driving "Love Jihad" Narrative in Kerala, *THE PRINT*, April 2, 2021; Laura Dudley Jenkins, *RELIGIOUS FREEDOM AND MASS CONVERSION IN INDIA, 196–200* (2019).

⁵ Soutik Biswas, *Love Jihad: The Indian Law Threatening Interfaith Love*, BBC, December 8, 2020.

⁶ David James Strohl, *Love Jihad in India's Moral Imaginaries: Religion, Kinship, and Citizenship in Late Liberalism*, 27 *CONTEMPORARY SOUTH ASIA* 1 (2019).

⁷ Charu Gupta, *Allegories of "Love Jihad" and Ghar Vāpasī: Interlocking the Socio-religious with the Political*, 84 *ARCHIV ORIENTÁLNI* 291 (2016).

⁸ Aastha Tyagi & Atreyee Sen, *Love-Jihad (Muslim Sexual Seduction) and Ched-Chad (Sexual Harassment): Hindu Nationalist Discourses and the Ideal/Deviant Urban Citizen in India*, 27 *GENDER, PLACE & CULTURE* 1 (2020).

⁹ Arihant Pawariya, *Why the Proposed "Love Jihad" Law by UP and MP Will Be a Dud on Arrival*, *SWARAJYA*, November 23, 2020. For the text of the ordinance, see Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, No. 21 of 2020, <https://prsindia.org/bills/states/the-uttar-pradesh-prohibition-of-unlawful-conversion-of-religion-ordinance-2020> [hereinafter Uttar Pradesh Ordinance].

¹⁰ M. Nageswara Rao, *Love Jihad: Ban on Polygamy Is a Better Option than Making Special Laws*, *SWARAJYA*, November 30, 2020.

¹¹ Pratap Bhanu Mehta, *SC Was Never Perfect, But the Signs Are that It Is Slipping into Judicial Barbarism*, *INDIAN EXPRESS*, November 18, 2020.

¹² Saba Naqvi, *Love Jihad Law Speaks to Hindutva's Insecurities about Conversion, and Is Driven by Need to Curb Free Will*, *INDIAN EXPRESS*, December 31, 2020.

¹³ Abhinav Chandrachud, *UP's "Love Jihad" Ordinance Has Chilling Effect on Freedom of Conscience*, *INDIAN EXPRESS*, December 3, 2020.

¹⁴ Shyam Saran, *India's Embrace of Modernity Is Now Threatened by Social Regression*, *THE PRINT*, January 13, 2021.

The Constitutional Status of Anti-conversion Laws vis-à-vis the Freedom of Choice

Article 18 of the Universal Declaration of Human Rights¹⁵ and Article 18(1) of the International Covenant on Civil and Political Rights¹⁶ recognize that the right to freedom of religion, belief, or conscience is an inalienable, non-derogable human right that also includes freedom to change religion. Both international instruments affirm that an individual has a right to renounce religion and embrace another religion or relinquish it altogether. In other words, freedom to adopt a religion entails that an individual can choose a religion or belief, including the right to change religion or belief to another religion or become an atheist.

This understanding of religious freedom has also found a place in regional agreements.¹⁷ For instance, Article 9 of the European Convention on Human Rights stipulates the right of religious freedom.¹⁸ Since the establishment of the European Court of Human Rights, the freedom of religion and conscience has been significantly expanded not just in the European Union but also in other parts of the world.¹⁹ For example, in *Kokkinakis v. Greece*, the European Court of Human Rights found that proselytizing activities of a Jehovah's Witnesses follower violated Article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms.²⁰ However, in his profound dissent, Judge S. K. Martens argued that if someone intends to change religion, it is no concern of the state because "human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best—there is no justification for the State to use its power to protect the proselytized."²¹

Subject to certain exceptions, including public order, Article 25 of the Constitution of India guarantees every individual the right to religious freedom and envisions the right to adopt another belief system.²² Thus, in India, citizens have the constitutional right to follow, accept, or adopt any religion or to follow none at all. However, on the pretext of public order, the state often uses broad discretionary power to regulate conversion activities.

In *Rev. Stanislaus v. State of Madhya Pradesh*, the Supreme Court of India, while upholding the validity of legislation prohibiting forcible conversions, held that the constitution grants

¹⁵ G.A. Res. 217 (III) A, art. 18, Universal Declaration of Human Rights (Dec. 10, 1948) ("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.").

¹⁶ International Covenant on Civil and Political Rights art. 18, Dec. 16, 1966, 999 U.N.T.S. 171 ("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.").

¹⁷ Daniel Wehrenfennig, *The Human Right of Religious Freedom in International Law*, 18 PEACE REVIEW 3 (2006).

¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 ("Freedom of thought, conscience and religion: 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.").

¹⁹ Wehrenfennig, *supra* note 17.

²⁰ *Kokkinakis v. Greece*, Application no. 14307/88 (1993), <https://hudoc.echr.coe.int/eng?i=001-57827>.

²¹ *Id.*

²² INDIA CONSTITUTION, article 25(1) ("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."). Public order exceptions are also recognized in international law. For instance, article 9(2) of the European Convention on Human Rights, *supra* note 18, and article 18(3) of the International Covenant on Civil and Political Rights, *supra* note 16, stipulate that the right to manifest one's religion or belief can be restricted only if it is prescribed by law.

the right only to propagate religion and its tenets, not the fundamental right to convert.²³ The Court's decision underlines that only forcible conversion, which might create public disorder, is unlawful under the constitution. Nonetheless, the *Rev. Stanislaus* decision was criticized by one of the foremost jurists, H. M. Seervai, who observed that

The right to propagate religion gives a meaning to freedom of choice (of religion), for choice involves not only knowledge but an act of will. A person cannot choose if he does not know what choices are open to him. 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 conversion.... Conversion does not in any way interfere with the freedom of conscience but is a fulfilment of it and gives a meaning to it. The Supreme Court judgment is clearly wrong. It is productive of the greatest public mischief and ought to be overruled.²⁴

Seervai's opinion corresponds with the opinion of K. M. Munshi, a member of the Constituent Assembly, who, in reference to the word *propagate*, said, "the Indian Christian community laid the greatest emphasis, not because they wanted to convert people aggressively, but because the word 'propagate' was a fundamental part of their tenet. Even if the word was not there, I am sure, under the freedom of speech which the Constitution guarantees, it will be open to any religious community to persuade other people to join their faith."²⁵

In *Rabindra Kumar Pal v. Republic of India*, the Supreme Court held that "there is no justification for interfering in someone's belief by way of use of force, provocation, conversion, incitement or upon a flawed premise that one religion is better than the other."²⁶ Thus, the legislature may regulate active proselytizing if it is carried out by forcible or fraudulent means. However, if conversion is a free exercise of conscience, it is permissible and lawful. Therefore, any law that adversely undermines free and voluntary adoption or relinquishment of any religious faith would not pass the muster of constitutionality. Nevertheless, time and again, in the guise of limiting induced and forcible conversions, authorities excessively regulate conversion activities, especially if a Hindu wishes to convert.²⁷ As a result of this intrusion, frequently an individual's freedom to adopt another religion is subverted.²⁸

How do the anti-conversion laws fare with regard to the right to choose? In *Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal*, the Supreme Court recognized that "a forcible intrusion into a person's mental processes is an affront to human dignity and liberty."²⁹ Similarly, in *Justice K. S. Puttaswamy v. Union of India* the Supreme Court recognized the right of "a human being to be left alone in a core which is inviolable."³⁰ In *National Legal*

²³ *Rev. Stanislaus v. State of Madhya Pradesh*, MANU/SC/0056/1977. Citations beginning with MANU have been cited to the subscription based Manupatra legal database (<https://www.manupatrafast.com/>). Some cases may also be available on the free India Kanoon legal database (<https://indiankanoon.org/>).

²⁴ V. Venkatesan, *Conversion Debate*, FRONTLINE, September 26, 2008.

²⁵ Constituent Assembly Debates Official Report, Volume VII, Dec. 1, 1948.

²⁶ *Rabindra Kumar Pal v. Republic of India*, MANU/SC/0062/2011.

²⁷ Jenkins, *supra* note 9, at 181.

²⁸ *Id.* at 183.

²⁹ *Maharashtra University of Health Sciences v. Satchikitsa Prasarak Mandal*, MANU/SC/0136/2010.

³⁰ *Justice K. S. Puttaswamy v. Union of India*, MANU/SC/1044/2017.

Services Authority v. Union of India, the Supreme Court noted that Article 21³¹ guarantees personal autonomy to an individual who is equipped to make decisions about her life.³²

As India is a free and democratic country, in *Lata Singh v. State of U.P.*, the Supreme Court held that once an individual attains majority age, she can marry whomsoever she likes.³³ In *Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News*, the Supreme Court explicitly stated that the freedom of choice in marriage is an inherent aspect of Article 21 of the Constitution.³⁴ Likewise, in *Asha Ranjan v. State of Bihar*, the Supreme Court observed that under Article 19,³⁵ women have a constitutional right to choose their life partner.³⁶

Similarly, in *Shafin Jahan v. Asokan K.M.*, the Supreme Court categorically held that the Constitution recognizes “personal liberty” and “individual autonomy,” enabling women to choose a partner.³⁷ Therefore, “neither the state nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters.” Going a step further, in *Nandakumar v. State of Kerala* the Supreme Court held that consenting parties, even if they are not legally competent to marry, have the right to live together outside of wedlock.³⁸ In *Shakti Vahini v. Union of India*, a case related to the decision of Khap Panchayats prevented two consenting adults from marrying. In this case, the Supreme Court held that “when two adults consensually choose each other as life partners, it is a manifestation of their choice which is recognized under Articles 19 and 21 of the Constitution.”³⁹

The above catena of judicial opinion enumerates that the ability to make choices for marriage is a facet of personal liberty and dignity. The state has no right to interfere in the marriage of consenting adults.⁴⁰ However, under the guise of regulating unlawful and forcible conversion, especially restraining Muslim men and Hindu women from exercising their constitutional freedom of choice, the Uttar Pradesh Ordinance appears to be infringing on the autonomy of consenting adults, which is embedded in a dignified life. By prescribing a jail term of up to ten years and a fine for conversion under marriage, fraud, coercion, or enticement, it appears that the Uttar Pradesh Ordinance may violate the right to religious freedom and the freedom of choice, as well as obliterate all interfaith marriages under personal laws.⁴¹

³¹ INDIA CONSTITUTION, article 21 (“Protection of life and personal liberty—No person shall be deprived of his life or personal liberty except according to procedure established by law.”).

³² National Legal Services Authority v. Union of India, MANU/SC/0309/2014.

³³ Lata Singh v. State of U.P., MANU/SC/2960/2006.

³⁴ Re: Indian Woman says gang-raped on orders of Village Court published in Business and Financial News, MANU/SC/0242/2014.

³⁵ INDIA CONSTITUTION, article 19 (“Protection of certain rights regarding freedom of speech etc.”).

³⁶ Asha Ranjan v. State of Bihar, MANU/SC/0159/2017; Vikas Yadav v. State of U.P., (2016) 9 SCC 541 (“Freedom, independence, constitutional identity, individual choice and thought of a woman be a wife or sister or daughter or mother cannot be allowed to be curtailed definitely not by application of physical force or threat or mental cruelty in the name of his self-assumed honour. That apart, neither the family members nor the members of the collective has any right to assault the boy chosen by the girl. Her individual choice is her self-respect and creating dent in it is destroying her honour.”).

³⁷ Shafin Jahan v. Asokan K.M., MANU/SC/0340/2018.

³⁸ Nandakumar v. State of Kerala, 2018 SCC ONLINE SC 492.

³⁹ Shakti Vahini v. Union of India, (2018) 7 SCC 192.

⁴⁰ Joseph Shine v. Union of India, MANU/SC/1074/2018.

⁴¹ India maintains a personal law system in marriage, divorce, maintenance, adoption, and succession. According to this, different religious communities govern aspects of family law. However, they do not derive their validity from the law made by a legislature or other authority in India. Instead, its foundational sources are religious scriptures.

The Constitutionality of the Uttar Pradesh Ordinance and the Love Jihad

The Hindu Marriages Act of 1955 strictly enforces monogamy. If either of the spouses solemnizes a second marriage without dissolving the first marriage, that spouse would be prosecuted for bigamy under the Indian Penal Code.⁴² Relying on the finding in *Sarla Mudgal v. Union of India*, in *Lily Thomas v. Union of India* the Supreme Court held that conversion to other religions from the Hindu religion is a ground for divorce.⁴³ However, mere conversion does not automatically dissolve marital ties unless recourse has been taken under the Act.

Further, the Court observed that if “a non-Muslim male gets converted to the Muslim faith without any real change of belief and merely with a view to avoid any earlier marriage or to enter into a second marriage, any marriage entered into by him after conversion would be void.” It appears that the dictum “without any real change of belief” any conversion for marriage is void was used to justify the Uttar Pradesh Ordinance.⁴⁴ Nonetheless, the Supreme Court did not declare that all conversions for marriage were void or that certain conditions must be fulfilled for any conversion to be legitimate. Instead, the Court stated that a Hindu marriage exists even after the conversion. Therefore, in the event of a second marriage without formally dissolving the first under the Act, the contravening party commits bigamy. Therefore, it seems that the observations made by the Supreme Court were taken out of context to justify the Uttar Pradesh Ordinance to prohibit interfaith marriages.

The Uttar Pradesh Ordinance is not limited to marriages of Hindu women with Muslim men. Therefore, on its face, it appears to be impartial and nondiscriminatory. However, an examination of various sections of the Uttar Pradesh Ordinance, including its objectives and purposes, reveals that it assaults individuals’ autonomy, including their right to choose a partner, their personal liberty, and their dignity.

Unsubstantiated Threat

Undeniably, a legislature is the democratic institution best suited to threats to the public good and formulate laws to address those threats. However, when challenged, the government is duty-bound to disclose the reasons for introducing the law with demonstrable evidence or proof. In relation to the Uttar Pradesh Ordinance, the government has not presented any credible empirical data to prove the purported conspiracy of love jihad. Therefore, the Uttar Pradesh Ordinance proceeds on a hypothesis that Hindu women are being forcibly converted.

Abuse of Power

The preamble of the Uttar Pradesh Ordinance stipulates that as the state legislature was not in session, the governor was satisfied that there were circumstances that made it necessary to take immediate action to promulgate the ordinance.⁴⁵ To buttress this, the governor of Uttar Pradesh stated that the results of a survey indicated that many girls and their parents

⁴² Hindu Marriages Act, No. 25 of 1955, § 17, INDIA CODE, <https://www.indiacode.nic.in/handle/123456789/1560?locale=en> (“Punishment of bigamy—Any marriage between two Hindus (including Buddhist, Jain or Sikh) solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code (45 of 1860) shall apply accordingly.”).

⁴³ *Sarla Mudgal v. Union of India*, MANU/SC/0290/1995; *Lily Thomas v. Union of India*, MANU/SC/3519/2000.

⁴⁴ Jagvir Singh, *Outrage on Conversion Misses the Point: No Community Is Entitled to Be Close-Minded*, INDIAN EXPRESS, December 30, 2020.

⁴⁵ Uttar Pradesh Ordinance, *supra* note 9, preamble (“WHEREAS the State Legislature is not in session and the Governor is satisfied that circumstances exist which render it necessary for him/her to take immediate action”).

had lodged complaints about the conspiracy to proselytize Hindu women and convert them to Islam.⁴⁶ However, the governor did not share the details regarding where and how such a survey was conducted or whether the government had made any effort to document the same in the form of a report. Interestingly, the chair of the Uttar Pradesh State Law Commission, which submitted a report to the government to frame a law to check unlawful religious conversions for marriages, admitted that media reports prompted him to write the report and draft model legislation.⁴⁷

However, a few days before the promulgation of the ordinance, the Special Investigation Team formed by the Uttar Pradesh government to probe cases of alleged love jihad concluded that there was no such conspiracy.⁴⁸ Notably, the Union government has stated that “the term Love Jihad is not defined under the extant laws. No such case of Love Jihad has been reported by any of the Central agencies.”⁴⁹ In this context, in *D. C. Wadhwa v. State of Bihar*, the Supreme Court held that the power to promulgate an ordinance is essentially a power to be used to meet an “extraordinary situation” and cannot be allowed “to serve political ends.”⁵⁰

Against the claim of the Uttar Pradesh government, there seems to be a dearth of evidence to substantiate the allegation that forced or coerced conversions were occurring. Consequently, there was no “extraordinary situation,” and the governor, therefore, had no cause to promulgate the ordinance, and her doing so was therefore contrary to the constitutional requirements of Article 213⁵¹ of the Constitution.

Criminalization of a Civil Law Offense

The preamble and section 3 of the Uttar Pradesh Ordinance use the phrase “prohibition of unlawful conversion from one religion to another by misrepresentation.”⁵² In the criminal cases of fraud or forgery, civil law elements could also exist.⁵³ However, misrepresentation per se is distinct from coercion, force, fraud or other prohibited modes, as it is not always a criminal act.

Nevertheless, the Uttar Pradesh Ordinance declares that all religious representation could be a criminal act of misrepresentation. For example, if an individual was told that she would feel closer to God upon conversion, but she did not subsequently experience the same, it would constitute misrepresentation under the ordinance.⁵⁴ Thus, misrepresentation as an

⁴⁶ Maulshree Seth, *Anandiben Patel Interview: “Anti-conversion Law Not Passed Just Like That ... Survey Showed Need,”* INDIAN EXPRESS, January 7, 2021.

⁴⁷ *A Woman or Her Family Can Now Fearlessly Go to the Police*, HINDUSTAN TIMES, December 1, 2020.

⁴⁸ Manish Sahu, *SIT Probe Into “Love Jihad” Rules Out Conspiracy Angle, Outside Funding*, INDIAN EXPRESS, November 24, 2020.

⁴⁹ “Love Jihad” Not Defined under Law, Says Centre, THE HINDU, February 05, 2020.

⁵⁰ *D. C. Wadhwa v. State of Bihar*, MANU/SC/0072/1986.

⁵¹ INDIAN CONSTITUTION, article 213 (“Power of Governor to promulgate Ordinances during recess of Legislature (1) If at any time, except when the Legislative Assembly of a State is in session, or where there is a Legislative Council in a State, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinance as the circumstances appear to him to require.”).

⁵² Uttar Pradesh Ordinance, *supra* note 9, at § 3 (“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 misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage nor shall any person abet, convince or conspire such conversion.”).

⁵³ *Mahesh Choudhary v. State of Rajasthan*, MANU/SC/0344/2009.

⁵⁴ South Asia Human Rights Documentation Centre, *Anti-conversion Laws: Challenges to Secularism and Fundamental Rights*, 43 ECONOMIC AND POLITICAL WEEKLY 2 (2008).

unacceptable ground for conversion covers all kinds of religious and charitable acts. Therefore, the scope of the Uttar Pradesh Ordinance is such that it criminalizes civil law offenses.

Vague and Imprecise Grounds of Conversion

A vague definition is an anathema to the principles of the rule of law. Undoubtedly, using coercion and fraud to convert people are unacceptable, as they violate freedom of conscience.⁵⁵ However, if a conversion is a free act of conscience, restriction by vague law would pose a serious challenge to religious freedom guaranteed in international human rights instruments and enshrined in the Indian constitution.⁵⁶

In the definition section, the Uttar Pradesh Ordinance defines the term *allurement* as including “offer of any temptation in the form of any gift,” “easy money,” “material benefit,” “free education in reputed schools,” “better lifestyle,” and “divine displeasure.” Allurement could thus include offering prayer, help, and charitable assistance.⁵⁷ In *Ramesh Mehta v. Sanwal Chand Singhvi*, the Supreme Court held that a “definition is not to be read in isolation. It must be read in the context of the phrase which would define it. It should not be vague or ambiguous.”⁵⁸ In *Harakchand Ratanchand Banthia v. Union of India*, a case related to the constitutionality of the Gold (Control) Act, 1968, the Supreme Court held that vague expressions are not capable of objective assessment and will lead to uncertainty.⁵⁹ The court stated that conferment of wide and vague power upon the administrators might unreasonably restrict the fundamental right to carry on business.⁶⁰ In *Grayned v. City of Rockford*, the United States Supreme Court held that uncertain meaning led citizens to “steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.”⁶¹ Therefore, as in *A.K. Roy v. Union of India*, the Supreme Court observed that vague expressions are “capable of wanton abuse.”⁶²

Similarly, in *Kartar Singh v. State of Punjab*, the Supreme Court held that laws should give a reasonable opportunity to assess what is prohibited and what is not. In the absence of sufficient warning, vague laws would entrap innocent people.⁶³ In *United States v. Williams*, the United States Supreme Court held that if a law “fails to provide a person of ordinary intelligence fair notice of what is prohibited or is so standardless that it authorizes or encourages seriously discriminatory enforcement,” it would be without any authority of law.⁶⁴ In *Federal Communication Commission v. Fox Television Stations, Inc.*, the United States Supreme Court again held that laws that regulate persons or entities must give fair notice of conduct that is forbidden or required.⁶⁵

On the basis of the above judicial decisions, it appears that terms such as *gift*, *easy money*, *better lifestyle*, and *divine displeasure* give no clear guidance to citizens and are open to multiple interpretations depending upon the perspective of the concerned persons.

⁵⁵ Sarah Claerhout & Jakob De Roover, *Religious Freedom and the Limits of Propagation: Conversion in the Constituent Assembly of India*, 10 RELIGIONS 3 (2019).

⁵⁶ *Id.*

⁵⁷ Meghan G. Fischer, *Anti-Conversion Laws and the International Response*, 6 PENN STATE JOURNAL OF LAW & INTERNATIONAL AFFAIRS 1 (2018).

⁵⁸ *Ramesh Mehta v. Sanwal Chand Singhvi*, MANU/SC/0395/2004.

⁵⁹ *Harakchand Ratanchand Banthia v. Union of India*, MANU/SC/0038/1969.

⁶⁰ *Id.*

⁶¹ *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

⁶² *A.K. Roy v. Union of India*, MANU/SC/0051/1981.

⁶³ *Kartar Singh v. State of Punjab*, MANU/SC/1597/1994.

⁶⁴ *United States v. Williams*, 553 U.S. 285, 304 (2008).

⁶⁵ *Federal Communication Commission v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012).

Different persons may reach different conclusions after reading the provision. The definition of *allurement* in the Uttar Pradesh Ordinance can include a broad range of human activities, not specific acts or activities. Therefore, the vague terms employed in the Uttar Pradesh Ordinance do not give adequate guidance or warning to a person who possesses ordinary intelligence to organize her acts.⁶⁶

With its ambiguous terminology, the ordinance seems to exceed the goal of protecting religious freedom and confers unfettered discretion of interpretation to authorities. The definitions in the Uttar Pradesh Ordinance leave uncertain which activities are permissible and which are prohibited thus inviting arbitrariness in its application.⁶⁷ Therefore, it is manifestly arbitrary and against the principles of Article 14 of the Constitution.

Untenable Assumptions about Conversion, Reconversion, and Marriage

The common law system developed over varying times is shaped by different ideas, interests, visions, and other factors. Therefore, it may not correspond to a single rationale.⁶⁸ However, as contradictory laws are less persuasive and instinctively wrong,⁶⁹ irrespective of the different understanding of justice and fairness, therefore, the State should act on a coherent set of principles.⁷⁰ In this context, section 3 of the Uttar Pradesh Ordinance states that there is “prohibition of unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage.” While it is conceivable that there could be a misrepresentation, force, undue influence, coercion, allurement, or fraud involved in conversion for the purpose of marriage, no one is automatically converted upon marriage.⁷¹ It happens either before or after the marriage.

By putting marriage in the same category as other distinct grounds for prohibition, such as force, undue influence, or coercion, it appears that the Uttar Pradesh government is under the impression that marriages do not happen voluntarily but are the result of misrepresentation, force, fraud, undue influence, or allurement. So, by lumping marriages together with these other grounds for challenging a conversion, the Uttar Pradesh Ordinance did not distinguish between voluntary marriages and forced marriages. As the Uttar Pradesh government did not provide any reliable data about the basis on which the ordinance was promulgated, the provision is neither based on any credible differentia nor does it have any reasonable relation to the object sought to be achieved by the ordinance; thus, this classification appears to be irrational. Therefore, it may fail the arbitrariness test as laid down by the Supreme Court in *E. P. Royappa v. State of Tamil Nadu* and *State of West Bengal v. Anwar Ali Sarkar*.⁷²

Similarly, the exception in Section 3 of the Uttar Pradesh Ordinance, which allows the reconversion to the “immediate previous religion,” appears contradictory and stipulates a different rule for the reconversion without any rational basis. In *Evangelical Fellowship of India v. State of Himachal Pradesh*, a similar provision was found to be discriminatory because it did not satisfy the parameters of Article 14 of the Constitution, as the Uttar Pradesh Ordinance is

⁶⁶ South Asia Human Rights Documentation Centre, *supra* note 54.

⁶⁷ Michael Hertzberg, *The Gifts of Allurement: Anti-conversion Legislation, Gift-Giving, and Political Allegiance in South Asia*, 35 JOURNAL OF CONTEMPORARY RELIGION 1 (2020).

⁶⁸ John McGarry, *The Possibility and Value of Coherence*, 34 LIVERPOOL LAW REVIEW 17 (2013).

⁶⁹ *Id.*

⁷⁰ RONALD DWORKIN, *LAW'S EMPIRE* 166 (1988).

⁷¹ Madan B. Lokur, *An Ill-Conceived, Overbroad and Vague Ordinance*, THE HINDU, January 2, 2021.

⁷² *E. P. Royappa v. State of Tamil Nadu*, (1974) 2 SCR 348; *State of West Bengal v. Anwar Ali Sarkar*, (1952) SCR 284.

not forthcoming in providing the reason for making such an exception for similarly situated individuals.⁷³ Therefore, reconversion to the immediately previous religion has no relation to the object of prohibiting conversions by force or fraud. Therefore, the proviso seems discriminatory and may violate Article 14 of the Constitution.

Procedural Requirements of Pre-conversion and Post-conversion Declarations

In *Uday Shankar Triyar v. Ram Kalewar Prasad Singh*, the Supreme Court stated that “procedure, a hand-maiden to justice, should never be made a tool to deny justice or perpetuate injustice, by any oppressive or punitive use.”⁷⁴ Section 8 of the Uttar Pradesh Ordinance requires pre-conversion and post-conversion declaration. It states that if one desires to convert, she must declare her intention to the district magistrate at least sixty days before the conversion, and the district magistrate shall institute an enquiry to ascertain “real intention,” “purpose,” and “cause” of the religious conversion.⁷⁵ Furthermore, if the convert fails to follow the procedure, she will face criminal consequences and would also be liable for a fine.

In *Kharak Singh v. The State of U.P.*, Justice Subba Rao, in his minority opinion, contended that the “Constitution does not expressly declare a right to privacy as a fundamental right but is an essential ingredient of personal liberty.”⁷⁶ Similarly, in *Govind v. State of Madhya Pradesh*, the Supreme Court held that “individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution ... any right to privacy must encompass and protect the personal intimacies of the home, the family marriage ... the fundamental rights explicitly guaranteed to a citizen have penumbral zones.”⁷⁷

Do these punishable procedural requirements of the Uttar Pradesh Ordinance defeat substantive rights of autonomy or ensure justice? In the matter of giving thirty days’ notice to the district magistrate for conversion, in *Evangelical Fellowship of India v. State of Himachal Pradesh*, the Himachal Pradesh High Court held that “each and every citizen of this country has a right not only to follow his own beliefs but also has a right to change his beliefs.... If a person changes his religion or belief of his own volition, then the State has no role to play. Why should a human being be asked to inform the authorities that he is changing his belief? What right does the State have to direct the converttee to give notice in advance to the D[istrict] M[agistrate] about changing his rebellious thought?”⁷⁸

The High Court further observed that the requirement of giving notice for changing religion might prejudicially affect parties, and they would be subjected to physical violence and psychological torture.⁷⁹ Under the garb of a specious plea of public order, the State cannot derogate citizens’ right to change a belief and right to privacy.⁸⁰

⁷³ *Evangelical Fellowship of India v. State of Himachal Pradesh*, MANU/HP/1259/2012.

⁷⁴ *Uday Shankar Triyar v. Ram Kalewar Prasad Singh*, MANU/SC/2173/2005.

⁷⁵ Uttar Pradesh Ordinance, *supra* note 9, at § 8(1) (“One who desires to convert his/her religion, shall before give a declaration in the form prescribed in conversion of Schedule-I at least sixty days in advance, to the religion pre-report and District Magistrate or the Additional District Magistrate specially authorized by District Magistrate, that he wishes to convert his/her religion on his/her own and with his/her free consent and without any force, coercion, undue influence or allurement.”); § 8(3) (“The District Magistrate, after receiving the information under subsections (1) and (2), shall get an enquiry conducted through police with regard to real intention, purpose and cause of the proposed religious conversion.”).

⁷⁶ *Kharak Singh v. The State of U.P.*, MANU/SC/0085/1962.

⁷⁷ *Govind v. State of Madhya Pradesh*, MANU/SC/0119/1975.

⁷⁸ *Evangelical Fellowship of India*, *supra* note 73.

⁷⁹ *Id.*

⁸⁰ *Id.*

In its 235th report,⁸¹ the Law Commission of India suggested that if a conscious choice of an individual drives the change of religion, no law should insist on obtaining prior permission from the district magistrate to change his or her religion.⁸² Although the declaration followed by confirmation may serve as an important piece of evidence of conversion, it cannot be treated as conclusive of conversion.⁸³ Therefore, the filing of a declaration and registration should not be an obligatory or indispensable mode of proof of conversion.⁸⁴

In *Smt. Safiya Sultana v. State of U.P.*, the Allahabad High Court held that the requirements of a thirty days' notice period, the publication of the notice, and inviting objections to the intended marriage under the Special Marriages Act⁸⁵ would violate fundamental rights of liberty, privacy, and freedom to choose to marry without interference from state and non-state actors.⁸⁶ As marriages solemnized under personal laws do not require any notice or invite objections, this classification discriminates against the class of persons adopting the Special Marriages Act for their marriage.⁸⁷ Therefore, the requirement of publication of notice and inviting objections are "directory in nature."⁸⁸

It appears that the Court deliberately did not hold the requirements for thirty days' notice period, the publication of the notice, and inviting objections unconstitutional for the reasons that the case was related to the writ of habeas corpus and the parties did not explicitly challenge the constitutionality of said provisions of the Special Marriages Act. Moreover, the constitutionality of the said provisions of the Special Marriages Act was already pending before the Supreme Court.⁸⁹ In such a situation, the only way to address the concerns of the parties was to declare the provision directive in nature.

Ordinarily, the declaration to the authorities is unnecessary or not required if an individual wants to convert of her own free will. However, the Uttar Pradesh Ordinance requires that the convert declare the particulars of the conversion within sixty days, and the same shall be exhibited publicly until its confirmation.⁹⁰ It also requires that within sixty days of marriage, the converted person must declare it to the district's District Magistrate where she resides ordinarily.⁹¹ Therefore, there appears to be an assumption of illegality in all conversion, which needs to be investigated, scrutinized, and certified by the authorities.

Furthermore, it is incomprehensible why the conversion requires additional declaration and confirmation after the authorities have already investigated to ascertain the intention and purpose of conversion. Additionally, this requirement of declaration seems to be jurisdictionally overreaching in nature. For instance, if a person is from a district of Uttar

⁸¹ *Conversion/Reconversion to Another Religion—Mode of Proof*, Report No. 235, LAW COMMISSION OF INDIA, December 2010.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Safiya Sultana v. State of U.P.*, (2021) 2 All LJ 363. The Special Marriage Act, 1954, provides a civil law of marriage. It was enacted to provide the citizens of India with a special form of marriage, regardless of religion, caste, creed, or community. In this act, two individuals from different religions can solemnize their marriage without renouncing their religions. It means that religion has no relevance for registering a marriage under this Act. Once a person solemnizes marriage under this law, the marriage is no longer governed by personal laws. Special Marriage Act, No. 43 of 1954, INDIA CODE, https://www.indiacode.nic.in/bitstream/123456789/15480/1/special_marriage_act.pdf.

⁸⁶ *Safiya Sultana*, *supra* note 85.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Krishnadas Rajagopal, Supreme Court Seeks Centre's Reply on Plea Challenging Provisions of Special Marriage Act*, THE HINDU, September 16, 2020.

⁹⁰ Report No. 235, *supra* note 81.

⁹¹ Uttar Pradesh Ordinance, *supra* note 9, at § 9 ("The converted person shall send a declaration in the form prescribed in Schedule-III within sixty days of the date of conversion, to the District Magistrate of the District in which converted person resides ordinarily.").

Pradesh but decides to convert in Kolkata, West Bengal, in the absence of corresponding legislation, on what basis can the Uttar Pradesh Ordinance require the convert to notify the district magistrate of Kolkata?

The cumbersome procedures required by the Uttar Pradesh Ordinance seem not to be an effort to address forced religious conversions but are, instead, a brazen attempt to stifle all conversion. Thus, the procedural requirements of the Uttar Pradesh Ordinance are an encroachment on the right to adopt any religious faith through voluntary conversion as guaranteed by Article 25, which protects the right to profess, practice, and propagate any religious faith of one's choice.

As the above discussion shows, the constitutional courts have maintained, albeit in different contexts, that periods of notice, mandatorily publishing a notice of the intended marriage, and entertaining objections from the public violate the citizens' right to privacy. Moreover, the declaration requirements of the ordinance to check conversion for marriage may jeopardize the safety and security of those who intend to solemnize interfaith marriages. By introducing such an onerous requirement of sixty days' notice period, along with pre-conversion and post-conversion declarations, the ordinance's authorization of the administration to interfere in interfaith marriages with impunity may violate the right to equality.

Shifting Onus

Under criminal jurisprudence, the presumption of innocence is a cardinal principle in the administration of justice. In essence, a person is presumed to be innocent until proven guilty.⁹² In other words, until an individual is held guilty of a criminal charge, she enjoys the presumption of innocence, which should not be interfered with except for compelling and substantial reasons.⁹³ However, to ensure that there is no miscarriage of justice, whether a person is guilty or not, the burden of proof ordinarily lies on the prosecution or the state, which has to prove it beyond reasonable doubt.⁹⁴

In *Woolmington v. DPP*, the United Kingdom House of Lords authoritatively held that the burden of proving a charge is on the prosecution.⁹⁵ It observed that "one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt."⁹⁶ In *C.S.D. Swamy v. the State*, India's Supreme Court observed that it is an established principle of criminal jurisprudence that the burden always lies on the prosecution to prove all the ingredients of the offense charged and that the burden never shifts to the accused to disprove the charge framed against him.⁹⁷

Nonetheless, section 12 of the Uttar Pradesh Ordinance stipulates that "the burden of proof as to whether a religious conversion was not effected through misrepresentation, force, undue influence, coercion, allurement or by any 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 other person." There is thus a presumption that all religious conversions are illegal. In that case, the burden is on the convert and the person carrying out the conversion to prove that it is not illegal. The illegal conversion is also made "cognisable" and "non-bailable," meaning that a police officer can arrest an accused without a warrant. The accused may or may not be released on bail, but it is up to the discretion of the Court; she cannot claim it as a matter of right.

⁹² *Noor Aga Khan v. State of Punjab*, (2008) 16 SCC 417.

⁹³ *Govindaraju v. State*, MANU/SC/0211/2012.

⁹⁴ *State of Rajasthan, Through Secretary, Home Department v. Abdul Mannan*, MANU/SC/0764/2011.

⁹⁵ *Woolmington v. DPP*, [1935] AC 462.

⁹⁶ *Id.*

⁹⁷ *C.S.D. Swamy v. the State*, MANU/SC/0025/1959.

India's Supreme Court has consistently reiterated⁹⁸ that an accused has the presumption of innocence until she is convicted because the state has greater access to resources and is better equipped to establish guilt than an accused trying to prove innocence. However, for compelling and substantial public interests, many socioeconomic offenses,⁹⁹ and where the evidence is within the knowledge of the accused, such as rape and dowry death, the inclusion of reverse onus has been recognized and held constitutional.¹⁰⁰ As the Uttar Pradesh government did not demonstrate any compelling grounds in the conversion cases, the Uttar Pradesh Ordinance turned this foundational principle of procedural fairness on its head.

It is unclear what public interest the Uttar Pradesh Ordinance intends to achieve by shifting the burden of proof upon the accused, especially when there is no evidence that love jihad exists. Because of the shift in the burden of proof, in all likelihood, the accused will have to go to great lengths to establish innocence, and this hardship could lead to the wrongful conviction of innocent citizens. Moreover, the reverse onus clause would result in the accused giving evidence against himself, violating the well-established principle of the burden of proof and undermining protection against the compulsion of self-incrimination embodied in Article 20(3) of the Constitution.

Conclusion

Love transcends social boundaries. However, the Uttar Pradesh Ordinance appears to be institutionalizing communalism that reinforces patriarchy. It entails that a government would play a role in determining the choice of partners, which is against *K. S. Puttaswamy v. Union of India*, dictum in which the Supreme Court held that "the individual is the focal point of the Constitution because it is in the realization of individual rights that the collective well-being of the community is determined."¹⁰¹ Furthermore, despite the lack of evidence on the existence of love jihad, the broad and vague Uttar Pradesh Ordinance criminalizes the freedom of choice in marriage, which is an inherent part of individual dignity. As the Supreme Court observed in *Laxmibai Chandaragi B v. The State of Karnataka*, the absence of dignity erodes individuals' choices; therefore, the Uttar Pradesh Ordinance falls foul of constitutional guarantees enshrined in Article 21 of the Constitution. Thus, the Uttar Pradesh Ordinance violates the freedom of conscience and the right to practice, adopt religion or belief. It also strikes at the right to personal liberty guaranteed by the Constitution of India.¹⁰²

⁹⁸ *Surajpal Singh v. State*, MANU/SC/0033/1951; *Ajmer Singh v. State of Punjab*, MANU/SC/0042/1952; *Atley v. State of Uttar Pradesh*, MANU/SC/0102/1955; *Chandrappa v. State of Karnataka* MANU/SC/7108/2007; *M.G. Agarwal v. State of Maharashtra*, MANU/SC/0117/1962; *Bhagwan Singh v. State of M.P.*, MANU/SC/0218/2003; *Arijana Thirupala v. Public Prosecutor, High Court of A.P., Hyderabad*, MANU/SC/0629/2002; *Ramanand Yadav v. Prabhunath Jha*, MANU/SC/0854/2003; *Kallu v. State of M.P.*, MANU/SC/0271/2006.

⁹⁹ *Food Adulteration Act*, No. 37 of 1954, INDIA CODE; *Essential Commodities Act*, No. 10 of 1955, INDIA CODE; *Customs Act*, No. 52 of 1962, INDIA CODE; *Foreign Exchange Management Act*, No. 42 of 1999, INDIA CODE; *Narcotic Drugs and Psychotropic Substances Act*, No. 61 of 1985, INDIA CODE; *Wealth Tax Act*, No. 27 of 1957, INDIA CODE; and *Prevention of Corruption Act*, No. 49 of 1988, INDIA CODE.

¹⁰⁰ In *Noor Aga v. State of Punjab*, MANU/SC/2913/2008, the Supreme Court held that reverse burdens are constitutional, both policy considerations and social control concerns justifying this extraordinary measure. See also *K. Veeraswami v. Union of India*, MANU/SC/0610/1991 ("Adroitly the prosecution cannot, in the very nature of things.... It is for him to explain. Such a statute placing burden on the accused cannot be regarded as unreasonable, unjust, or unfair. Nor can it be regarded as contrary to Article 21 of the Constitution. The principle that the burden of proof is always on the prosecution and never shifts to the accused is not a universal rule to be followed in every case.").

¹⁰¹ *Puttaswamy*, *supra* note 30.

¹⁰² *Laxmibai Chandaragi B v. The State of Karnataka*, 2021 SCC Online SC 85.

Undoubtedly, accepting conversion by coercion, fraud, or other illegitimate means and methods is unjustifiable. Nevertheless, the Uttar Pradesh Ordinance assumes that all interfaith marriages are forcible conversion, which gives short shrift to the constitutional guarantees of personal liberty and religious freedom. The terms such as “misrepresentation” and “allurements” used in the ordinance are overly broad and vague, providing no guidance to individuals on how they should be understood. Such ambiguous terminology leaves a high degree of discretion to enforcement agencies to determine which actions are prohibited and which are not. As individuals will be unable to understand the circumstances in which restrictions might be imposed and foresee the consequences of their actions with a degree of certainty, it is fraught with selective enforcement, therefore, prone to abuse.

The Uttar Pradesh Ordinance systematically places restrictions on interfaith marriages. It confers expansive powers on authorities to curb unlawful conversions. It reverses the burden of proof, which may prejudicially affect the right of an accused. By making the conversion process itself a punishment, the objective of the Uttar Pradesh Ordinance does not appear to be regulating unlawful or forcible conversion but incarcerating those who attempt to solemnize interfaith marriages. Therefore, the Uttar Pradesh Ordinance is arbitrarily, excessively, and disproportionately trampling upon citizens’ autonomy, including their freedom to choose a partner and their religious freedom, a constitutionally unsustainable proposition. With the unreasonable restrictions on the exercise of autonomy and agency of individuals, especially on Hindu women, the Uttar Pradesh Ordinance turns a constitutional state into a vigilante state and brazenly erodes the legitimate right to be let alone.

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