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Constitutionality of the Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020

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ABSTRACT

The purpose of this paper is to analyze the religious conversion laws and highlight the consequences related to “The Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020. This paper also talks about the emergence of the alleged conspiracy theory, “Love-Jihad” and how Sangh vigilantes backed by political parties have been able to maintain its existence for so long. The intention of the legislation can be determined by its provisions, though a forcible marriage has been an illegal act criminalizing the conversion by the act of marriage between two consensual adults is unquestionably violating the fundamental rights of the citizens.

Keywords: *Love Jihad, Religious Conversion, Conversion by Marriage, Personal Liberty*

I. INTRODUCTION

Looking at the recent developments in our nation, one can certainly determine the importance of religion in our political and social life. At one stage the judicial authorities of the country are reminding us all the importance of personal liberty and our freedom of conscience, on the other hand, keeping the communal conspiracy alive, theories like ‘Love-Jihad’ have been established by the very people whom we have so faithfully elected.

Inter-religious marriages are a rarity in our nation. Despite having legislation that provides provisions and procedures for inter-faith marriages, such arrangements are likely to be prevented by religious conservatism, casteism, and parental authorities. It is strange coming out of a land as diverse as India, which not just presents endless varieties of cultural patterns but professes all the major religions of the world.

We are living in a society that has popularized the idea that women who seek consensual relationships either have been lured or tricked into it by men of different ethnicity. However, this is to be expected from a society that normally infantilizes women and considers them puerile and incapable of making rational decisions.

Having an idea of these circumstances, the ordinance passed by the Government of Uttar

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Pradesh not only makes religious conversions that forcefully take place void, but also invalidates those conversions which are made solely for marriage, this is simply a finishing touch to an already created turmoil.

None of this is supposed to happen in a secular, democratic republic as treasured in our Preamble, but such are the times that we live in and not just Uttar Pradesh, but several other State governments have started their projects to embargo what they describe disparagingly as “Love-Jihad”.

This paper revolves around the issues regarding the constitutionality of the above-mentioned Ordinance, the emergence of the Love-Jihad conspiracy, its perilous effects on the individual’s privacy and choice rights, failure of the Special Marriage Act, 1954, and determination of its patriarchal roots.

(A) Objective

The objective behind this paper is to analyze the religious conversion laws and determine to what extent they interfere with the fundamental rights of the citizens.

(B) Methodology

This paper has been written after thorough research in every aspect possible and after analyzing several judgments and recent amendments. Data for this research is collected from secondary sources. Data collection methods are:

1. Books and Bare Acts
2. Journals
3. Articles

II. THE EMERGENCE OF THE LOVE JIHAD CONSPIRACY

It is noteworthy how a term such as ‘Love-Jihad’ has so effortlessly slipped into the vocabulary of many as if it were a social truism, so factual that questioning its legitimacy might be considered foolish. Beginning from coastal Karnataka and northern Kerala in the mid-2000s, the term is about a measured campaign that uses love, seduction, and trickery to convert women from other religions mainly Hinduism and Christianity into Islam.²

As per Sangh vigilantes, planning and money are utilized in such a mission where Muslim individuals mainly the youth are trained to stalk women from other religions, and for this, they

² A.P. Shah, 'Love Jihad' Ordinance Is Symbolic of Social Fabric Being Aggressively Changed: Justice A.P. Shah, THE WIRE (April 12, 2021, 10:01 PM), <https://thewire.in/law/love-jihad-ordinance-communal-rhetoric-divisive-justice-ap-shah>

are provided with modern clothes, mobile phones, and dark glasses which they could use to persuade women. Once trapped, it is alleged that the women would end up converting to Islam to marry Muslim men.

Keeping in mind the same agenda, Love-Jihad has been able to find its purpose and scope for destruction in the north under the leadership of Uttar Pradesh Chief Minister Yogi Aditya Nath. However, following him closely are the ministers from Madhya Pradesh, Haryana, Karnataka, and Assam.³

Not so long ago, in a well-reasoned order of the High Court, it was held that “*religious conversions, even when made solely for marriage, constituted a valid exercise of a person’s liberties*”.⁴ The order makes it clear that it is neither the province of the state nor any other individual to interfere with a person’s choice of partner.

But how long can this tenuous peace last? In response to the judgment, the government of Uttar Pradesh has introduced an ordinance that not only makes a religious conversion that is forcefully obtained, an offense but also declares void any conversion found to be made solely for marriage.

III. THE ALLEGED ETERNAL HATRED

Chaudhary Charan Singh as a minister in the Uttar Pradesh government once proposed to Prime Minister Jawahar Lal Nehru in 1954, to pass a law so that jobs as gazette officers could only be received by those who had and wanted to marry outside their caste.⁵ However, Nehru declined the proposal as it would infringe the free will of the individual citizens of India.

It is astonishing how much time has changed where the same state (Uttar Pradesh) that Charan Singh once belonged to has an ordinance that criminalizes inter-faith marriages. The focus is firmly on ‘protecting’ Hindu women from marrying men from other religions mainly Islam.

Adding to this, the U.P. Chief Minister had, erst-while, toyed with the ‘Anti-Romeo’ squad following the same agenda of ‘saving’ women from the unwelcome gaze of men.⁶ It is quite shameful that despite holding a position of such great power, they are not employing their

³ Ajoy Ashirwad Mahaprashasta, *The History of 'Love Jihad': How Sangh Parivar Spread a Dangerous, Imaginary Idea*, THE WIRE (April 12, 2021, 10:02 PM), <https://thewire.in/communalism/love-jihad-anti-muslim-history-sangh-parivar>

⁴ *Salamat Ansari v. State of U.P.*, 2020 SCC Online All 1382 : 2021 Cri LJ (NOC 39) 13 : (2020) 3 HLR 667 (DB)

⁵ Harsh Singh Lohit, *Chronology & Milestones in the life of Charan Singh*, CHARAN SINGH (April 12, 2021, 10:03 PM), <https://charansingh.org/sites/default/files/Chronology-of-the-Life-of-Charan-Singh-20181002.pdf>

⁶ Snigdha Poonam, *UP’s anti-Romeo squads strike terror: A quiet, gloomy Sunday at Ghaziabad’s biggest park*, HINDUSTAN TIMES (April 12, 2021, 10:04 PM) <https://www.hindustantimes.com/india-news/up-s-anti-romeo-squads-strike-terror-a-quiet-gloomy-sunday-at-ghaziabad-s-biggest-park/story-s0oLyrFPCu5ua2bUk00tFO.html>

minds and resources in a developmental project, rather they have created the conspiracy of 'Love-Jihad' which offers endless possibilities as far as anti-Muslim rhetoric is concerned.

The law in U.P. has already set a precedent for other BJP ruled states such as Madhya Pradesh which is in the process of making another Anti-conversion Bill, along with these, there is Himachal Pradesh's Freedom of Religion Act, 2019⁷ and Uttarakhand's Freedom of Religion Act, 2018.⁸

Thus, this not only destroys the long-standing fraternity that India has been based on, but it also denies the Muslims of their rights as equal citizens of this Republic. The U.P. Ordinance along with Madhya Pradesh's Freedom of Religion Bill, 2020, and other acts with similar consequences are vicious on the multitude which surely even as per our Constitution doesn't hold any water.

IV. CONSTITUTIONALITY

Under the Constitution of India, it is the individual citizen who exercises rights and duties. However, it isn't wrong to state that these new laws treat 'religious communities' instead of individual citizens as basic entities. If implementing these laws would result in taking away this social contract that has been given by our Constitution to individuals to exercise, this fundamentally deforms the framework of our republic.

One can always argue that the Constitution does interfere with the communities whenever it comes to the topic of minorities and untouchability in terms of certain sects, but this should not distract us from focusing on the real purpose behind those provisions. How can we expect a community to exercise their rights as individuals if all they have faced is social and cultural discrimination all their lives?

The state must acknowledge and overcome such discrimination as it only impedes the ability of those citizens to exercise their rights. To make the Government responsible and to provide protection to those in need, multiple articles in the form of Fundamental Rights have been given to us by the makers of the Indian Constitution.

Thus, the right to equality (Article 14-18) is not merely a negative right not to be discriminated

⁷ PTI, *Act against 'forced conversion' comes into force in Himachal Pradesh over a year after being passed by Assembly*, INDIAN EXPRESS (April 12, 2021, 10:05 PM), <https://indianexpress.com/article/india/act-against-forced-conversion-comes-into-force-in-himachal-pradesh-over-a-year-after-being-passed-by-assembly-7112629/>

⁸ Lalmani Verma, *Uttarakhand: Three months after Hindu woman converted to marry, couple among four people booked*, INDIAN EXPRESS (April 12, 2021, 10:06 PM), <https://indianexpress.com/article/india/uttarakhand-three-months-after-hindu-woman-converted-to-marry-couple-among-four-people-booked-7125510/>

against, but also a positive right to be treated as an equal.⁹

V. PROVISIONS AND IMPACT - PERSONAL LIBERTY

In the case of *Kharak Singh v. the State of U.P.*,¹⁰ it was the first time the meaning and scope of “personal liberty” came up for consideration under article 21 of the Constitution i.e., Protection of Life and Personal Liberty.

In this case, speaking for the majority Ayyangar J held that “*personal liberty was used in the article as a compendious term to include within itself all the varieties of rights which go to make up the personal liberties of a human being other than those dealt with in the several clauses of Article 19(1)*.”

In the same case, he also held that “*right to privacy is not a guaranteed right under our constitution and merely a manner in which privacy is invaded would not amount to infringement of a fundamental right guaranteed under part III*”.¹¹ However, not everybody was in favour of the said statement.

It was only after *Maneka Gandhi v. Union of India*¹² that a revolutionary change took place concerning establishing a relationship between Article 14, 19, and 21 also popularly known as the “golden triangle” of the Indian Constitution which had been denied in *A.K. Gopalan*¹³

In this case, the leading opinion was delivered by Bhagwati J., who held “*that the law must now be taken to be well-settled that Article 21 does not exclude Article 19, and a law prescribing a procedure for depriving a person of “personal liberty” will have to meet the requirement of Article 21 and also of Article 19 as well as of Article 14*”.

He also explained the principle of reasonableness which is an essential element of equality and non-arbitrariness saturating Article 14, must apply with equal force to the “procedure” envisaged by Article 21, that is to say, the procedure must be “right, just and fair” and not “arbitrary, fanciful or oppressive”. And, at last, for a procedure to be right, just, and fair, it should comply with the principle of natural justice.

As for the matter at hand, let’s consider the consequences of some provisions of the **impugned ordinance**. Section 3 provides that “*no person shall convert or attempt to convert any other person from one religion to another by use or practice of misrepresentation, force, undue*

⁹ V.N. Shukla, Constitution of India (Thirteenth Edition) pg. 48

¹⁰ AIR 1963 SC 1295: (1964) 1 SCR 332

¹¹ Ibid.

¹² (1978) 1 SCC 248: AIR 1978 SC 597.

¹³ AIR 1950 SC 27: 1950

influence, coercion, allurements or by any fraudulent means or by marriage".¹⁴

It is reasonable to the extent that conversion by coercion or fraud etc. is a matter of seriousness and should be dealt with with proper state action. But what is "conversion by marriage"? Nobody gets converted by marriage. If a Hindu woman is marrying a Muslim man, as per her own will, what amounts to conversion here – and who gets converted?

When we think about it, one can still understand conversion for marriage, an adult person is in love with another adult person, and one of them desires to get converted to the religion of another before the marriage, what sort of restriction anybody can impose here? And even if there is a restriction it is highly doubtful if such a restriction would be "right, just and fair" in nature.

By invoking the Supreme Court's judgment in *Puttaswamy*¹⁵, Allahabad High Court in the case of *Salamat Ansari* held that an individual's ability to control vital aspects of her life come under her right to privacy and this includes the protection of decisional autonomy on affairs such as "*personal intimacies, the sanctity of family life, marriage, procreation, the home, and sexual orientation*".

In *Salamat Ansari*,¹⁶ it was held "*that religious conversion, even for marriage, constituted a valid exercise of a person's liberties*". It is unfortunate that even after 70 years of independence all of this had to be spelled out in a secular, democratic country. Thus, the ordinance without any doubt poses a grave assault on the personal liberty of an individual and is violative of Article 21.

Section 7 of the Ordinance gives power to a police officer to arrest the person under the Criminal Procedure Code without an order from the magistrate if any information is received regarding a conversion that is designed to take place and arresting is necessary to prevent the commission of the offense.

Now, the nature of information is such that any stranger can complain to the police, which without any doubt can be used as a fresh tool for harassing the convert. The term "allurement" has also been used in the provisions and makes it a criminal offense to convert a person by offering him/her an "allurement".

¹⁴ Devika Sharma, *Prohibition of Unlawful Religious Conversion | Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 [Brief Explainer]*, SCC ONLINE (April 12, 2021, 10:08 PM), <https://www.scconline.com/blog/post/2020/12/01/prohibition-of-unlawful-religious-conversion-uttar-pradesh-prohibition-of-unlawful-conversion-of-religion-ordinance-2020-brief-explainer/>

¹⁵ (1978) 1 SCC 248; AIR 1978 SC 597

¹⁶ 2020 SCC Online All 1382 : 2021 Cri LJ (NOC 39) 13 : (2020) 3 HLR 667 (DB)

Section 2(a) of the ordinance defines allurement in a very broad manner which includes an offer of any temptation in the form of a gift and gratification. To understand it better, let's say a man and woman of different religions were out on a date and the man offered certain gifts to the woman which is quite common, any person being the so-called aggrieved party can easily complain to the police that she/he has overheard a conversation in which a temptation (in the form a gift) was offered to the girl and this could prompt an arrest of the man offering the allurement, thus a forcible marriage is no doubt seen as an offense but now even a gift-induced wedding is an offense too.

Under **Section 8**, if a person sincerely desires to convert but doesn't have any intention to get married, also would have to inform the District Magistrate (DM) two months before the plan through a declaration. Interestingly, such a declaration is expected to be displayed on the notice board of the office till the time the contents of the declaration are confirmed. This just not grossly violates the right to privacy but also puts the lives of those converts at risk whose families are against it.

Finally, **Section 12** reverses the rule of the burden of proof in criminal jurisprudence. It provides that the burden to prove the conversion was not on account of coercion, fraud, etc., or by marriage will be on the person who has caused the conversion. At the same time, instead of presuming that the person accused of committing the offense is innocent until proven guilty, the ordinance proceeds on the presumption that every religious conversion is illegal.

We must ask ourselves, how is the person who's been accused of converting supposed to know the mind-set of the converted person? After all, it is only the person converted who can tell and nobody else.

VI. NON-DISCLOSURE OF A REASON FOR IMMEDIATE ACTION

Article 213(1) of the Indian Constitution gives power to the Governor to promulgate Ordinance in the absence of a Legislative Assembly of a State in session or where there is no Legislative Council in a State or when both Houses of the Legislature is not in session and he is satisfied that such circumstances exist which render it necessary for him to take immediate action.¹⁷

After going through the above article, it is well settled that there are three pre-conditions before the Governor to satisfy to promulgate an ordinance:

1. State Legislature should not be in session;

¹⁷ V.N. Shukla's Constitution of India, Thirteenth Edition, page no. 645

2. Circumstances should exist for promulgating an ordinance and;
3. Importantly, those circumstances must necessitate immediate action.

In our political system, there is no “founded practice” that requires the Governor, or even the President under Article 123, to state the circumstances for immediate action. This is one reason why the Commission for Air Quality Management Ordinance¹⁸ which was promulgated on October 28th, 2020 gave a four-page justification for immediate action and on the other side, the hurriedly promulgated farm laws merely stated in the preamble what the ordinance provides for but did not disclose the circumstances for immediate action.

For the healthy functioning between the State and its citizens, it is very important to have transparency when it comes to such rules and regulations and that can be developed by stating the reasons for such immediate actions. After all, it is better to disclose the circumstances before the people for whom it has been enacted so that they don’t have to request the same from the courts.

Similarly, the Preamble of the “Love-Jihad Ordinance” apart from stating the unlawful conversion from one religion to another by coercion, misrepresentation, and so on, then continues to record the satisfaction of the Governor of the existence of circumstances and the requirement for “her/him to take immediate action”.

But what could be the circumstances that required the promulgation of an Ordinance? As far as marriage is concerned, if one fraudulent interfaith marriage is going to take place, the police have the authority to prevent it with the existing laws as they are supposed to do with child marriages, hence an ordinance is not required for it.

Even if mass conversions have been planned to take place it is unlikely that such an event would be a secret and happening at the same time. But again, if it happens then most certainly this can be prevented by invoking the existing criminal provisions. Thus, it doesn’t matter how hard and widely one thinks, the reason for immediate action is very difficult to extrapolate.

VII. CONCLUSION

Despite having multiple petitions raised and amid the protests by the opposition, the Uttar Pradesh Legislative Assembly on 24th February 2021, passed the bill with the purpose to curb religious conversions carried out by fraudulent or any other undue means, including through

¹⁸ Ministry of Law and Justice, *The Commission for Air Quality Management in National Capital Region and Adjoining Areas Ordinance, 2020*, PRS INDIA (April 12, 2021, 10:10 PM), https://www.prsindia.org/sites/default/files/bill_files/Commission%20for%20Air%20Quality%20Management%20in%20National%20Capital%20Region%20and%20Adjoining%20Areas%20Ordinance,%202020.pdf

marriage by voice vote.¹⁹ This way the bill has replaced the ordinance promulgated in November last year.

From being just a conspiracy theory to a full-fledged bill, “Love-Jihad” has traveled a long journey which is now a crime punishable by imprisonment. However, by establishing such developments even as the government has confirmed in the Parliament that there was no evidence of such a theory²⁰, it is difficult to anticipate the consequences but more than that it is indeed diabolical.

Lately, the Supreme Court while considering two PILs challenging the religious conversion laws, allowed ‘Jamiat Ulema-E-Hind’ which is a body of Islamic Scholars to be impleaded as a respondent. On which the Chief Justice of India SA Bobde asked Senior Advocate Ejaz Maqbool, “What is your locus? How are you aggrieved?”

“A large number of Muslim youths have been harassed by these laws. We want to assist your lordships”, Mr. Maqbool replied.²¹

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Bill, 2021 is prone to abuse, and if anyone were to inspect the numerous newspapers one would be able to see the consequences that most commonly include- intimidation, mistreatment, and arbitrary arrest.

On the one hand, when the Supreme Court in one of its judgments emphasized the importance of interfaith marriages stating, “society must learn to accept inter-caste and inter-faith marriages without hounding the couples”²², the U.P. conversion bill not just exhibits the elements of vilifying all inter-faith marriages but places unreasonable hindrances on consenting adults in exercising their personal choice of a partner, violates their right to life, liberty, and dignity.

¹⁹ PTI, *Uttar Pradesh Assembly passes Bill on religious conversion amid din*, THE HINDU (April 12, 2021, 10:11 PM), <https://www.thehindu.com/news/national/other-states/uttar-pradesh-assembly-passes-bill-on-religious-conversion-amid-din/article33925722.ece>

²⁰ Sana Shakil, *‘Love Jihad’ not defined under existing laws, no case reported yet: Government in Parliament*, THE NEW INDIAN EXPRESS (April 12, 2021, 10:13 PM), <https://www.newindianexpress.com/nation/2020/feb/05/love-jihad-not-defined-under-existing-laws-no-case-reported-yet-government-in-parliament-2099277.html>

²¹ LiveLaw News Network, *Supreme Court Allows Jamiat Ulema-E-Hind To Intervene In Pleas Challenging ‘Love Jihad’ Laws*, LIVE LAW (April 12, 2021, 10:15 PM), <https://www.livelaw.in/top-stories/supreme-court-jamiat-ulema-e-hind-implead-pleas-challenging-love-jihad-laws-169984>

²² Utkarsh Anand, *SC: Society must learn to accept intercaste, interfaith marriages*, HINDUSTAN TIMES (April 12, 2021, 10:17 PM), <https://www.hindustantimes.com/india-news/sc-society-must-learn-to-accept-intercaste-interfaith-marriages-101612809173318.html>