

“LIFTING THE VEIL: CRITICAL ANALYSIS OF UTTAR PRADESH’S LAW AGAINST CONVERSION FOR MARRIAGE”

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INTRODUCTION

The Governor of the Largest State of India in terms of population, that is, Uttar Pradesh has recently promulgated an ordinance “The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020¹ with the purpose to prohibit unlawful conversion from one religion to another or in another words it seeks to prevent the so called “Love Jihad” in the state by criminalizing marriages which are carried out solely for the purpose of religious conversion, even if it is with the consent of individual except when the prior sanction for that is obtained from the state.² The term “Love Jihad” basically revolves around a religious conspiracy theories which argues that, in India the Muslim men are secretly waging a war against the Hindus by enticing and marrying young Hindu girls, which resultantly leads to forcible conversion of Hindu girls to Islam thereby increasing the Muslim population and diminishing that of Hindus. Even though interfaith marriages can exist between people belonging to any religion, but only the marriage between Muslim man and a Hindu woman is considered as Love Jihad, thereby making the assumption behind the law communal.

WHAT’S WRONG WITH THE UTTAR PRADESH’S ANTI-LOVE JIHAD LAW?

The body of the ordinance contains various objectionable provisions, for instance the provision dealing with the burden of proof. Generally, when a person makes some allegation that something happened or some act has been committed then it is up to him/her to prove that fact. As in criminal cases, the burden of proof is on prosecution and the person accused of committing an offence is presumed to be innocent until proven guilty.³ However the ordinance presumes that every religious conversion is illegal and burden to prove that it is not illegal is on the person carrying out the conversion. Hence this reverse of burden of proof is not against the

¹ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020, UP Ordinance No 21 of 2020, Nov, 27, 2020

² Abhinav Chandrachud, *UP’s ‘love jihad’ ordinance has chilling effect on freedom of conscience*, Indian Express, Dec 3, 2020, <https://indianexpress.com/article/opinion/columns/up-love-jihad-law-religious-conversion-anti-conversion-law-7078370/>

³ Rishi Kesh Singh And Ors. vs The State, AIR 1970 All 51, 1970 CriLJ 132

doctrine of criminal justice system but it is also against the Indian Evidence Act, 1872.⁴ In addition to that, offence of religious conversion is made cognizable and non-bailable thereby giving police officer the power to arrest an accused without a warrant and the grant of bail to the accused is at the discretion of court. In fact, the ordinance is full of objectionable provision such as ambiguous definition of the term allurement- which is one the unlawful aspects of conversion as the term “allurement’ is very broadly defined to even include a gift given to the person who is sought to be converted. In other words, if someone gifts a copy of Bhagavad Gita to a Non-Hindu and after reading the Bhagavad Gita if the Non-Hindu decides to convert to Hinduism then this conversion falls within the definition of allurement as the same occurred after a gift was given. Under the provisions of ordinance, “allurement’ also includes telling the person who is sought to be converted that she will incur divine displeasure if she does not convert or have better lifestyle if she agrees or otherwise. Now, another issue arises in the use of word “otherwise” in the definition. So for instance, if some religious guru tries to encourage her followers or listeners to convert to some other religion by suggesting that the other religion has more believable tenets than that of theirs- whether this amount to allurement? One of the most imperative pre-condition of a criminal law is that it has to be clear and precise. It is unjust to punish a person for doing something a penal law does not precisely and clearly prohibit. Another aspect of the UP ordinance which appears quite stranger and contrary to its objective is that it states that reconversion of a person to his/her previous religion is not illegal even if the same is vitiated by force, misrepresentation, allurement, fraud etc. thereby the state government appears to be sending a direct and unmistakable signal to the target audience of the state that illegal conversion to other religion is prohibited, but it is normal if a convert is forced to reconvert back to his/her previous religion. Illegal conversion under the ordinance attracts varying jail terms depending on the gender, for instance the ordinance prescribes a minimum punishment of at least one year which is extendable up to five years and double the maximum sentence in case of subsequent conviction. Higher punishment are awarded to men if they are convicted of causing illegal conversion of minor, a person belonging to scheduled tribe or caste or strangely a woman, the minimum sentence in that case will be two years and the same can be extended up to 10 years. To put this in other words, the status of the woman who is sought to be converted or is already converted is immaterial for the purpose of awarding punishment. For instance, that woman may be a highly educated civil servant or even some CEO of a MNC. Still if somebody illegally converts her against her will, then the maximum punishment for this offence can go up to 10 years, as comparable to someone who illegally converts her male subordinates, then the

⁴ Act No. 1 of 1872

maximum punishment which can be awarded is 5 years at the most. This ordinance appears to be based on the assumption that women belonging to all sections of society and not merely from economically weak groups or historically marginalized groups are susceptible or vulnerable to illegal conversion. On the top of it, legitimizing the intrusion of third parties and State Government in the choice of who a person wishes to marry. Section 6 of the ordinance states that any marriage which is performed for the sole objective/purpose of unlawful conversion or vice versa will be declared null and void by a family court if prior sanction to concert and marry is not received from the office of district magistrate. Section 11 of the ordinance states that a criminal action can be initiated against the person who caused the religious conversion if the district magistrate is “not satisfied”. Person who caused the conversion is defined broadly to include person who committed the act, also persons who omitted to act and prevent the offence and also those responsible for aiding, abetting, counsel or even those who procure people for the said offence. The ordinance also gives the right to parents, siblings or any other individual who is related to the person converted either by blood or marriage to question the conversion. It is indeed debatable that whether there is any legal basis for prohibiting religious conversion even if the same is solely for marriage and the ordinance raises question of constitutional propriety. At this point, it seems appropriate to mention a case decided by the United States Supreme Court. In 1967, when Richard Loving filed a suit to challenge the ban on inter racial marriages imposed by the state of Virginia, the united states supreme court stated in *Loving v. Virginia*,⁵ “under constitution of United States of America, the freedom to marry, or not marry, a person of another race resides with the individual and the same cannot be infringed by the state”. The court additional held that “courts in this country have consistently denied the constitutionality of measures which restricts the citizens on account of race. Needless to say that restricting the freedom to marry merely because of racial classification violates the fundamental meaning of the equal protection clause.”⁶

TEST OF CONSTITUTIONALITY?

This ordinance is prima facie appears to be against the various provisions of the Constitution of India as the procedure which was followed by the executive to enact the legislation and also the manner in which it invades the right to privacy as mandated under Article 21 of the Constitution of India.⁷ Two public interest litigations have already been in the Allahabad High Court against the ordinance passed by the state of Uttar Pradesh wherein the petitioner contended that the

⁵ *Loving v. Virginia*, 388 U.S. 1 (1967)

⁶ Jayna Kothari, *Up Anti-Conversion Law Amounts To Discrimination And A Violation Of The Right To Equality*. Indian Express, December 18, 2020 at 17

⁷ INDIA CONST. art 21

ordinance making power vested in governor under article 213 of the constitution is only used in urgent or unforeseen situations.⁸ However state government failed to explain urgency or provide any survey/empirical data thereby necessitating the governor to exercise law making power under the Constitution. In this regard, reliance is placed on the decision of the apex court in *RC Cooper vs. Union of India*⁹ wherein the Supreme Court held that the decision of the president to promulgate ordinance under Article 123 of the Constitution could be challenged on the ground that immediate action was not required or needed. Additionally, the ordinance as is presently drafted on the face of it imperils the fundamental rights of citizen to profess, practice and propagate religion as enshrined under Article 25 of the Constitution. In addition to that, this ordinance which is nothing less than a draconian law is a violation of fundamental right to equality based on religion. The constitution of India guarantees equal protection of the law under Article 14 to all persons and the same is to be read with the Article 15 which guarantees of non-discrimination by directing that the state shall not discriminate against any of its citizen on the following grounds which are religion, caste, race, place of birth, sex or any of them. However imposing restrictions on the marriage by the state government only on ground of religion clearly amounts to discrimination and thereby violating right to equality. Still one may argue that state has the power to make separate classification under Article 14, but it is important to remember that the same is permissible only if such classification has a reasonable nexus with the purpose sought to be achieved by the act/law. In fact, the percentage of inter religious marriages is extremely small and moreover no empirical data is produced by the state government pertaining to harmful consequences of inter religious marriage.¹⁰

VIOLATION OF CONSTITUTIONAL RIGHTS OF WOMEN AND HER AUTONOMY

The anxiety of the state government seems to originate from the deep rooted patriarchal mindset of the people in power, wherein a woman is always perceived as little more than a cattle, handed over to her husband by her family, without her consent or sometimes little say in the matter. Not so long, we have witnessed the infamous Hadiya Case¹¹ wherein the woman's assertions of having converted and marrying her husband with her consent was of little value and she was reunited with her husband only after a long battle of litigation to convince the courts of her autonomy. The ordinance denies the adult Hindu women the right to take life decision as

⁸ Nadeem Vs State of UP, Criminal Misc. Writ petition No - 16302 of 2020

⁹ AIR1970 SCR (3)530

¹⁰Zeeshan Shaikh, *Explained: What a study in 2013 Revealed About Interfaith Marriages in India*, Indian Express, Oct 22, 2020.

¹¹ Shafin Jahan v. Ashokan K.M, CrI.A 366/2018 (arising out of SLP (CrI.) 5777/2017)

contravening their constitutional right to choose a partner for themselves and undermining their autonomy and civil liberties.

PRESENT LAW ON INTER-RELIGIOUS MARRIAGE

Supporters of the unlawful conversion ordinance argue that if people actually love each other then, what is the need to change their faith? As they can get married under the Special Marriage Act 1954¹² without converting to the religion of their spouse. However this argument is based on the misconception that the Special marriage act provides a convenient procedure for couples from different personal laws to get married. Sadly, nothing is farther from the truth, the procedure under the aforesaid act is in fact far more onerous than getting married under one's personal laws. For instance, the special marriages act mandates the requirement of giving a 30 days public notice before a couple is entitled to register their marriage. Needless to say, such a public notice can be a great source of danger if parties are from different castes, faith or communities. The public documentation of details pertaining to the prospective groom and bride and the fact of the same being displayed during the aforesaid notice period is already under challenge before the Apex Court. Instead, the only and the preferred option would be for either to convert to the religion of other and get married. In fact, personal laws make it rather quite easier to convert and get married. Now, a somewhat similar or I rather say, more onerous precondition of an application to the district authorities with a 60-day public notice and in addition to that, a police enquiry before conversion is mandated under the recently promulgated UP ordinance.

POST ORDINANCE INCIDENTS

Within one month of the promulgation of the ordinance, about 14 cases were reportedly registered and the state police have made around 51 arrests.¹³ In one of the case, the family of the girl informed the police officials that the matter was resolved and that the girl had married another boy and no complaint was filed by the family. Still, an FIR was registered against the boy by the police. In yet another case, after registration of FIR and issuance of non bailable warrant, the police allegedly threatened the boy's family if the boy did not comply with the summons issued by the police. It is safe to conclude that continuous rise in number of cases of murder, assault, rape or theft does not concern the state government and it appears that the same are being considered as normal in UP and on the other hand these inter religious marriages is in fact

¹² Act No. 43 of 1954

¹³ Web Desk, *No Plans, Says Centre On Enacting Anti-Conversion Law To Check Interfaith Marriages*, India Today, Feb 2, 2021

engaging the attention of the police force of the state. The police officials are unnecessarily interfering in between solemnization of the marriage ceremony and thereby violating the fundamental right to choice and defaming and harassing them and their family members. Following the footsteps of Uttar Pradesh Government, on 26th December 2020 the Dharma Swatantrya (Religious Freedom) Bill 2020 was passed by a voice vote by Madhya Pradesh cabinet chaired by Chief Minister Shivraj Singh Chouhan which is also aimed at curbing forced religious conversions.¹⁴ As per the bill introduced by the Madhya Pradesh government, a person involved in forcing religious conversion on anyone will be liable for a punishment of 1-5 years with a minimum fine of Rupees twenty five thousand and if the person converted is under aged or belongs to scheduled tribe or caste, then the accused will be liable for a punishment of 2-10 years in addition to a maximum penalty of up to Rupees one lakh. Apart from this, the bill has similar provisions like reverse burden of proof on accused and on those involved with him, including institutions and organisations. Needless to say that, interference by the state government in personal matters indeed has a serious chilling effect on the exercise of citizen's freedom of choice. In an order dated 18.12.2020 passed by the Allahabad High Court in the Habeas corpus writ petition titled as *Nadeem vs. State of Uttar Pradesh and 6 others*¹⁵, the Hon'ble High Court reunited an interfaith couple while holding that the woman had expressed her desire to live with her husband and she is free do move as per her own choice without any hindrance or restriction being created by third party. Calcutta High Court in *Palash Sarkar vs. The State of West Bengal & Others*¹⁶, has expressly stated that if an adult woman married as per choice and subsequently decides to convert and not return to her paternal house, then there could be no inference in that case. Not so long ago, in the celebrated judgment of *Shakti Vabini vs. Union of India & others*¹⁷, the Hon'ble Apex Court held that "when two adults marry out of their own wish, they are free to decide their path; they consummate their marriage; they feel that it is their goal and they have every right to do that." Any kind of ill-treatment or torment or torture in the name of honor that violates or infringes the choice of an individual or person pertaining to love and marriage by any assembly, and it assumes any nomenclature whatsoever cannot be allowed a moment of existence and the same is illegal. Additionally the Hon'ble High Court of Karnataka in the case of "*X vs. Commissioner of Police, Bangalore & Others*" has held that the right of an adult to marry the person of her/his choice is a fundamental right enshrined under the part 3 of the constitution of India and the liberty pertaining to the marital or personal relationship of two adults cannot be

¹⁴ Prashasti Singh, *Madhya Pradesh cabinet approves Dharma Swatantrya (Religious Freedom) Bill 2020*, Hindustan Time, Dec 26, 2020

¹⁵ Criminal Misc. Writ Petition No.-16302 of 2020

¹⁶ WPA No. 9732 of 2020

¹⁷ Writ Petition (Civil) No. 231 of 2010

violated by anybody irrespective of religion or caste.¹⁸ In the light of the aforesaid judgments of constitutional courts, it is high time now to revisit the five judge bench judgment of the Hon'ble Apex Court in *Rev Stainislaus vs. State of Madhya Pradesh*¹⁹ wherein the court upheld anti-religious conversion statutes passed by the states of Madhya Pradesh and Orissa, though they imposed slightly less extreme but similar restraints on the right to propagate religion and freedom of conscience. The Constitutional Courts of our country which have reiterated their utmost duty to protect personal liberties of citizens, will undoubtedly strike down this draconian law.

CONCLUSION

After Uttar Pradesh and Madhya Pradesh, other states like Karnataka, Assam, Haryana are also considering passing a similar law criminalizing religious conversion by marriage. At the Centre of this ordinance passed in the state of Uttar Pradesh is a deep rooted opposition to inter-faith marriages and the patriarchal desire to control girls and women under the pretense of safeguarding them from being coerced into forced religious conversion by marriage. In fact, this opposition can be compared to the similar opposition to inter-caste marriages in India, as both originate from historical prejudices between communities. However, being aware of such social evils being prevalent in our society, members of the sub-committee on fundamental rights during the drafting of our constitution, especially Hansa Jivraj Mehta and Rajkumari Amrit Kaur recommended for the inclusion of inter-faith marriage in the constitution as a fundamental right. They wanted to remove social stigma against inter-faith marriages and to provide protection to the couple who wish to enter into inter-faith marriages. In India, marriage has been historically used as a tool to stop women from exercising their autonomy or to control women's sexualities and even promulgate caste lineage. This ordinance further restricts their freedom of choice, social interactions and mobility instead of safeguarding their rights. In a democratic country like ours, young Indian Women are increasingly asserting (and rightly so) their basic human rights which includes and not limited to, freedom- marry who they choose, study, to work and live life on her terms and these should not be curtailed or questioned. The attempts to rob women of these basic rights is aimed at producing a docile Indian female population which does not rebel against family or societal directives and does as it is told. A nation like ours that was born of bloodshed but still rose above it to being identified itself with diversity, unity and togetherness. In the end, it seems appropriate to recall the Martin Luther King Jr. who famously said that: "Injustice anywhere is a threat to justice everywhere".

¹⁸Rintu Mariam Biju, *Right of individual to marry any person of his/her choice, irrespective of caste or religion is a fundamental right: Karnataka High Court*, (05Feb 2020: 16:55), <https://www.barandbench.com/news/litigation/fundamental-right-marry-choice-irrespective-caste-religion-karnataka-high-court>

¹⁹ 1977 AIR 908, 1977 SCR (2) 611