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A take on the (un)constitutionality of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020.

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Much ado about conversion for marriage – a take on the (un)constitutionality of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020

There has been some debate on the promulgation of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance 2020 ('**UP Ordinance**') calling it the ***Love Jihad*** Act. Some have called it '*an assault on personal liberty*'^[1] claiming it places unreasonable restrictions on the right to marriage by questioning conversion for the purposes of marriage and is violative of the right to privacy. Some have argued that it '*puts the personal dignity and*

freedom of choice at a backseat'.^[2] There is also a comparison of the law to Nazi Germany's Reich Citizenship laws.^[3] These are very serious allegations and it would appear that the law is *ex facie* unconstitutional. I propose to examine if it is really the case.

Scheme of the UP Ordinance

Let us first examine the heading of the Act and the intention as seen from the preamble of the Ordinance. A plain perusal would indicate that the focus is on anti-conversion and not on prohibition of inter-religious marriages. Let us now examine the provisions of the UP Ordinance. Section 3 prohibits conversion from one religion to another religion by misrepresentation, force, fraud, undue influence, coercion, allurement or marriage. The definition of 'allurement', 'coercion', 'force', 'fraudulent means', 'undue influence' and 'unlawful conversion' are found in Section 2 which deals with definitions.

Section 4 allows any relative who is related by blood, marriage or adoption or any aggrieved person to lodge an FIR if there is violation of Section 3.

Section 5 provides for punishment for contravention of Section 3 which is imprisonment of minimum of 1 year and up to 5 years. But if it is a minor or a woman or a scheduled caste or schedule tribe person, then the minimum imprisonment is 2 years and extends up to ten years. It provides for compensation for such a victim of conversion which may extend to rupees five lakh in addition to any fine.

Section 6 provides that any marriage which was done for the sole purpose of conversion or vice versa shall be declared void by a Family Court at the instance of the applying spouse.

Section 7 makes the offences under the Ordinance to be cognizable and non-bailable.

Section 8 provides for the procedure prior to conversion and to apply for conversion and states that any person who wishes to convert must give a declaration in the prescribed format at least 60 days in advance to the District Magistrate that the conversion is with free consent and without any force, coercion, undue influence or allurement. The religious converter shall also give one month's notice in the prescribed format before performing such conversion ceremony. The District Magistrate shall get an inquiry conducted through the police to ascertain the real intention, purpose and cause of the proposed religious conversion. Contravention of this provision entails imprisonment as prescribed.

Section 9 provides for declaration post conversion of religion in the prescribed format to be submitted to the District Magistrate who shall exhibit it which shall provide details of the conversion and the converted individual shall appear in person before the District Magistrate within 21 days of sending the declaration to confirm the contents therein. If the provisions of Section 9 are not fulfilled, the conversion is rendered null and void.

Section 10 provides for punishment for institutions or organizations

Section 11 states that the parties to the offence will be every person who has either done the act of conversion, aided or abetted it, counsel or convince or procures any person.

Section 12 places the burden of proof on the person who has caused the conversion to prove that it was with free consent.

The UP Ordinance provides for a legal mode for recording of any conversion from one religion to another. Sixty days prior to conversion, a notice is required to be given under Section 8 and the District Magistrate will carry out an inquiry to verify that the conversion is truly out of free will. After conversion, the converted person will send a declaration to the District Magistrate and thereafter personally appear to satisfy the District Magistrate that the conversion is valid and proper in terms of Section 9. If the procedure

under Section 8 and Section 9 are not followed prior to conversion, then the burden of proof is on the converted person and all other such persons connected with the conversion to show that the conversion was out of free will. If a conversion or attempt at conversion is by use or practice of misrepresentation, fraud, undue influence or by any fraudulent means or by marriage, then it is prohibited under Section 3 and punishable under Section 5.

Comparison with other anti-conversion laws:

The provisions of the UP Ordinance are pari-materia to other anti-conversion laws which are either in force or at some point in time were in force. For ease of convenience, I have charted out the key provisions of these laws which are prevailing in various states.

Pertinent Details of Acts	M.P.	Chhattisgarh C.G.	Odisha O.D.	Gujarat G.J	Himachal Pradesh H.P.	Uttarakhand U.K.
Prohibition on Conversion	Yes	Yes	Yes	Yes	Yes	Yes
Pre-Conversion Declaration	No	No	Yes	Yes	Yes	Yes
Post-Conversion Declaration	No	No	No	Yes	Yes	Yes
Inquiry by Magistrate to examine Bonafides of Conversion	No	No	Yes	No	Yes	Yes
The converted / associated persons bear the Burden of Proof	–	–	–	–	Yes;	Yes;

From the above, it is seen that the provisions are more or less similar to other enactments. It may be interesting to note that these provisions have been challenged before Courts and upheld by the

Courts. I have prepared a table which will give one a bird's eye view of such challenges and the current state of the law.

State/Act	Challenge to Act (& Brief Status)
Orissa Freedom of Religion Act, 1967 Act & Rules notified	Orissa HC – <i>Rev. Satya Ranjan Majhi and Ors vs. State of Orissa & Ors.</i> – Upheld the constitutionality of statute and dismissed W.P. Supreme Court – <i>Satya Ranjan Majhi vs. State of Orissa & Ors.</i> – SC – Upheld the validity of HC judgment and dismissed SLP. Orissa HC – <i>Yulitha Hyde and Ors. vs. State of Orissa & Ors.</i> – Has been overruled by SC in <i>Rev. Stainislaus</i>
M.P. Dharma Swatantraya Adhiniyam, 1968 (Chhattisgarh Dharma Swatantraya Adhiniyam, 1968 – Same as MP Act since Chhattisgarh had not been carved out) Act & Rules notified	Supreme Court – <i>Rev. Stainislaus vs. State of Madhya Pradesh & Ors.</i> – The Supreme Court upheld the constitutionality of the said Act and dismissed the Civil Appeals.
Gujarat Freedom of Religion Act 2003 Act & Rules notified	Gujarat HC – Challenge <i>vide SCA No 1582 of 2009</i> – <i>Rev. Stanislaus Fernandes, Archbishop of Gandhinagar & Ors. vs. State of Gujarat & Anr.</i> – Petition has been dismissed as withdrawn
Himachal Pradesh Freedom of Religion Act, 2006 (Repealed) Replaced by the Himachal Pradesh Freedom of Religion Act, 2019 Act & Rules notified	Himachal Pradesh HC – <i>Evangelical Fellowship of India vs. State of Himachal Pradesh</i> – 2006 Act held valid but Petitions allowed to a limited extent Supreme Court – Matter disposed for not complying conditional order of curing of defects
Uttarakhand Freedom of Religion Act, 2018 Act & Rules notified	No challenge as of now
Jharkhand Freedom of Religion Act, 2017 Act & Rules Notified	– No challenge as of now
Arunachal Pradesh Freedom of Religion Act, 1978 Act Notified; No Rules	– No challenge as of now

Tamil Nadu Prohibition of Forcible Conversion of Religion Act, 2002 Brought in as Ordinance; Act repealed	Revocation of Act by the Government due to widespread protests.
Rajasthan Freedom of Religion Bill, 2006 Pending President's Assent	– No challenge as of now
Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020 Brought in as Ordinance	– No challenge as of now

Constitutional validity of anti-conversion laws

With this background, let us examine the legal validity of the anti-conversion laws. The fundamental challenge to all anti-conversion laws has been on the ground of Article 25 (1) of the Constitution apart from legislative competence of States. The argument is that by imposing restrictions on conversion including an inquiry on whether the conversion is valid, going into the issue of whether the conversion is based on free will etc would violate Article 25 (1) of the Constitution. For ease of reference, Article 25 (1) is extracted hereinbelow.

“(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 to freely to profess, practice and propagate religion.”

The Madhya Pradesh and Orissa anti-conversion laws were challenged before the Supreme Court and the Constitution Bench in **Rev. Stainislaus vs. State of Madhya Pradesh**[\[4\]](#) upheld the same as not violative of Article 25. The Supreme Court held that right to ‘propagate’ does not include the right to ‘convert’ but to transmit or spread one’s religion by an exposition of its tenets. Therefore, there is no fundamental right to ‘convert’.

While interpreting the word ‘propagate’, the Supreme Court held that if a legislation is framed to ensure that there is no forcible conversion, the same would be in furtherance of Article 25 by holding as under:

“We have no doubt that it is in this sense that the word ‘propagate’ has been used in Article 25 (1), for what the Article grants is not the right to convert another person to one’s own religion, but to transmit or spread one’s religion by exposition of its tenets. It has to be remembered that Article 25 (1) guarantees ‘freedom of conscience’ to every citizen, and not merely to the followers of one particular religion, and that, in turn, postulates that there is not a fundamental right to convert another person to one’s own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all citizens of the country alike.”

Another aspect on which the Supreme Court upheld the validity was that while one has the freedom to convert another person, it can be restricted by public order. It held *“if an attempt is made to raise communal passions on the ground that someone has been forcibly converted to another religion, it would give rise to an apprehension of breach of public order. Hence, the restriction imposed on conversion by seeking that the same be recorded by way of a declaration before a Magistrate would not fall foul of Article 25.”* If one applies this principle, the requirement under the UP Ordinance for recording of the declaration of conversion and inquiry by the Magistrate to ensure that the conversion is free would not fall foul of the Constitution.

This judgment has held the field since then and followed and applied by High Courts across the country. The Division Bench of the Himachal Pradesh High Court examined the constitutionality of the HP Act in ***Evangelical Fellowship of India vs. State of Himachal Pradesh***^[5] and upheld the same to the extent that it was covered by the ***Rev. Stainislaus***. The Himachal Pradesh High Court examined the definitions of ‘force’, ‘fraud’ and ‘inducement’

which was argued to be vague and capable of misuse which the Court held was not a legal basis to nullify the enactment. It may be noted that the definitions are almost *pari-materia* to the UP Ordinance.

There were some rules which were not found in the earlier version of the MP and Orissa laws such as notice before conversion by the converttee, inquiry and registration of case and sanction for prosecution. The Himachal Act sought for notice before conversion and power to inquire into the conversion in the event of any complaint. The argument of privacy was examined as to whether it would be appropriate for such restrictions to be put in place.

The High Court held that a person cannot be asked to disclose his religion and it cannot be ruled out that a person who is changing his religion may face harassment by giving such notice and that such a notice may lead to communal clashes. Holding an inquiry to examine if a conversion is proper or not may be violative of privacy of that individual. Hence only those provisions were held to be unconstitutional.

It may be noted that these provisions are also *pari-materia* to the UP Ordinance. Therefore, it will be possible to argue that those provisions are unconstitutional applying the dicta of the Himachal High Court. It will be necessary to note that although the judgment was challenged before the Supreme Court, the SLP was dismissed for non-curing of the defects by way of a general procedural order along with several other petitions and cannot be considered as confirmed by the Supreme Court.[\[6\]](#)

Here, it may be necessary to examine a subsequent judgment of the Orissa High Court in ***Rev. Satya Ranjan Majhi vs. State of Orissa***[\[7\]](#), wherein certain amendments of 1999 to the Orissa Rules which provided for an inquiry, declaration before conversion were also challenged saying that it was in excess of the judgment of the Supreme Court in ***Rev. Stainislaus***. The same was dismissed by the Orissa High Court and taken on appeal to the Supreme Court in ***Satya Ranjan Majhi vs. State of Orissa***[\[8\]](#). The Supreme

Court upheld the provisions and dismissed the SLP by a speaking order. Therefore, the judgment of the Supreme Court would apply in the present situation and the UP Ordinance will stand the test of constitutionality on that ground.

By the above analysis, it is clear that the general provisions relating to seeking registration of conversion, prescribing punishment for conversion which is not based on free-will would stand constitutional scrutiny. The only question that remains is the addition of conversion for the purpose of marriage to the law would stand the test or not.

Let us understand as to how typically these inter-religious marriages are functioning at the present and the problems faced therein and how the UP Ordinance can potentially resolve such issues:**Lack of sufficient evidence of such conversion:** If one of the spouses fails to fully comply with the religious requirements for conversion or if the conversion is not properly recorded or if one of the spouse does not have any record and the sanctity of the marriage is questioned (ostensibly because the other records of the converting spouse will show his / her previous religion). If the procedure under Section 8 and 9 of the UP Ordinance are followed, then it creates evidence of such conversion which cannot later on be disputed by any party.

Legality of the marriage is questioned: Although it is possible to argue live-in relationship for the purpose of maintenance in the event of desertion by the other spouse, a lengthy and protracted trial will be the consequence as these marriages are not registered and often the converter will not get the election ID card or other identity cards changed to her / his new name. So, there is a possibility that the marriage itself will be disputed which will result in protracted litigation. If the conversion is for the purpose of marriage and later on if someone wants to nullify the marriage, it gives such a party additional ground to question to marriage. The corollary being that such a declaration of conversion will also estop the converter to renege from such marriages.

Inheritance issues: There is also a possibility that succession to spousal property or the grant of legitimacy to the children born out of such inter-religious marriage is disputed and without sufficient proof of conversion, one will get entangled in protracted litigation. Once a person converts to the religion of choice, the benefits of the said religion will automatically follow and cannot be taken away.

Criminal cases being foisted upon the converter and relatives: Typically cases of kidnapping, coercion, rape and other provisions are foisted on the husband in the event the converter is a girl. By the time the criminal cases are resolved in courts of law, the entire family and the marriage is put under strain. This arises because there are no records that the conversion has been out of free will. If there is compliance under the UP Ordinance and if the spouse comes and makes a statement in Court that she has chosen to marry out of her own free will and without coercion, the criminal cases will automatically fall as was done in the Hadiya case.

Misuse of conversion for the purpose of marriage: As highlighted in *Lily Thomas vs. Union of India*, some Hindus often convert to Islam merely to sustain bigamous relationships. A proper inquiry as contemplated under the UP Ordinance will ensure that the process of conversion is not misused.

The next question to address is if someone intends to convert for the purpose of marriage, how is it wrong. I will go no further than to cite from the Hon'ble Supreme Court in *Lily Thomas vs. Union of India*^[9] to make my point:

“Religion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict senses constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another

religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution”

Is it seriously violative of freedom of choice of religion to examine that the choice has been exercised freely? The Supreme Court has already answered in ***Stainislaus*** that it is not. The law is only seeking a declaration and an inquiry to satisfy that the conversion is based on free will. Is there really a major problem with seeking such a declaration? If a person is choosing to marry someone he or she loves and if he or she or that person's family puts a condition that the other person must convert for the purpose of marriage, then is such a conversion really out of free will? The Supreme Court in ***Lily Thomas*** has already answered in an emphatic no.

There is another important aspect which has to be considered viz. that the Special Marriages Act, 1954 ('**SM Act**') legalizes any inter-religious marriages. The requirement under the SM Act is that notice requires to be given first and thereafter the marriage would be solemnized without the requirement of any religious ceremony. Therefore, there is no necessity to convert for the purpose of marriage as per existing law.

The SM Act does not bar holding religious ceremonies for solemnization of the marriage but does not give legal sanctity to such ceremonies. In order to overcome the requirements of the SM Act, couples belonging to different religions choose to convert to a common religion and the marriage is solemnized in that common religion.

It is a settled position of law that a person has a right to marry any person of his or her choice and also has the right to convert his or her religion as per choice. [\[10\]](#) There is no rational need or nexus for

converting to the other person's religion for the purpose of marriage. If a person is allured fraudulently to believe that without conversion the marriage is not possible, then would it be entirely wrong on part of the State to place restrictions to ascertain and satisfy itself that the conversion for the purpose of marriage is not necessary and apprise such a person of the provisions of the SM Act.

The SM Act was put in place for the specific purpose of ensuring that the marriage between inter-religious communities take place and this great nation of India continues to remain a melting pot and an amalgum of cultures. It was only after Akbar married Jodhabai that his perspectives towards religion evolved and became tolerant. He did not insist on his wife to convert to Islam.^[11] Two examples from contemporary times are also relevant, Shahrukh Khan's wife is a practicing Hindu. The families celebrate both Hindu and Muslim cultures. In Karnataka, a Congress politician Mr. Dinesh Gundu Rao's wife is a practicing Muslim. Neither spouse has restricted the other from practicing their religion. They claim that they have an increased appreciation of the other's religion because of the inter-religious marriage. I cite them as examples merely to show how love unites in the absence of conversion for the purpose of marriage. As a country we must encourage that and appreciate the same rather than be restricted by religion and insist on conversion for the purpose of marriage.

To conclude, I would say that there is nothing wrong in the UP Ordinance ensuring that the conversion is not for the purpose of marriage and it would not fall foul of the Constitution.

(Ajay J Nandalike is an advocate practicing in the Karnataka High Court. I thank Mr. Harish Jayakumar, Advocate for the research and the tabular representation and Mr. Chandan Kallaiaah Advocate for his valuable inputs. Views are entirely personal)

[1] <https://www.livelaw.in/columns/up-ordinance-criminalizing-conversion-for-marriage-is-an-assault-on-personal-liberty-166575>

[2] <https://www.livelaw.in/top-stories/up-ordinance-against-religious-conversions-by-marriage-justice-m-b-lokur-166600>

[3] <https://www.thequint.com/news/law/love-jihad-laws-india-nuremberg-law-anti-miscegenation-us-similarities#read-more>

[4] (1977) 1 SCC 677

[5] MANU/HP/1259/2012

[6] It is interesting to note that several petitions were dismissed by a general order. The order was passed by a Bench comprising of CJI Gogoi, J Deepak Verma and another judge. J Deepak Verma passed the judgment in the HP High Court. Therefore, in effect J Deepak Verma dismissed the appeal against his own order, albeit by inadvertence and as a procedural order.

[7] MANU/OR/0133/2003

[8] (2003) 7 SCC 439

[9] (2000) 6 SCC 224 at para 38 at p.245

[10] Shafin Jahan vs. Ashokan KN (2018) 16 SCC 368

[11] <https://en.wikipedia.org/wiki/Mariam-uz-Zamani> t3

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