

THE BURNING ISSUES AND CHALLENGES OF THE ORDINANCE ANTI CONVERSION LAW IN INDIA

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Abstract

There has been debate and discussion surrounding the Uttar Pradesh Prevention of Illegal Conversion of Religion Ordinance, 2020 (hereafter referred to as the Ordinance). It has been described in every conceivable way imaginable, from "racist towards Muslims" to "a law similar to Hitler's rule." Three schedules and fourteen sections make up the Ordinance. The purpose of this Ordinance is to outlaw the conversion of individuals from one faith to another without their consent, whether it may be by marriage, coercion, undue influence, coercion, or any other fraudulent means. However, a number of individuals and organisations have claimed that the Ordinance places an unnecessary burden on both the person attempting to convert and the person performing such a conversion by requiring both of these people to declare before the district magistrate that such conversion is being done out of free consent and not out of coercion any dishonest tactics, including misrepresentation, compulsion, undue influence, coercion, allurement, and marriage. Not only before conversion, but also following conversion, this declaration must be made twice. Furthermore, the individual who initiated the conversion has the responsibility of proving that the interfaith union was not influenced by deception, compulsion, undue influence, coercion, allurement, or any other fraudulent methods or by marriage.

Key Words: Traditional religions, Dharma Swatantrya Adhiniyam, 1968, Orissa Freedom of Religion Act, 1967.

1.1 INTRODUCTION

The inclusion of traditional religions and other faiths in the category of religion has drawn criticism for broadening the scope of the Ordinance. As a result, it is asserted that the definition of religion is nebulous and unclear. Nonetheless, the goal of doing so is to avoid using unjust techniques to convert tribal people. These native people practise neither animism nor any other religion. It has been noted that missionaries and other organisations specifically target credulous tribal members in an effort to convert them to their own faith. This is why many different faiths, in addition to traditional religion, are included in the concept of religion¹.

¹Kaul Rahul, Srivastava Siddhartha. "Analysis of the Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020." ILI Law Review. Winter Issue 2020.

Any conversion performed only for the sake of marriage is already recognised as invalid and unlawful. This section therefore does not harm anyone and instead penalises marriages that are solely for conversion. Additionally, every other word in the section has a negative meaning, such as deception, fraud, coercion, undue influence, or force. It follows that "marriage" would also likely have some negative implications. In light of this exemption, the question that emerges is what happens if such reconversion is accomplished through deceit, fraud, force, coercion, undue influence, allurement, or marriage. As a result, the Ordinance permits a variety of harm to be done under the guise of reconversion.

SECTION3:

According to section 3, there is a serious potential for mischief on the part of the executive due to the use of the word "marriage" without any qualifications. Every marriage that involves conversion becomes unlawful and punished as a result. Nonetheless, it seems that the word marriage is not unqualified if we read the piece as a whole. The essential clause, "No individual shall convert or attempt to convert any other person from one faith to another by use or practise of, either directly or otherwise," must be read after the term "marriage." As a result, the entire phrase reads, "No person shall convert or attempt to convert any person by use of or practise of marriage."

1.2 FIRAGAINSTTHE CONVERSION (SECTION4):

Any person who is connected to the converted person by blood or marriage may file a FIR to stop the conversion under Section 4. According to the Ordinance, any aggrieved individual, his or her parents, siblings, or any other person related to them by blood, marriage, or adoption may submit a First Information Report (FIR) against an unlawful religious conversion. Now, in most cases, the people opposed to a person's conversion are their family members. This clause gives displeased family members the ability to obstruct such conversion by filing a FIR in each instance where the person and family are at odds.

It must be kept in mind, too, that filing a FIR won't make the conversion go away; the police will instead look into whether the conversion was legal or not. Additionally, under the terms of sections 57 and 167 of the Criminal Process Act of 1973, the investigation cannot last longer than 60 or 90 days, as the case may be. Nonetheless, filing a police report quickly or under duress is not unusual, and the possibility of filing a fraudulent report is not unheard of. Such abuse needs to be controlled. Additionally, since the offence is cognizable and not subject to bail, an arrest may be made and one has already been made in a few instances where it might not have been necessary. In these situations, the person who had been arrested had to go before the High Court to obtain personal freedom.

SECTION5:

Punishment for violating Clause 3 is outlined in Section 5. When juveniles, women, or members of scheduled castes or scheduled tribes are violated, the punishment is harsh. According to some, the section's inclusion of such a clause contradicts Article 14, which guarantees equality. Everyone must be treated fairly by the law. Yet, it is important to remember when making this argument that the state of India is given the authority to establish specific provisions for women, children, scheduled castes, and scheduled tribes under Articles 15(3) and 15(4) of the Indian Constitution. Furthermore, it is not uncommon for fringe members of other religions to target scheduled caste and scheduled tribe members because of their socioeconomic status. Moreover,

identical clauses can be found in anti-conversion laws in other states. As a result, crimes against certain groups of people carry harsh penalties.

1.3 MARRIAGES INVOLVING RELIGIOUS CONVERSION (SECTION 6):

Any marriage performed only for the purpose of an illegal conversion, or the reverse, may be declared void by the court under Section 6. According to the Ordinance, if a marriage was entered into with the sole intent of performing an illegal conversion, or vice versa, and the religious conversion was not performed in accordance with the method required by the Ordinance, the marriage may be deemed null and void. Thus, Section 6 stipulates that courts would deem marriages that are solely for conversion purposes—or vice versa—void. The clause just reiterates the Supreme Court's rulings in the cases of Lily Thomas v. Union of India², and Sarla Mudgal v. Union of India³, respectively. The hitch with this clause is that only the parties and not family members can seek to have the marriage dissolved.

1.4 PROCEDURE FOR RELIGIOUS CONVERSION (SECTION 8 AND 9):

According to the Ordinance, a statement of the intended religious conversion must be given in advance to the District Magistrate (DM) by both the prospective converts and the religious convertors (i.e., those who carry out the conversion). A required notification of must be included with the declarations.

- The person has 60 days, and
- The convertor has 30 days.

A violation of this procedure is punishable by a minimum of six months in jail but a maximum of three years in prison, a fine of at least Rs. 10,000 (for those undergoing conversion), and a sentence of one to five years in jail and at least Rs. 25,000 in fines (for the convertors). Moreover, a violation will make the conversion invalid and illegal. The DM is required to launch a police investigation into the proposed conversion's motive, purpose, and cause after receiving both declarations.

SECTION 11:

Section 11 discusses the parties to the offence and compares a number of people to those who really committed the offence. This clause has a flaw since it penalises both those who "do" and those who "omit to do any act to enable or aid any person to do crime." The use of the word "omits" is the fundamental problem. How may one person's failure to act allow or assist another in committing a crime? Enabling or assisting always involves active involvement. The Ordinance gives the executive wide latitude for mischief by including "omits to do any act." Moreover, section 11(iv) makes it unlawful to "guide," "convince," or "procure" for conversion. These are really polite statements, and it will be difficult to balance making them punitive with the ability to

²Lily Thomas v Union of India(2000)6SCC224.

³Sarla Mudgal v Union of IndiaAIR1995SC1531.

spread one religion. If a person is forbidden from offering advice or persuasion to others, how can their religion be spread?

SECTION12:

One of the most contentious parts of the Ordinance is Section 12, which states that the burden of proving that a religious conversion was not brought about by fraud, force, coercion, undue influence, allurement, or marriage is on the person who brought about the conversion and, in cases where the conversion was facilitated by another person, on that person.

1.5 NEED TO PROMULGATE AN ORDINANCE

As an ordinance is only passed when immediate action is required, it has been questioned why the ordinance was passed in the first place. Furthermore, because time is of the utmost importance, it does not include debate or discussion like that of a bill. If circumstances necessitate quick action, the Governor may publish an Ordinance during the state legislature's break under the authority of Article 213 of the Indian Constitution. He is free to enact laws based on how he perceives the situation. To promulgate an ordinance, the following requirements must be met:

- There shouldn't be a session of the State Legislature or Parliament;
- Certain conditions must exist in order to enact such a law;
- Such situations ought to call for quick or urgent action.

Was the current Ordinance justifiable in being passed despite the fact that the state legislature was not in session at the time? Furthermore, were these events timely enough to warrant the promulgation of an ordinance? In this regard, the Uttar Pradesh administration needs to respond to a few queries. In 2019, the UP Law Commission delivered its findings, and it found no evidence that the state was experiencing an excessive number of religious conversions or mass conversions. Inter-faith unions make up barely 2% of all marriages in India, according to sceptics, making them much too insignificant to have any noticeable impact on public order.

1.6 COMPARISON BETWEEN THE UP ORDINANCE AND MADHYA PRADESH DHARMA SWATANTRYA ADHINIYAM, 1968 AND ORISSA FREEDOM OF RELIGION ACT, 1967

The Orissa Freedom of Religion Act, 1967, and the Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968, were passed in response to the growing activities of Christian missionaries in the states of Orissa and Orissa. Both of these states' Acts were drafted along similar lines and have comparable clauses. The UP Ordinance, in contrast, was created with a different goal in mind: to control conversions performed with the intention of getting married. As a result, the UP Ordinance has specific measures relating to this objective, such as providing the District Magistrate with a pre-conversion declaration, conducting a police investigation, and making a post-conversion declaration public.

i. Bail: The Ordinance also differs significantly in other important ways from the two Acts of Madhya Pradesh and Orissa. The UP Ordinance is tighter in that it imposes harsher penalties and makes offences covered by

this Act both cognizable and non-bail able. In contrast, crimes punishable by the MP and Orissa Acts are crimes that are subject to bail.

ii. Police Inquiry: The Ordinance specifies how police inquiries should be conducted prior to conversion. A police investigation must be carried out to find out the details of conversion after a person who intends to convert notifies the District Magistrate of their intention. The individual must show up in front of the District Magistrate for confirmation following the conversion. This pre-conversion and post-conversion declarations are presented in public and the public is invited to voice any concerns to the conversion. The MP and Orissa Acts do not contain these strict pre- and post-conversion laws or police inquiries before conversion.

iii. Conversion by Marriage: Conversions for the purpose of marriage or the reverse are expressly prohibited under the Ordinance. The MP and Orissa Acts, however, have a more general provision that renders conversion by fraudulent means a criminal offence despite not specifically addressing marriage by conversion.

iv. Pre-Conversion Statement and Penalty: The severity of the penalties for violations of the Ordinance are greater than those for violations of the MP and Orissa Acts. According to the Ordinance, the penalty is a minimum of one year in prison and a maximum of five years in prison as well as a fine of at least Rs. 15,000. A minimum of three years in prison and a maximum of ten years in prison as well as a fine of at least Rs. 50,000 are the penalties for crimes committed against minors, women, or members of the SC or ST groups. Contrarily, under the MP and Orissa Acts, the penalty is either a year in prison or a fine of Rs. 5,000 or both; if the offender is a woman from a scheduled caste or tribe, or a minor, the penalty is either a two-year sentence in prison or a fine of Rs. 10,000 or both.

v. Burden of Proof: Another distinction between the Ordinance and the two Acts is that the burden of proof in the Ordinance is on the individual who instigated the conversion, but it is the prosecution's responsibility in the two Acts of MP and Orissa. Prior approval from the District Magistrate is necessary before prosecution for offences under the MP and Orissa Acts, but under the Ordinance, no such approval is necessary.

vi. Impact of Violation: The MP and Orissa Acts both provide for penalties in cases of noncompliance, although the conversion carried out under the Acts is still valid. However, if the rules of the Ordinance are broken, it makes the conversion null and void as well as making punishments available.

vii. For violations of the MP and Orissa Acts, only the convertor is held accountable; but, under the Ordinance, both the convertor and the person being converted are held accountable.

viii. Reconversion: The process of reconversion is another significant distinction between the Acts and the Ordinance. Reconversion to the prior religion is prohibited by the MP and Orissa Acts and will have the same consequences as a fresh conversion. However, the Ordinance has made an exception for reconversion, enabling the individual to return to their original religion.

Consequently, it can be observed that the UP Ordinance differs considerably from the MP and Orissa Acts in that it is wider and harsher, and that it lengthens and makes more difficult the conversion process by adopting a greater number of procedures that anyone seeking to convert must complete.

1.7 RIGHT TO PRIVACY

The Supreme Court's decision to give Article 21 an expanded scope following the Maneka Gandhi era is an interesting step in Indian constitutional law. According to the Supreme Court, Article 21 is the foundation of Fundamental Rights. It is claimed that treating a right as a basic right does not require it to be designated as such in the Constitution. The country must recognise new rights in light of recent political, social, and economic changes. The law evolves to meet societal requirements in its unending youth. One such right that has emerged as a result of expanding the scope of Article 21 is the right to privacy.

Although noting that the freedom to choose a life partner is a component of the right to privacy, the Supreme Court also stated that any State invasion of the right to private must comply with the following criteria:

- Legality, which assumes that laws exist.
- Need as it relates to a valid social necessity.
- Proportionality, which ensures a sensible connection between the goals and strategies used to achieve them.

1.8 PROPORTIONALITY

Some people can argue that marriage for the only purpose of conversion or conversion for the sole purpose of marriage is morally and ethically wrong. Yet, is it appropriate to make such conversion a crime?

Judge Indu Malhotra stated in the landmark decision *Joseph Shine v. Union of India*⁴ that "the component of public condemnation, visiting the offender with punitive consequences, and overriding individual rights would be justifiable only when the society is directly damaged by such behaviour. Where a crime carries a prison sentence, a stronger defence is needed. In order to respect the right of each person to make their own decisions, the State must adhere to a limited approach to the punishment of offences.

The Ordinance further ignores the need and justification for annulling such marriages and pressuring couples to make difficult decisions in order to experience something as intimate as marriage. Additionally, contrary to the customary practise in criminal law, which places the burden of proof on the prosecution and maintains the accused's innocence until proven guilty, Section 12 now places the burden of proof on the accused to establish that the marriage entered into by the two parties was not forced. This makes it easier for parents who disapprove and other family members to bring false accusations against a couple who rejects their parents' prohibition against marriage. A rule of this nature would also have the unintended consequence of functioning as a barrier to interfaith relationships. The illegal/forced conversion infraction is now a cognizable, non-bailable offence under Section 7. This indicates that a police officer may detain a suspected criminal for a number of days at the Court's discretion without obtaining a warrant.

⁴Joseph Shine v Union of India 2018 SCC Online SC 1676.

1.9 RIGHT TO CONSCIENCE:

The freedom to profess, practise, and spread one's religion is guaranteed by Article 25 of the Indian Constitution. Separate definitions for the right to conscience and the right to religion have also been established. This shows that it's possible to practise one's freedom of conscience while not practising any religion. A knowledge or moral judgement that opposes the transgression of previously acknowledged ethical norms and induces emotions of guilt if such values are violated is what the dictionary defines as conscience, according to the definition. As a result, one's ability to exercise their conscience cannot be restricted only because it deviates from the ethics and morals prescribed by their faith. The right to conscience cannot be curtailed if a person feels that a religious principle violates his or her ethical beliefs and if those ethical beliefs are legal and do not interfere with the exercise of another person's rights. How can a State place limitations on a person's right to a conscience that involves religious conversion, then, is the crucial question to examine in this situation.

1.10 RESTRICTION ON FREEDOM OF RELIGION:

Analysis of Article 25 of the Constitution, which protects freedom of conscience and the free profession, practise, and promotion of religion, is necessary to understand the significance of religious freedom in India. The right to freedom of religion is covered by this article in Part III of the Basic Rights. Article 25 should be one of the most fundamental rights that Indian citizens enjoy because it is covered under the section on Fundamental Rights. In fact, Part III also includes Article 32, remedies for enforcing rights granted by this section, giving individuals a special means of appealing to the Indian Supreme Court where there is a concern about the abridgement of a basic right. Furthermore, the preamble itself refers to the freedom of belief, faith, and worship, all of which are connected to the basic right to freedom of religion. A constitution's prologue is a reflection of the body of the text and can be interpreted as embodying the spirit of the whole thing. As a result, the right to freedom of religion need to be highly valued in Indian constitutional law.

1.11 CONSTITUTIONAL COMPETENCE:

State anti-conversion legislation are not intended to prevent forced conversion, even if it should be avoided. The Rev. Stanislaus upheld the constitutionality of anti-conversion laws. Yet because Orissa and Madhya Pradesh lacked the constitutional authority to enact their anti-conversion legislation, the Court shouldn't have taken that action. Because they are religious issues rather than issues of public order, anti-conversion legislation fall under the constitutional purview of the Union Government rather than the state governments. Likewise, the state of UP lacks the authority to enact such an Ordinance. The Supreme Court has determined that anti-conversion statutes are constitutional, although its justifications are not strong. They fall short of effectively defending the Court's decision in the Stanislaus case. Because they focus more on religion than on maintaining public order, these anti-conversion laws are unlawful. Because of this, Indian states lack the constitutional authority to enact these anti-conversion legislation.

1.12 VIOLATION OF INTERNATIONAL LAW:

Also, the Supreme Court found that the Indian Constitution largely upholds the principles of the International Declaration of Human Rights. The proclamation guarantees religious freedom, as was previously discussed in Section IV. The authors of the Indian Constitution gave international law a particular place, even though the UDHR is not regarded as binding on its signatories. Article 51 of the Indian Constitution makes it clear

that it upholds international law. Additionally, it might be argued that the Universal Declaration of Human Rights has reached the status of accepted international law. This means that even while the International Declaration of Human Rights does not have legal force of law, the values it upholds do. India has also ratified the International Covenant on Civil and Political Rights, which guarantees religious freedom and is binding on its signatories and was previously covered in Part IV. The right to conversion is explicitly recognised in international documents like the Universal Declaration of Human Rights (UDHR), the European Convention on Human Rights (ECHR), and even the International Covenant on Civil and Political Rights (ICCPR), and any law that restricts this freedom would be against international standards.

1.13 CONCLUSION

The Constitution guarantees freedom of choice, interfaith marriage, and religious conversion, all of which are said to be violated by the Ordinance. The burden of proof often rests with the prosecution in criminal proceedings. Nonetheless, under this Ordinance, it is the converted person's responsibility as well as the one who triggers the conversion in accordance with these laws to provide evidence. As a result, it is simple for family members and dishonest third parties to file fabricated complaints without supporting documentation to harass interfaith marriages.

The 30-day public notice period and objections mechanism required by the Special Marriage Act of 1954 could not be made mandatory, the Allahabad High Court said in the Salamat Ansari case. Also, the notice period tormented interfaith couples needlessly. The Supreme Court recently rejected the UP government's request to send the applications to the SC, hence the Allahabad High Court has not yet heard any petitions filed in opposition to the UP law. Nonetheless, this ruling against the SMA may indirectly have a significant impact on interfaith marriages. Interfaith couples may be able to choose the SMA path thanks to the court's decision that the notification period is not required. Hence, since conversion is the core component of the UP Ordinance, no conversion is necessary for the purpose of marriage. Second, the arguments made in opposition to the Ordinance might also utilise this as a legal precedent against any notice period and then cite this specific judgement to demonstrate that the UP Law is in fact unconstitutional.

v. Uncertainty: There is no doubt that there is some uncertainty in the legislation. The Indian judicial system is capable of communicating and interpreting laws. It is as obvious, though, that laws concerning love-jihad continue to be blatantly prejudiced against prosecuting Muslim youngsters. An artful euphemism for the perception that women are incapable of controlling themselves in social situations is the desire to protect women. The judiciary is concerned about the fact that the aforementioned ordinances support this idea of incompetence while also giving people a chance to target a certain community. Hence, the Ordinance simultaneously violates a number of fundamental rights.

The covert "protection" of women by the law must be another component of it. In the Joseph Shine case, the Supreme Court had previously declared that Article 15(3) of the Constitution does not permit the preservation of laws that "perpetuate damaging sexual stereotypes that consider women as inferior." Article 15(3), which permits the creation of particular measures for women and children, cannot defend laws whose fundamental justification is discrimination.

Nonetheless, this would not be the first time that such a statute had been used. A similar law, the Himachal Pradesh Freedom of Religion Act of 2006, was overturned by the Himachal Pradesh High Court in 2012. Contrary to what its name might imply, the Act prohibited religious conversions. All religious conversions

had to be announced 30 days in advance to a magistrate and publicly recorded. For individuals returning to their ancestral religion—mostly Hinduism—the government granted exceptions. The Act was invalidated by Judge Deepak Gupta because it violated the Constitution.

There are several issues with the UP Ordinance, 2020. Some are put correctly, while others are misplaced. There is little doubt that the Ordinance imposes a number of restrictions on those who convert to other religions, but the courts have not yet determined whether these restrictions constitute regulation or an unnecessary intrusion into people's lives.

The provisions of the Ordinance must also be viewed in the context of the Puttaswamy case's triple test, which states that any regulation that impacts the right to private must pass muster as being legitimate, necessary, and proportionate. Additionally, it must be determined if the Ordinance violates or merely limits the freedom of religion guaranteed by Articles 25 to 28 of the Constitution.

The UP government, on the other hand, is relying on the Rev Stanislaus judgement, which held that there is no fundamental right to convert and that the fundamental right to profess, practise, and propagate a religion can be reasonably restricted on the grounds of public order, morality, health, and other provisions of Part III. The judgement also mentions that unlawful conversion can lead to law and order issues. The conclusion of the same legitimate restriction based on public order is the Ordinance. However, numerous states have already passed laws that limit conversion, therefore the Ordinance is not the first to do so. Even while the Ordinance appears to violate a number of fundamental legal principles and judicial precedents, that fact alone does not render it unlawful. It will be viewed in light of the logical limitations that it attempts to impose. It has already been seen when the Supreme Court supported the legitimacy of laws created by the states of Odisha and Madhya Pradesh despite loud challenges to their validity. Yet, compared to these rules, the current Ordinance represents a significant improvement. These statutes were also deemed to be lawful in light of article 25. Articles 14 and 21 will also need to be upheld for the UP ordinance to be valid. The Stanislaus precedent can be useful, but it cannot be a legally binding precedent. The Allahabad High Court's ruling is also shocking to the Ordinance's legality since it deems the Special Marriage Act of 1954's public notice of marriage procedure to be incompatible with individual liberties and privacy. There is a comparable, more sophisticated provision in the Ordinance. Although though the High Court ruling will not be legally enforceable, it will nonetheless be very convincing because it originates from the same region as the UP Ordinance.

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