
CONSTITUTIONALITY OF STATE LEGISLATURE

CURBING CONVERSION FOR MARRIAGE

Manvi Talwar, O.P Jindal Global Law School

ABSTRACT

The evolving jurisprudence surrounding the states pervasive control has often been an area of question especially in the highly personal realm of conversion and marriage. This personal interplay of two facets of identity often create a dichotomy between the states role in regulating such beliefs and ensuring the right to personal autonomy. This research attempts to evaluate the constitutionality of legislature governing matters of religion and marriage that have been a point of contention for years playing into the ongoing trend of constitutional morality. Several state governments have taken an aggressive approach to curb conversion as a result of a majoritarian view into a change in religious beliefs. The impact of majoritarianism has often influenced legislature and this article attempts to identify if certain such legislature can stand the test of constitutionality. The paper further attempts to highlight the problems arising out of such legislature curbing voluntary conversion for marriage and how the courts may resolve such a dichotomy.

Introduction

State regulation of religious conversion has been a contentious issue in India as the state has attempted to curb any conversion by fraudulent means, and several states have in recent years enacted legislation to criminalize conversion for marriage. These laws are a direct assault on the basic institution of marriage that has been time and again subject to judicial review.¹ Conversion has become a national concern as a result of the love jihad campaign leading to a wave of state legislature curbing religious conversion for marriage.² This pertinent issue has led to restrictions on the right to freedom to choose and freely profess any religion in a virtually secular state such as India.

In India, the idea of secularism is constitutionally rooted and the freedom to profess, practice and propagate any religion is a fundamental right under Article 25.³ Alongside this, Article 26 provides the fundamental right to manage one's religious affairs.⁴ Article 25 encapsulates the right to conscience and freedom of choice of adults which is heavily under question when state laws restricting conversion by marriage are put in force. The constitution further provides the fundamental right to personal liberty under Article 21 which includes the right to privacy and autonomy which are also violated by the said state laws.⁵ There are several Law Commission Reports that further clarify the stance on conversion that needs to be analyzed to understand the implications of curbing conversion by free consent in India.⁶

Timeline of legislature restricting conversion for marriage

Colonial Roots of legislature curbing conversion in India

Conversion is not something unfamiliar to the Indian population and has been a norm since pre-colonial times. As a result of such practices, there have been laws limiting conversion dating back to the colonial times when several princely states such as Raigarh (now Madhya

¹ 42 Ahmad Skehteshamuddin & SK Ehteshamuddin Ahmad, *Marriage and the Issue of Conversion under Muslim Personal Law during the Colonial Period* 71.

² 27 Sangari Kumkum, *Gender Lines: Personal Laws, Uniform Laws, Conversion* 17 (1999).

³ India Const. art. 25 [Hereinafter COI].

⁴ Id. at art. 26.

⁵ KS Puttaswamy v Union of India, (2018) 1 SCC 809 (India).

⁶ Law commission of India, 235th Report on Conversion/reconversion to another religion – mode of proof, 2010 [Hereinafter Law Commission].

Pradesh) had legislation such as the Raigarh State Conversion Act of 1936.⁷ Under this act, any person wanting to convert had to submit an application before a designated officer.⁸

Post-independence several bills were introduced in the parliament to help curtail conversions such as the Indian Conversion (Regulation and Registration) Bill in 1954⁹ which focused on the registration of conversions, followed by the Backward Communities (Religious Protection) Bill in 1960,¹⁰ which aimed at placing a check on the conversion of Hindu's to other religions, however, none of these were passed due to a lack of parliamentary support.

Recent legislature restricting conversion for marriage

Despite the lack of central legislature curbing conversions, suspicions regarding forceful conversion led to the enactment of several state legislatures such as the Madhya Pradesh Dharma Swatantrya Adhiniyam (1968) an Act for the "prohibition of conversion from one religion to another by use of force or allurement or by fraudulent means and for matters incidental thereto."¹¹ This Act was a successor of the Raigarh State Conversion Act of 1936.¹²

The MP High Court upheld this law while the Orissa High Court found a very similar law, The Orissa Freedom of Religion Rules, 1989 Act unconstitutional taking the case to the Supreme Court. The Apex Court upheld the laws limiting conversion in *Stanislaus v. State of Madhya Pradesh*.¹³ However, this case does not address a personal law facet such as marriage, which the court did not comment upon, and hence the same principles would not extend to such laws governed by Articles 21 and 25 of the constitution.¹⁴

Inter-religious marriage has been a controversial subject in India, however, in recent years the question of conversion for marriage has created fear among the majority. The religious majority in India is Hinduism and there have been several accusations of attempting to reduce this majority through religious conversions for marriage. Against this backdrop, even a freely consented religious conversion by an adult capable to consent to marriage became a cause of

⁷ The Raigarh State Conversion Act, 1936.

⁸ Jenkins Laura Dudley, Legal Limits on Religious Conversion in India, *Law and Contemporary Problems* 71, no 2 (2008), 114 [hereinafter Legal Limits].

⁹ Indian Conversion (Regulation and Registration) Bill, 1954.

¹⁰ Backward Communities (Religious Protection) Bill, 1960.

¹¹ Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968.

¹² Raigarh State Conversion Act, 1936.

¹³ *Stanislaus v State of Madhya Pradesh*, (1977) 1 SCC 677 (India) [hereinafter Stanislaus].

¹⁴ COI, n 3, Art 21,25.

growing unease.¹⁵ This doubt is specifically objectionable with respect to the conversion of a member from the religious majority population (Hindus) to the second-highest religious population of Islam. This phenomenon has been portrayed by the media as “Love Jihad” in a narrative where Hidayah was being committed through trickery and fraud in furtherance of Islam.¹⁶ Justice Deepak Kumar Mishra has also categorically stated that the new state legislature is rather a majoritarian rule rather than a rule of law as it infringes upon the fundamental rights enshrined in the constitution.¹⁷

The spread of this fear of anti-majoritarianism led to the creation of several laws limiting religious conversion to the extent of marriage in several states through the legislature, these Acts are as follows-

1. Chhattisgarh Dharma Swantantraya Adhiniyam [Freedom of Religion] Act, 1968 (as amended by the Chhattisgarh Freedom of Religion (Amendment) Act, 2006)¹⁸
2. Gujarat Freedom of Religion Act, 2003 (as amended by the Gujarat Freedom of Religion (Amendment) Act, 2021)¹⁹
3. The Haryana Prevention of Unlawful Conversion of Religion Act, 2022²⁰
4. Jharkhand Freedom of Religion Act, 2017, along with the Jharkhand Freedom of Religion Rules, 2017²¹
5. Karnataka Protection of Freedom of Religion Act, 2022²²
6. Uttarakhand Freedom of Religion Act, 2018²³

¹⁵ See Legal Limits, *supra* note 8 at 112.

¹⁶ Charu Gupta, Hindu Women, Muslim Men: Love Jihad and Conversions, *Economic and Political Weekly* 44, no 51 (2009), 13–15.

¹⁷ Sebastian Manu, Anti-Conversion Laws Are Coming for Political Reasons than Actual Reasons: Ex-Judge Justice Deepak Gupta: Transcript of Interview, *Live Law*, 10 Dec 2022 <https://www.livelaw.in/interviews/anti-conversion-laws-are-coming-for-political-reasons-than-actual-reasons-justice-deepak-gupta-216324> [Hereinafter J Deepak Gupta].

¹⁸ Chhattisgarh Dharma Swantantraya Adhiniyam (Freedom of Religion) Act, 1968.

¹⁹ Gujarat Freedom of Religion Act, 2003.

²⁰ The Haryana Prevention of Unlawful Conversion of Religion Act, 2022 [Hereinafter Haryana].

²¹ Jharkhand Freedom of Religion Act, 2017.

²² Karnataka Protection of Freedom of Religion Act, 2022.

²³ Uttarakhand Freedom of Religion Act, 2018 [Hereinafter Uttarakhand].

7. Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021²⁴

8. Madhya Pradesh Freedom of Religion Act, 2021²⁵

9. Himachal Pradesh Freedom of Religion Act, 2019²⁶

Intervention by High Courts

Several High Courts have already addressed the constitutional validity of the said state amendments limiting conversion for marriage by analyzing the infringements to Articles 21 and 25 of the constitution of India. The Gujarat High Court stayed the operation of section 5 of the Gujarat Freedom Of Religion (Amendment) Act, 2021 as ultra vires to the constitution and further in a plea for removal of stay denied such plea.²⁷ The court referred to *Shafin Jahan v Ashokan* where the court held that the right to marry is integral to Article 21 and it can only be taken away through a fair just and reasonable substantial law.²⁸ The Gujarat High Court also found that there was a *prima facie* intervention on the right to choice of an individual under Art 21 of the constitution and hence passed an interim order restraining the same.²⁹

The Himachal Pradesh High Court in *Evangelical Fellowship of India and Anr. Vs. State* ruled that Section 4 of The Himachal Pradesh Freedom of Religion Act, 2006 was arbitrary and hence struck down as it was violative of article 14 of the constitution.³⁰ This section required notice to the district magistrate at the time of conversion which has been reinstated by the Himachal Pradesh Freedom of Religion Act, 2019 under Section 7.³¹ Based on the above ruling Section 7 of the 2019 act shall also be held to be ultra vires to the constitution.

The Madhya Pradesh High Court also barred the state government from implementing Section 10 of the Madhya Pradesh Freedom of Religion Act, 2021, which mandates a declaration of conversion to be made 60 days prior to the conversion before the district magistrate.³² The

²⁴ Uttar Pradesh Prohibition of Unlawful Conversion of Religion Act, 2021.

²⁵ Madhya Pradesh Freedom of Religion Act, 2021.

²⁶ Himachal Pradesh Freedom of Religion Act, 2019.

²⁷ Jamiat Ulama-E-Hind Gujarat v State of Gujarat, (2021) C/SCA/10304/2021 (India) [Hereinafter Jamiat Ulama-E-Hind Gujarat].

²⁸ *Shafin Jahan v Asokan KM*, (2018) 16 SCC 368 (India).

²⁹ Jamiat Ulama-E-Hind Gujarat, Supra note 22.

³⁰ *Evangelical Fellowship of India v State of HP*, (2013) 4 RCR (Civ) 283 (India).

³¹ Himachal Pradesh Freedom of Religion Act, 2019, § 7.

³² Madhya Pradesh Freedom of Religion Act, 2021, § 10.

court granted interim relief and directed that no one should be prosecuted under Section 10 as it found this section *prima facie* unconstitutional on the grounds of Articles 21 and 25.³³

Applicability of *Stanislaus v. State of Madhya Pradesh*

The Apex Court in *Stanislaus v. State of Madhya Pradesh* clarified that the right to religious freedom under Art. 25 does not include the right to convert a person to one's own religion. The court in this case focused on the "public order" exception provided to the freedom of conscience keeping in mind the criminal basis for fraudulent conversion, however, the same argument cannot be extended to conversion for marriage.³⁴ Criminalization of conversion through force, fraud or allurement has been held to be constitutional as it does not infringe on the right to privacy and bodily autonomy however marriage is an integral part of this right leading to a direct implication on Article 21 of the constitution.³⁵

The distinction between voluntary and involuntary conversion is pertinent in determining the constitutionality of conversion for marriage. Conversion for marriage when made as a voluntary decision by parties with the capability to consent is not the same as an involuntary conversion, the Supreme Court has also only noted the requirement to "curb such forced conversion, maybe, by force, allurement or fraudulent means," and has omitted the use of marriage in the same time and again.³⁶

Understanding this point of difference between involuntary and voluntary conversion makes it abundantly clear that the precedent set in *Stanislaus v. State of Madhya Pradesh* is correct but does not extend to conversion for marriage in the state legislatures in question.³⁷

Current writ petition before the Supreme Court

Citizens for Peace and Justice has filed a writ petition before the Supreme Court challenging the validity of the Uttarakhand Freedom of Religion Act, 2018³⁸ and Uttar Pradesh Prohibition

³³ Rev. Suresh Carleton & Ors v State of MP & Ors, (2022) MANU/MP/3711/2022 (India)[Hereinafter Suresh Carleton].

³⁴ *Stanislaus*, Supra note 13.

³⁵ *Lata Singh v State of UP*, (2006) 5 SCC 475 (India) [Hereinafter Lata Singh].

³⁶ *Ashwini Kumar Upadhyay v Union of India*, (2022) Writ Petition(s)(Civil) No(s). 63/2022 (India).

³⁷ *Stanislaus*, Supra note 13.

³⁸ *Uttarakhand*, Supra note 23.

of Unlawful Conversion of Religion Act, 2021.³⁹ As of January 2023, other state legislations with very similar provisions have been tagged to this writ petition to ensure uniformity and conformity across the country.⁴⁰ This petition focuses on several grounds such as the right to personal liberty and autonomy, freedom of choice of adults, right of conscience, and right against discrimination.⁴¹ This case is currently pending before a three-judge bench in the Supreme Court and will determine the constitutionality of state intervention into conversion for marriage.

Fundamental Rights violations

Violations of Art. 21 and 14

The constitution of India under Art. 21 provides the right to life and personal liberty which includes the right to privacy and its fundamental aspects such as marriage and family life as put forth by the Supreme Court in *R. Rajagopal vs State Of T.N*⁴² reaffirmed by the landmark Puttaswamy judgement.⁴³ The state laws in question have infringed on this right to privacy by requiring mandatory registration of conversion through a lengthy process. The Supreme Court has clarified that demographic requirements by acts such as the Special Marriage Act, 1954 are not violative of Art. 21 however it is important to notice that the mandated registration of conversion as per these state laws is not demographic or for the sake of record but rather an application process.⁴⁴ This registration is subject to an enquiry by the district magistrate regarding the “real purpose” of conversion as can be seen in Section 8(3) of the Uttarakhand Freedom of Religion Act, 2018.⁴⁵ This enquiry is violative of the right to privacy as it infringes on matters of personal importance such as marriage which is a constitutional violation as opined by the Apex Court in *Navtej Singh Johar v UOI*.⁴⁶

For any new law to pass the test on constitutionality under Article 21 it must be fair, just and reasonable, and must also pass the tests of reasonable classification and arbitrariness under

³⁹ Citizens For Justice And Peace v The State Of Uttar Pradesh, (2020) WP(Criminal) 428/2020 [Hereinafter Citizens for Peace and Justice].

⁴⁰ Zahid Maniyar, CJP's Amended Petition Allowed, CJP Also Challenges 'Love Jihad' Laws of 5 More States. CJP, (9 Mar 2023), <https://cjp.org.in/cjps-amended-petition-allowed-cjp-also-challenges-love-jihad-laws-of-5-more-states/>.

⁴¹ Citizens for Peace and Justice, Supra note 39.

⁴² R Rajagopal and Ors v State of Tamil Nadu and Ors, (1994) 6 SCC 632 (India).

⁴³ Puttaswamy, Supra note 5.

⁴⁴ Id.

⁴⁵ Uttarakhand, Supra note 23.

⁴⁶ Navtej Singh Johar v Union of India, (2018) 10 SCC 1 (India).

Article 14.⁴⁷ The state laws in question are manifestly arbitrary as they require notice of conversion in order to curb fraudulent conversions. Applying the reasonableness test we must realize that the State's aim here is to curb involuntary forceful conversions however restricting conversion for marriage does not help accomplish the same. This arbitrariness is supported by the findings of the Himachal Pradesh High Court.⁴⁸ Further, these state laws classify women as a “vulnerable class,” this classification with enhanced punishment is arbitrary in nature as it has no rational nexus to a legitimate objective.⁴⁹

It is also pertinent to pay heed to the Ex-Supreme Court Justice Deepak Gupta, who has clearly opined that in his judgement before the Himachal Pradesh High Court, he dealt with a similar provision and found it to be unconstitutional in nature. He believes that this judgement and conclusion is only strengthened by the Puttaswamy judgement as the state laws in question are a clear violation of the right to privacy and in turn Art. 21 of the constitution.⁵⁰

Violations of Art. 25

Article 25 of the constitution provides for the freedom of conscience and the state laws in question place sanctions on the right to freely practice a religion of choice after marriage.⁵¹ The Supreme Court has clarified that the right to convert is not encompassed within Article 25, however, this is in relation to conversion by forceful and fraudulent means on the basis of the exception of “public order” provided within the constitution itself.⁵² The court in the above case defined ‘disruption of public order’ as disrupting the community as a whole and not merely an individual.⁵³ Applying this definition to the exception under Art 25⁵⁴ it is evident that the exception doesn’t apply to freely consensual conversion by adults for marriage as it is not a matter of public order but rather a matter of personal liberty and privacy.⁵⁵ The Supreme Court has time and again reaffirmed the freedom of choice of adults that encapsulates how once a

⁴⁷ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248 (India) [Hereinafter *Maneka Gandhi*].

⁴⁸ *Suresh Carleton*, Supra note 33.

⁴⁹ Network Livelaw News, ‘Arbitrary Legal Sanction to Pervasive State Intrusion into Private Lives’: NFIW Challenges Anti-Religious Conversion Laws of Eight States in SC *Live Law*, 27 Jan 2023, <https://www.livelaw.in/top-stories/supreme-court-anti-religious-conversion-law-federation-of-indian-women-220015?infinitescroll=1>.

⁵⁰ J Deepak Gupta, Supra note 17.

⁵¹ COI, Supra note 3, Art 25.

⁵² Stanislaus, Supra note 13.

⁵³ South Asia Human Rights Documentation Centre, ‘Anti-Conversion Laws: Challenges to Secularism and Fundamental Rights 66’ (*Economic and Political Weekly* 43, no. 2 (2008)).

⁵⁴ COI, Supra note 3, Art 25.

⁵⁵ Puttaswamy, Supra note 5.

person reaches the age of majority they can marry any person of their choice and these state laws limit the ability of a major to willingly convert to marry a person of choosing.⁵⁶

Violations as a result of reverse burden of proof

The state legislatures restricting conversion for marriage place a reverse burden of proof on the accused to prove that the conversion “was not effected through misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage.”⁵⁷ The Supreme Court has time and again reaffirmed the importance of the presumption of innocence as held in *Gurbaksh Singh Sibia v. State of Punjab*.⁵⁸ It has further clarified that this presumption is a fundamental right under Articles 20 and 21 of the Constitution.⁵⁹ Section 106 of the Indian Evidence Act, 1872 states that the burden will only be shifted if any fact is within the personal judgement of the accused.⁶⁰ This however cannot be extended to legislature curbing conversion for marriage to permit reverse burden of proof as the conversion is not just a piece of personal knowledge.⁶¹

As per *Babu v State of Kerala*, any legislature reversing the burden of proof must stand the tests of Articles 14 and 21.⁶² Under Article 14 the test of arbitrariness needs to be passed and based on the available information the need for the reverse burden of proof is arbitrary in nature as the act itself mandates inquiry into the reason for conversion so there is no additional personal information that can be provided by the accused. Further, applying the balancing proportionality doctrine under Art. 21, there is a legality in place through these state laws, and there is also a legitimate state aim to curb involuntary conversions however restraining conversion for marriage fails the test of suitability as this voluntary conversion is antithetical to the idea of curbing forceful and fraudulent conversions.

Beyond this, it is important to understand that the shift in the burden of proof in exceptional cases is subject to the prosecution proving the foundational facts however as per these legislatures the accused is themselves expected to prove that the conversion was not effected

⁵⁶ Lata Singh, Supra note 35.

⁵⁷ Uttarakhand Freedom of Religion Act, 2018, § 13.

⁵⁸ Hema Mishra v State of UP, (2014) 4 SCC 453 (India).

⁵⁹ Maneka Gandhi, Supra note 47.

⁶⁰ Indian Evidence Act, 1872, § 106.

⁶¹ IV Gargi Pant, Constitutional Validity Of Reverse Onus Clause In Uttarakhand Freedom Of Religion Act, 2018 (2018) Issue V, Indian Journal of Law and Legal Research.

⁶² Babu v State of Kerala, (2010) 9 SCC 189 (India).

through fraud or marriage and establish the facts themselves.⁶³ The shift of onus is only after a *prima facie* case is established and hence this presumption cannot be entirely made at first instance as put forth by the state legislatures making it violative of Articles 20 and 21.⁶⁴

Causes for conversion for marriage

Conversion as an Alternative to the SMA

Conversion for marriage is often used as an alternative to the Special Marriage Act, 1954 (“SMA”) to ease the process of inter-faith marriage.⁶⁵ Inter-faith and inter-caste marriages have been promulgated by the constituent assembly and the same has been promoted through the SMA. Despite, this Act being in place the process that needs to be followed by an inter-religious couple in India to get their marriage registered opens them up to harassment and societal alienation.

Section 5 of the SMA requires couples to give a 30 day prior notice to the marriage officer who will then under Section 6 of the act publish the notice in the marriage notice book.⁶⁶ Any person may object to this marriage after the notice is published within the permissible 30 day period as prescribed under section 7.⁶⁷ This lengthy process makes it challenging for inter-religious marriages to take place when people are already facing social prosecution. The act further requires that at least one party to the marriage must be living in the area of registration for thirty days, and if both parties are not permanent residents of this area then the publication of notice must also happen in the marriage district where they are permanently residing. The notice opens the parties up to scrutiny from family members, where the family is against an inter-faith marriage the couple does not have the option to run away to get married which is why their only alternative is for one spouse to convert and get married under the personal law of the converted religion. The thirty-day period is often a time of cruelty against the couple by the community leading to religious persecution.⁶⁸

These problems are relied upon by the Allahabad High Court in *Safiya Sultana v State of UP*, where the court opined that the publishing of such notice should not be mandatory but rather

⁶³ Hanif Khan v. Central Bureau of Narcotics, (2020) 16 SCC 709 (India).

⁶⁴ COI, Supra note 3, Art 20,21.

⁶⁵ Special Marriage Act, 1954 [Hereinafter SMA].

⁶⁶ Ibid, § 5, 6.

⁶⁷ SMA, Supra note 65, § 7.

⁶⁸ SMA, Supra note 65.

optional as it leads to persecution on the ground of inter-faith and inter-caste marriages. In this case, the petitioner converted from Islam to Hinduism to marry a husband of her choice consistent with Hindu rituals, after the marriage her father did not allow her to live with her husband and hence a Habeas Corpus petition was filed through the husband. The petitioner claimed that she converted to Islam to avoid the lengthy process of the SMA that opened up the floodgates at her parental home for scrutiny.⁶⁹ The Allahabad High Court's judgement was extremely progressive in nature keeping in mind the right to privacy and personal liberty as prescribed under Article 21.⁷⁰

The new state legislatures criminalizing conversion for marriage would have held Safiya Sultana guilty of conversion on the grounds of marriage despite her conversion being fully consensual within all other legal provisions, opposing this Allahabad High Court judgement.⁷¹ The Safiya Sultana judgement is complimented by the Delhi High Court which put forward that "the unwarranted disclosure of matrimonial plans by two adults entitled to solemnize it may, in certain situations, jeopardize the marriage itself. In certain instances, it may even endanger the life or limb of one at the other party due to parental interference."⁷² This case was a situation where the executive attempted to overreach its jurisdiction to mandate compliance by inter faith couples which is often an area of concern surrounding laws on conversion.

The impugned acts in question also attempt to track and disclose interfaith matrimonial plans endangering the life or limb of the parties, the case further clarifies that this is a violation of the right to privacy under Article 21 which can be further interpreted to mean that these acts contravene the right to privacy of parties intending to get married under personal law by conversion.⁷³ The Punjab and Haryana High Court referring to the above case further opined that "the State is not concerned with the marriage itself but with the procedure, it adopts which must reflect the mindset of the changed times in a secular nation promoting inter-religion marriages."⁷⁴ The Acts restricting conversion for marriage are restricting inter-religious marriages by limiting the alternative available to the SMA and go against the primary principles of secularism.

⁶⁹ Safiya Sultana v State of UP, (2021) SCC OnLine All 19 (India).

⁷⁰ COI, Supra note 3, Art 21.

⁷¹ *Id*

⁷² Pranav Kumar Mishra v Govt of NCT of Delhi, (2009) SCC OnLine Del 725 (India).

⁷³ *Id*.

⁷⁴ A v State of Haryana, (2018) SCC OnLine P&H 7681 (India).

Conversions for polygamy

Fraudulent religious conversions for marriage have been an area of concern used as a loophole to commit bigamy or polygamy. If the state legislature aims to curb such conversions then this problem has already been tackled by the Supreme Court of India by *Sarla Mudgal v Union of India*⁷⁵ and *Lily Thomas v Union of India*.⁷⁶ The Apex Court in the above cases suggests a Uniform Civil Code and clarifies that if a married man wishes to convert to Islam and remarry, he must end the first marriage as per the divorce procedures under the personal laws of the first marriage. This restricts fraudulent marriages solely to commit polygamy and ensures that conversion for marriage is not solely for this purpose but rather is a genuine conversion hence the acts under scrutiny is not required to address this concern.

Law Commission report on conversion

235th Law Commission Report

The 235th Law Commission Report clearly states that “The reason for or propriety of conversion cannot be judged from the standards of rationality or reasonableness.” The report emphasizes how conversion is a personal experience and it is tough to objectively determine standards of conversion in order to prescribe legal conditions that need to be fulfilled.⁷⁷ The state legislation criminalizing conversion for marriage requires a determination of the reason for conversion despite clarity by the Law Commission that the reason for conversion cannot be judged by objective standards making the implementation of these provisions highly subjective. The same can be interpreted through David Pearl’s “Who is a Muslim,” where he suggests that conversion must have a subjective or objective standard.⁷⁸ He goes on to refer to the subjective interpretation used by the courts in *Resham Bibi v Khuda Baksh*, where the appellant renounces Islam and commits apostasy as a way to end her unhappy marriage. In this case, the court opines that conversion and religious beliefs are mental conditions and hence cannot be interpreted by objective tests as employed by the district court in attempting to make the appellant eat pork. This subjective application of the test for conversion is reaffirmed by

⁷⁵ *Sarla Mudgal v Union of India*, (1995) 3 SCC 635 (India).

⁷⁶ *Lily Thomas v. Union of India*, (2000) 6 SCC 224 (India).

⁷⁷ Law Commission, Supra note 6.

⁷⁸ Pearl D, Who Is a Muslim? 274 (1975) 17.2, Journal of Indian Law Institute.

the above law commission report.⁷⁹

The report further stresses how documentation or tracking of conversion should be optional as this is only for evidentiary proof and is in no way conclusive of the conversion.⁸⁰ The Acts in question actively require documenting all conversions and go one step further mandating an inquiry into conversions to objectively determine the reason behind the said conversion which is antithetical to the suggestions of the Law Commission Report.

International Law violations

The Law Commission report also highlights that the right to conversion is also reflected Under Art.18 in the Universal Declaration of Human Rights(UDHR)⁸¹ as a right to change religion.⁸² Article 16 of the UDHR also ensures the right to marriage crystalizing the need for freedom to convert for the purpose of marriage.⁸³ The Supreme Court in *Keshvananda Bharti v. State of Kerela* opined that the UDHR may not be legally binding but forms a basis for the understanding of Human Rights and hence can be referred to in order to comprehend the context of the Constitution of India.⁸⁴ Here Articles 16 and 18 of the UDHR can be used to infer the right to conversion and personal liberty as provided by Articles 21, and 25 of the Constitution of India.⁸⁵ Voluntary conversion is also protected under Article 18(1) of the International Covenant on Civil and Political Rights which India is a signatory.⁸⁶ In response to these violations, the United States Commission on International Religious Freedom has recommended the U.S. Department of State to designate India as a country of particular concern under the International Religious Freedom Act.⁸⁷

Central Government Intervention in conversion for marriage

Several ministers of state enacting the anti-conversion laws have publicly spoken about the

⁷⁹ *Mussammat Resham Bibi v. Khuda Bakhsh*, 1937 SCC OnLine Lah 419 (India).

⁸⁰ Law Commission Report, Supra note 6.

⁸¹ Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 Art 18 [Hereinafter UDHR].

⁸² Law Commission Report, Supra note 6, 7.

⁸³ UDHR, Supra note 81, Art 16.

⁸⁴ *Kesavananda Bharati Sripadagalvaru vs. State of Kerala*, (1973) 4 SCC 225 (India).

⁸⁵ COI, Supra note 3.

⁸⁶ International Covenant on Civil and Political Rights, 1976, Art 18(1).

⁸⁷ Luke Wilson, Issue Update: India's State-Level Anti-Conversion Laws, (2023) United States Commission on International Religious Freedom

<https://www.uscirf.gov/sites/default/files/2023%20India%20Apostasy%20Issue%20Update.pdf>.

need for such laws to curb forceful conversions, such as the Haryana Home Minister Anil Vij. Interestingly in his statement supporting the Haryana Prevention of Unlawful Conversion of Religion Bill,⁸⁸ he stressed that voluntary conversions will be allowed which is antithetical to the idea restraining voluntary conversion for marriage as propagated in the bill itself.⁸⁹ The Karnataka Home Minister Araga Jnanendra also made a strong statement supporting curbing fraudulent and forceful conversions however failed to explain the restraint on voluntary conversion for marriage.⁹⁰

In line with these state legislatures, several central ministers have expressed their support to anti-conversion laws, however, the Ministry of Law and Justice has clearly clarified that these are matters that fall within the state list under schedule seven of the Constitution of India.⁹¹ The same has been reaffirmed by the Ministry of Home Affairs during the Budget Session, 2021.⁹²

Conclusion

The constitutionality of several state legislations that have been passed in recent years criminalizing conversion for marriage is an area of question that the Supreme Court of India must address taking into account the right to privacy under Article 21 and the right to freedom of religion under Article 25. It is pertinent for the court to note the importance of the freedom to convert while accounting for social persecution faced by interfaith couples and the gaps in the Special Marriage Act. The state acts in question also raise the question of love jihad and Hindu majoritarianism which has been an area of concern in popular media which influences legislative decisions. These acts are violative of the fundamental rights enshrined in the constitution and should be subject to judicial scrutiny through the current writ petition before the Supreme Court of India.

⁸⁸ Haryana, Supra note 20.

⁸⁹ Web Desk, 'Now Religion Cannot Be Changed Only for Marriage': Haryana Notifies Rules under Anti-Conversion Law, Organiser, 21 Dec 2022, <https://organiser.org/2022/12/21/102184/bharat/now-religion-cannot-be-changed-only-for-marriage-haryana-notifies-rules-under-anti-conversion-law>.

⁹⁰ Yamini C S, BJP Ministers File Nomination Papers for Karnataka Assembly Polls, Hindustan Times, 14 Apr 2023, <https://www.hindustantimes.com/cities/bengaluru-news/bjp-ministers-file-nomination-papers-for-karnataka-assembly-polls-101681441278727.html>.

⁹¹ Poorvi Sharma & Purusharth Dixit, An Analysis of State Anti-Conversion Laws in India, 6229-6236 (2021) International Journal of Law Management & Humanities 4.

⁹² Tanya Arora, Anti-Conversion Laws: Are Forced Conversions a Myth or Reality? CJP, 3 Apr 2023, <https://cjp.org.in/anti-conversion-laws-are-forced-conversions-a-myth-or-reality/>.