

ANALYSIS OF THE UTTAR PRADESH PROHIBITION OF UNLAWFUL CONVERSION OF RELIGION ORDINANCE, 2020

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Abstract

There has been much furore over the recent '*The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020*'. While many have dubbed the Ordinance as unconstitutional on the face of it, some have credited it to address the socio-cultural challenges in our society. The critiques have placed several reservations with respect to the provisions of the Ordinance, like definition of religion, pre and post conversion declaration, burden of proof on the accused, etc. of which several appear to be true, while others, a misguided apprehension. The aim of the paper is to examine the various controversial provisions of the Ordinance and make an attempt to discuss the criticisms in light of the actual provisions.

- I. Introduction**
- II. Provisions of the Ordinance**
- III. Analysis of the controversial provisions of the Ordinance**
- IV. Conclusion**

I. Introduction

THE UTTAR PRADESH Prohibition of Unlawful Conversion of Religion Ordinance, 2020¹ (hereinafter referred to as 'the Ordinance') has been at the centre of every debate in the recent times. From being called as 'discriminatory against Muslims'² to 'a law akin to Hitler's regime'³, every fanciful words in the dictionary has been used for it. A careful reading of the Ordinance suggests that while many of these claims have some basis, others seem to be misguided apprehensions.

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¹ The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 (UP Ordinance No. 21 of 2020), available at: https://prsindia.org/files/bills_acts/bills_states/uttar-pradesh/2020/UP%20Prohibition%20of%20Unlawful%20Conversion%20of%20Religion%20Ordinance,%2020%20.pdf (last visited on January 07, 2021).

² Ralph Alex Arakal, "Protests planned in Bengaluru as Karnataka mulls 'love jihad' law", *The Indian Express*, Dec. 1, 2020, available at: <https://indianexpress.com/article/cities/bangalore/protests-planned-in-bengaluru-to-oppose-karnatakas-proposed-love-jihad-law-7074294/> (last visited on Dec. 31, 2020).

³ Brinda Karat, "Adityanath's New Hitler-Like Rule On Inter-Faith Marriages", *The Indian Express*, Nov. 25, 2020, available at: <https://www.ndtv.com/opinion/adityanaths-new-hitler-like-rule-on-inter-faith-marriages-2329867> (last visited on Dec. 30, 2020).

It has been argued that the law which aims to prohibit unlawful conversion from one religion to another is against the fundamental rights of Equality, Life and Religion.⁴ Further, it is stated that the provisions of the Ordinance tries to cast an unnecessary burden over the party as well as the person conducting such conversion to make a declaration before the district magistrate that such conversion is out of free consent and without any misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage.⁵ This declaration has to be made not only before conversion but also after conversion.⁶ Further, the burden of proof to prove that the inter-religious marriage is not affected by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage is on the person who caused the conversion.⁷ The effect of such rigmarole of procedure coupled with punishment on the ground of such loosely drafted provisions is that it dissuades people from getting into inter-religious wed-locks and sets up a deterrent against involving in any inter-religious marriages.

But, the Uttar Pradesh government has fiercely defended the Ordinance on the ground that there is no fundamental right to convert as held in the *Rev Stanislaus v. State of Madhya Pradesh*⁸ case. Also, the Ordinance does not restrict inter-religious marriage, it merely tries to regulate the unlawful aspect of it on the ground of public order.⁹ Further, it is claimed that only the marriages which are used as a masquerade to further the agenda of conversion or vice-versa is being made punishable.¹⁰ Moreover, the provisions of the Ordinance are religion-neutral and will be equally applicable to all communities.¹¹ Also, the argument of several anti-conversion laws already present is made stating that the UP government is not

⁴ P. Chidambaram, "A Fraud on the Constitution", *The Indian Express*, Dec. 7 2020, available at: <https://indianexpress.com/article/opinion/columns/constitution-law-modi-govt-p-chidambaram-7093190/> (last visited on Dec. 31, 2020).

⁵ N. C. Asthana, "Legal Howlers in UP's 'Anti-Conversion' Law Expose its Real Intent", *The Wire*, Dec. 3, 2020, available at: <https://thewire.in/communalism/legal-howlers-in-ups-anti-conversion-law-expose-its-real-intent> (last visited on Dec. 30, 2020).

⁶ *Supra* note 3, s.9.

⁷ *Id.*, s.12.

⁸ 1977 SCR (2) 611. It was a unanimous opinion of the constitution bench where two laws *viz*, the Madhya Pradesh Dharma Swatantraya Adhiniyam, 1968 and the Orissa Freedom of Religion Act, 1967 was under question. Both were declared valid.

⁹ Tejaswi Surya & Suyash Pande, "UP Ordinance On Religious Conversion Is Being Misconstrued: Here's Why It Will Pass Judicial Scrutiny", *Swarajya*, Dec. 21, 2020, available at: <https://swarajyamag.com/politics/up-ordinance-on-religious-conversion-is-being-misconstrued-heres-why-it-will-pass-judicial-scrutiny> (last visited on Dec. 30, 2020).

¹⁰ *Ibid.*

¹¹ *Ibid.*

the first to legislate on conversion.¹² Thus, the Ordinance merely tries to regulate the freedom of religion which it can on the ground of public order.

II. Provisions of the Ordinance

The Uttar Pradesh Prohibition of Unlawful Conversion of Religion Ordinance, 2020 contains 14 sections and 3 schedules. It aims to prohibit unlawful conversion from one religion to another by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage and for the matters connected therewith. Section 3 illustrates the same by prohibiting any conversion by use of misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage.¹³ However, the section exempts reconversion to one's immediate previous religion.¹⁴ Further, section 4 talks about persons competent to lodge FIR. It enables any aggrieved person apart from his brother/sister, parents or any person related by blood/marriage or adoption to file FIR against conversion which contravenes the provisions of section 3.¹⁵ The punishment for contravention of section 3 is provided under section 5 as between one to five years along with a fine of not less than fifteen thousand rupees.¹⁶ The section provides separate punishment in relation to the offence being committed against minor, women and people of scheduled caste and scheduled tribe.¹⁷ Further, mass conversion and subsequent conviction has been punished more severely.¹⁸ Section 6 mandates the courts to declare marriages for the sole purpose of conversion or vice-versa void on petition of either parties.¹⁹ Section 7 makes the offences under the Ordinance as cognizable, non-bailable and exclusively triable by the Court of Sessions.²⁰ Section 8 is one of the most controversial parts of the legislation which mandates the person who desires to convert his/her religion to give a declaration at least sixty days in advance to the District Magistrate or Additional District Magistrate that the decision to convert is of his own and

¹² Poojisri Ganesan, "UP not first to target 'love jihad', 2 states have law against forced conversions for marriage", *The Print*, Nov. 26, 2020, available at: <https://theprint.in/judiciary/up-not-first-to-target-love-jihad-2-states-have-law-against-forced-conversions-for-marriage/552033/> (last visited on Dec. 30, 2020).

¹³ *Supra* note 3, s.3.

¹⁴ *Ibid.*

¹⁵ *Supra* note 3, s.4.

¹⁶ *Supra* note 3, s.5.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Supra* note 3, s.6.

²⁰ *Id.*, s.7.

with free consent without any force, coercion, undue influence and allurement.²¹ A similar one month advance notice is also to be given by the person who performs conversion ceremony to District Magistrate or Additional District Magistrate.²² Upon receiving the information, the District Magistrate shall get an enquiry conducted through police as to the real intention, purpose and cause of such conversion.²³ Contravention of the provisions of section will not only entail the concerned conversion as illegal and void but also it is made punishable.²⁴ Further, section 9 deals with post conversion declaration. The converted person is required to send a declaration within sixty days of conversion to the District Magistrate who shall exhibit a notice with respect to it on the notice board.²⁵ Subsequently, the converted person has to appear before the District Magistrate within twenty one days of sending the declaration to establish his identity and confirm the contents of declaration.²⁶ The District Magistrate shall record the same in a register with any objection if notified.²⁷ Contravention of any of the provisions of section 9 has the effect of making the conversion illegal and void.²⁸ Section 10 provides for provision of punishment for contravention of any of the provisions of the Ordinance by any institution or organization.²⁹ Such punishment is inflicted upon the persons in charge of the affairs of the institution or organization. In addition to punishment, such institution or organization will not be provided any financial aid/grant by the State government.³⁰ Section 11 makes liability of person who actually did the act which constitute offence, persons who does or omits to do any act enabling other person to do such offence, every person who aids/abets other person in committing such offence, any person who counsels, convinces or procures other to do such offence same as that of person actually committing the offence.³¹ Section 12 is also one of the most controversial provisions of the Ordinance which shifts the burden of proof over the person who caused such conversion or person who facilitated such conversion to prove that such conversion was not effected by misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage.³² Lastly, section 13 and 14 talks about power to remove

²¹ *Id.*, s.8(1).

²² *Id.*, s.8(2).

²³ *Id.*, s.8(3).

²⁴ *Id.*, ss.8(5), 8(6).

²⁵ *Id.*, ss.9(1), 9(2).

²⁶ *Id.*, s.9(4).

²⁷ *Id.*, s.9(5).

²⁸ *Id.*, s.9(7).

²⁹ *Id.*, s.10(1).

³⁰ *Id.*, s.10(2).

³¹ *Id.*, s.11.

³² *Id.*, s.12.

difficulties in the Ordinance by way of order published in official gazette and power to make rules.³³

III. Analysis of the controversial provisions of the Ordinance

Was there a need to promulgate an Ordinance?

The Ordinance has been questioned on the point of being passed as an ordinance because an ordinance is promulgated only in cases when immediate action is required, also, it encompasses no debate or discussion like that of bill as time is of extreme importance. Article 213 of the Constitution empowers the Governor of a State to promulgate an ordinance if the Legislative Assembly of the State or when Legislative Council is there, both the Houses, are not in session and the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinance as the circumstances appear to him to require. There are three prerequisites to promulgate an ordinance - the state legislature should not be in session, circumstances should exist for promulgating an ordinance and those circumstances should warrant for immediate action. In the case of the present Ordinance, the state legislature was not in session, but were there circumstances for promulgating an Ordinance and more so, were these circumstances immediate enough to promulgate an Ordinance are some questions which the Uttar Pradesh government will have to answer because the UP Law Commission submitted its report in 2019³⁴ and there was no such instance that too many religious conversions or mass conversions were happening in the state. In fact, critiques have argued that inter-faith marriages constitute only 2 per cent of total marriages in India³⁵, which is too miniscule amount to affect any public order.

Though there is no convention of mentioning the immediate circumstances existing for promulgating an Ordinance nor the courts try to delve into it, but it has been held by the Supreme Court in *RC Cooper v. Union of India*³⁶ that the President's decision to promulgate ordinance could be challenged on the grounds that 'immediate action' was not required, and the ordinance had been issued primarily to bypass debate and discussion in the legislature. A

³³ *Supra* note 3, ss.13, 14.

³⁴ State Law Commission of Uttar Pradesh, "Eighth Report on Freedom of Religion" (November, 2019), available at: <http://upslc.upsdc.gov.in/MediaGallery/8thReport.pdf> (last visited on Jan. 10, 2021).

³⁵ Joanna Slater, "It was never easy being an interfaith couple in India. Now some states are making it harder.", *The Washington Post*, Nov. 26, 2020, available at: https://www.washingtonpost.com/world/asia_pacific/love-jihad-india-interfaith-marriage/2020/11/25/a8b33bea-2df9-11eb-9dd6-2d0179981719_story.html (last visited on Jan. 10, 2021).

³⁶ AIR 1970 SC 564.

similar tone was used by the Apex court in *DC Wadhwa v. State of Bihar*³⁷ that the legislative power of the executive to promulgate ordinances is to be used in exceptional circumstances and not as a substitute for the law-making power of the legislature. The same was also reaffirmed in *Krishna Kumar Singh v. State of Bihar*³⁸ that the authority to issue ordinances is not an absolute entrustment, but is “conditional upon satisfaction that circumstances exist rendering it necessary to take immediate action”. A similar rule would also apply in case of Governor. Moreover, a healthy convention should develop of mentioning the immediate circumstances existing to promulgate an Ordinance, as an Ordinance does not involve any debate and discussion like the normal law does.³⁹

Definition of the word ‘religion’

The definition of religion has been criticized to include not only traditional religions but also different faiths, thereby increasing the ambit of the Ordinance.⁴⁰ Due to this, the definition of religion is claimed to be vague and ambiguous. However, one forgets that one aspect of preventing conversion is from the view point of tribal people. These tribal people do not have any religion or follow animism, and often it is seen that missionaries and different groups target these gullible tribal people to convert them to their own religion.⁴¹ It is for this purpose that the definition of religion has been drafted to include not only traditional religion, but also several faiths.

Section 3

Further, under section 3 it is alleged that use of the word marriage without any qualification leaves a serious scope of mischief on the part of executive.⁴² It makes each and every marriage in which conversion is done illegal and punishable. However, if we read the section in totality it appears that the word marriage is not unqualified. The word ‘marriage’ has to be read with the primary clause that is “No person shall convert or attempt to convert either

³⁷ 1987 AIR 579.

³⁸ 2017 (2) SCJ 136.

³⁹ Madan B. Lokur, “An ill-conceived, overbroad and vague ordinance”, *The Hindu*, Jan. 2, 2021, available at: <https://www.thehindu.com/opinion/lead/an-ill-conceived-overbroad-and-vague-ordinance/article33475179.ece> (last visited on Jan. 10, 2021).

⁴⁰ *Supra* note 3, s. 2(h); “Religion” means any organised system of worship pattern, faith, belief, worship or lifestyle, as prevailing in India or any part of it, and defined under any law or custom for the time being in force.

⁴¹ The Print Team, “What UP govt’s new anti-conversion law says, and origin of ‘love jihad’”, *The Print*, Nov. 26, 2020, available at: <https://theprint.in/opinion/what-up-govts-new-anti-conversion-law-says-and-origin-of-love-jihad/552115/> (last visited on Dec. 30, 2020).

⁴² Chittarvu Raghuram, “Checks and balances needed”, *The Pioneer*, Dec. 12, 2020, available at: <https://www.dailypioneer.com/2020/columnists/checks-and-balances-needed.html> (last visited on Dec. 29, 2020).

directly or otherwise any other person from one religion to another by use or practice of”, thus, the whole sentence meaning that, “No person shall convert or attempt to convert any person by use or practice of marriage.” It is already known that any conversion for the sole purpose of marriage is void and illegal. Thus, the clause does no mischief but punishes marriage for the sole purpose of conversion. Also, every other word in the section involves a negative connotation to it like misrepresentation, force, undue influence, coercion, allurements or fraudulent means, it can be well concluded that marriage would also have some negative connotations to it. The rule of *ejusdem generis* also states the same. However, under section 3, reconversion to once immediate previous religion is not deemed to be conversion under the Ordinance.⁴³ The moot question which arises in light of this exception is that what if such reconversion is effected by misrepresentation, force, undue influence, coercion, allurements or by any fraudulent means or by marriage. Thus, the Ordinance leaves a scope of mischief to emanate in the name of reconversion.⁴⁴

Section 4

One of the most controversial provisions of the Ordinance is section 4 which allows any aggrieved person, brother/sister, parents or any other person related by blood, marriage and adoption to file an FIR against such conversion.⁴⁵ Now, in most of the cases it is the family members who are against conversion of an individual. This section allows the disgruntled family members to cause impediments in such conversion by lodging FIR in each case wherein the person and family are not on the same page. However, it has to be kept in mind that lodging an FIR will not annul the conversion, police will investigate into the fact whether such conversion was free or not. Further, investigation is time bound by way of section 57 and section 167 of the Criminal Procedure Code, 1973 and in normal cases it will not exceed beyond the period of 60 or 90 days as the case may be. But, registration of FIR under pressure, haste is not abnormal and chances of false FIR are not uncommon. There needs to be a check on such abuse. Moreover, being a cognizable and non-bailable offence not only FIR but arrest can also be made and indeed arrest has been made in few cases which could have been avoided. The suspect, in such cases, had to move to the High court for securing

⁴³ *Supra* note 3, s.3.

⁴⁴ Abhinav Chnadrachud, “UP’s ‘love jihad’ ordinance has chilling effect on freedom of conscience”, *The Indian Express*, Dec. 3, 2020, available at: <https://indianexpress.com/article/opinion/columns/up-love-jihad-law-religious-conversion-anti-conversion-law-7078370/> (last visited on Dec. 30, 2020).

⁴⁵ *Supra* note 3, s.4.

personal liberty. For instance, The High court of Allahabad in *Nadeem v. State of UP*⁴⁶ and Delhi High court in *Simran Sgar v. GNCT Delhi*⁴⁷ provided protection of personal liberty and protection from any coercive action against the individuals who sought relief from the Ordinance under scrutiny. Therefore, it has the potential of leading to unnecessary harassment of such individuals.⁴⁸ However, mere scope of misuse cannot be a ground of holding a law unconstitutional. The same has also been stated by the Supreme Court in *Justice K.S.Puttaswamy (Retd) v. Union of India*⁴⁹ case wherein the Court ruled that “a statute cannot be struck down on the ground that there is scope for misuse”.

Section 5

Section 5 makes provision for punishment for violation of section 3. It makes punishment severe in cases of contravention against minor, women or person belonging to scheduled caste or scheduled tribe.⁵⁰ It has been stated that by making such provision, the section appears to violate article 14 that is Right to Equality. The law has to treat everyone equally.⁵¹ But, in making this argument, one tends to forget article 15(3) and article 15(4) of the Constitution of India which enables the state to make special provisions for women, children and scheduled caste and scheduled tribe. Moreover, it is not unknown that scheduled caste and scheduled tribe people due to their socio-economic status in the society are targeted by fringe elements from other religion.⁵² Also, similar kind of provision is also present in other state's Anti-Conversion law.⁵³ Thus, a severe punishment is provided for offence against these categories of people.

Section 6

Section 6 provides that a marriage for the sole purpose of conversion or vice-versa will be declared void by courts. The provision is nothing but reiteration of the Supreme Court's

⁴⁶ Criminal Misc. Writ petition No. - 16302 of 2020.

⁴⁷ W.P.(Crl.) No. 2118/2020 and Crl. M.A. No. 17492/2020.

⁴⁸ Mariyam Alavi, “UP's Anti-Conversion Law 'Unconstitutional', Say 4 Former Judges”, *NDTV*, Dec. 18, 2020, available at: <https://www.ndtv.com/india-news/love-jihad-ups-anti-conversion-law-unconstitutional-say-4-former-judges-2340694> (last visited on Dec. 30, 2020).

⁴⁹ (2017) 10 SCC 1.

⁵⁰ *Supra* note 3, s.5(1).

⁵¹ Surbhi Karwa & Prannv Dhawan, “Uttar Pradesh's 'Love Jihad' Law Is Sexist, Unconstitutional”, *article14*, Dec. 3, 2020, available at: <https://www.article-14.com/post/uttar-pradesh-s-love-jihad-law-is-sexist-unconstitutional> (last visited on Dec, 29, 2020).

⁵² *Supra* note 36.

⁵³ Laura Dudley Jenkins, “Legal Limits on Religious Conversion in India” 71:109 *Law and contemporary problems* 109 (2008).

judgement in *Sarla Mudgal v. Union of India*⁵⁴ case and *Lily Thomas v. Union of India*⁵⁵ case. The catch in this provision is that the marriage can be annulled only on the petition filed by the parties and not relatives.⁵⁶

Section 7

Section 7 makes the offences under the Ordinance as cognizable and non-bailable. This is the first act to make such a provision. When this provision is coupled with the fact that any aggrieved person, brother/sister, parents, or any person related by blood, marriage and adoption can file an FIR, it leaves tremendous scope for harassment and victimisation of the converted individuals. Moreover, such provision of offences being made non-cognizable and non-bailable has not been made in the Draft bill. The draft bill is silent on the offences being made bailable/non-bailable and cognizable/non-cognizable.

Section 8

Section 8 is again one of the most controversial provisions of the Act. It provides for a pre conversion declaration to be made to the District Magistrate or Additional District Magistrate sixty days in advance that the concerned conversion is free and without any fraud, coercion, undue influence and allurement.⁵⁷ It is interesting to note that ‘marriage’ has not been included in the list effecting consent. Further, a similar one month advance notice is to be given by the person conducting the religious ceremony for conversion to the District Magistrate or the Additional District Magistrate of the place where such conversion is scheduled.⁵⁸ The District Magistrate after receiving information about conversion shall get an enquiry conducted through police as to the real intention, purpose, and cause of the proposed conversion.⁵⁹ Non-observance of this provision is made punishable and will also render such conversion void and illegal.⁶⁰ The provision has been condemned for making declaration mandatory in every case of conversion. The effect of this provision is that conversion *per se* is deemed to be without free consent and the person has to prove by declaration that his conversion is out of his free will. Further, mandatory police investigation as to the real intention, purpose and cause of conversion has the potential of unnecessary harassment of the

⁵⁴ AIR 1995 SC 1531.

⁵⁵ (2000) 6 SCC 224.

⁵⁶ *Supra* note 3, s.6.

⁵⁷ *Id.*, s.8(1).

⁵⁸ *Id.*, s.8(2).

⁵⁹ *Id.*, s.8(3).

⁶⁰ *Id.*, s.8(4).

converted person. Involvement of police has always been seen as disgrace in our traditional society, such provision is bound to raise several eyebrows in the society which will bring unnecessary stigmatization of the converted individual. These provisions have the potential to give state sanction and administrative support to the societal hostilities which persons intending to have inter-faith marriages face. Numerous petitions filed in High Courts seeking police protection for inter-faith couples denote the level of community threat and social ostracism which they have to face.⁶¹

Section 9

Section 9 talks about post declaration conversion. The converted individual is required to send a declaration within sixty days of conversion to the District Magistrate of the place in which such person ordinarily resides.⁶² The District Magistrate will exhibit a copy of such declaration on the notice board of the office till the date of confirmation.⁶³ The converted individual will have to appear before the District Magistrate within twenty-one days of sending declaration to establish his identity and confirm the contents of the declaration.⁶⁴ Subsequently, the District Magistrate will record the fact of declaration and confirmation in a register of which a certified copy will be given to the converted person.⁶⁵ This provision further cumpers the converted individual to send a post conversion declaration and subsequently get it confirmed by presenting himself to the District Magistrate. Not only this, his declaration is exhibited on the public notice board of DM's office. This public display of one's conversion has the potential to make a private affair a public ceremony. Moreover, there are chances of being targeted by fringe elements who do not even shy away from lynching or beheading people in the name of religion.

Section 11

Section 11 talks about the parties to the offence and puts several category of people on the same footing as that of people who actually committed the offence.⁶⁶ The problem in this section is that it punishes person who not only 'does', but also those who 'omits to do any act for the purpose of enabling or aiding any person to commit offense'. The main issue is in the

⁶¹ Manu Sebastian, "UP Ordinance Criminalizing Religious Conversion on Marriage is an Assault on Personal Liberty", *Live Law*, Nov. 30, 2020, available at: <https://www.livelaw.in/columns/up-ordinance-criminalizing-conversion-for-marriage-is-an-assault-on-personal-liberty-166575> (last visited on Dec. 30, 2020).

⁶² *Supra* note 3, s.9(1).

⁶³ *Id.*, s.9(2).

⁶⁴ *Id.*, s.9(4).

⁶⁵ *Id.*, s.9(6).

⁶⁶ *Id.*, s.11.

use of the word ‘omits’. How can an omission of one person enable or aid another to commit an offence? Enabling or aiding are always by way of active participation, by including ‘omits to do any act’ the Ordinance leaves a scope of mischief in the hands of executive. Further, section 11(iv) makes ‘counsel’ ‘convinces’ or ‘procures’ for the purpose of conversion as punishable. These are very mild words and making them punishable will be very hard to reconcile it with freedom to propagate once religion. How is one to propagate his religion if he/she is not allowed to even counsel or convince anyone?

Section 12

Section 12 is also one of the most scathingly criticized sections of the Act wherein the burden of proof as to whether a religious conversion was not effected through misrepresentation, force, undue influence, coercion, allurement or by any fraudulent means or by marriage, lies on the person who has caused the conversion and, where such conversion has been facilitated by any person, on such person.⁶⁷ Traditionally in a Due process model of Criminal Law, it is the prosecution who has to prove the case and an accused is presumed to be innocent until proven guilty. This traditional burden of proof is shifted on the accused only in circumstances of likelihood that the accused seems to be guilty or when the criminal act takes place within the four walls of house, and is never unqualified. There are several circumstances where the burden of proof is on the accused like cases of Dowry death⁶⁸, custodial rape⁶⁹, suicide of a married woman⁷⁰ *etc.* In each such case, the shifted burden of proof on accused is accompanied with specific circumstances like for dowry death, it must be shown that soon before her death such woman was subjected to cruelty or harassment in connection to a demand of dowry and the marriage was solemnized not later than seven years of death, further, in cases of rape caused in the custody of a police officer it must be shown that where sexual intercourse if proved and women agrees that she did not consent it will be deemed that there was no consent, also, in cases of abetment of suicide by a married woman, it must be shown that the suicide was within seven years of marriage and her husband or relatives of husband had subjected her cruelty. Nowhere is it unqualified like the present section. Moreover, the offences under the Ordinance are cognizable and non-bailable⁷¹ and even

⁶⁷ *Supra* note 3, s.12.

⁶⁸ The Indian Evidence Act, 1872 (Act No. 1 of 1872), s.113(b).

⁶⁹ *Id.*, s.114(a).

⁷⁰ *Id.*, s.113(a).

⁷¹ *Supra* note 3, s.7.

relatives can file an FIR⁷², thereby subjecting the converted person to unnecessary harassment.

Does the Ordinance violate several judicial precedents?

The Supreme Court in the case of *Shafin Jahan v. Ashokan K.M.* case⁷³ held that:

The right to marry a person of one's choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness.

The present Ordinance by involving provisions like pre-post conversion declaration, putting burden of proof on accused and allowing person even related by blood, marriage and adoption apart from parents and brother/sisters to file FIR allows an element of unreasonableness to creep in. Given the Supreme Court's emphasis on freedom to choose a life partner⁷⁴, it will be interesting to see the Court's reaction on the Ordinance which has been challenged before it. Further, in *Justice K.S. Puttaswamy (Retd) v. Union of India*⁷⁵, the Apex while stated that the right to choose a life partner was a facet of right to privacy, it went on to state that any invasion of right to privacy by State must meet a threefold requirement: 1) Legality, which postulates the existence of law. 2) Need, defined in terms of legitimate social need. 3) Proportionality, which ensures a rational nexus between the objects and the means adopted to achieve them. The law may fare on legality aspect, but the need would be questionable and proportionality even more so because the law makes every conversion per se illegal and casts a burden on the converted person to not only make a declaration, but also prove that such conversion was not unlawful. Further, the Ordinance also seems to be at loggerheads with the recent Allahabad High Court judgment in *Salamat Ansari v. State of UP*⁷⁶ case wherein the court stated that:

⁷² *Supra* note 3, s.4.

⁷³ AIR 2018 SC 357.

⁷⁴ *Soni Gerry v. Gerry Douglas*, (2018) 2 SCC 197, *Shakti Vahini v. Union of India*, (2018) 7 SCC 192 and *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475.

⁷⁵ *Supra* note 10.

⁷⁶ 2020 SCC OnLine All 1382.

We fail to understand that if the law permits two persons even of the same sex to live together peacefully then neither any individual nor a family nor even state can have objection to relationship of two major individuals who out of their own free will are living together. Decision of an individual who is of the age of majority, to live with an individual of his/her choice is strictly a right of an individual and when this right is infringed it would constitute breach of his/her fundamental right to life and personal liberty as it includes right to freedom of choice, to choose a partner and right to live with dignity as enshrined in Article 21 of the Constitution of India.

Though the judgment is of a High Court but it will have a high persuasive value considering the fact that it is from the same state as that of the Ordinance.

Similarly, the Lucknow bench of Allahabad High court in the recent case of *Smt. Safiya Sultana v. State of UP*⁷⁷ stating that laws should change with time and circumstances made issue of public notice under the Special Marriage Act, 1954⁷⁸ as directory. The court stated that:

The procedure of publication of notice and inviting objection to the intended marriage has to be such as to uphold the fundamental rights and not violate the same. In case the simplistic readings are held mandatory, they would invade in the fundamental rights of liberty and privacy from state and non-state actors. Thus, the court mandated that it shall be optional for the parties to the intended marriage to make a request in writing to the Marriage Officer to publish or not to publish a notice and follow the procedure of objections. In case they do not make such a request for publication of notice in writing, while giving notice, the Marriage Officer shall not publish any such notice or entertain objections to the intended marriage and proceed with the solemnization of the marriage.

Thus, the provision of publishing notice of marriage under the Special Marriage Act, 1954 was held to be intrusive of rights of liberty and privacy. The UP Ordinance has also a similar procedure, in fact, a more advanced procedure. The judgement is certain to be appealed in the Supreme Court, which will have to decide about both the procedure in the Special Marriage Act, as well of the Ordinance.

⁷⁷ HABEAS CORPUS No. - 16907 of 2020.

⁷⁸ The Special Marriage Act, 1954 (Act No. 43 of 1954).

Comparison of the Ordinance with the draft bill prepared by the Uttar Pradesh State Law Commission

The Uttar Pradesh State Law Commission in its report on ‘Freedom of Religion’⁷⁹ had prepared a draft bill titled ‘The Uttar Pradesh Freedom of Religion Act, 2019’⁸⁰ (hereinafter referred to as ‘the draft bill’) for the sake of reference after looking into several relating laws in different states. The Ordinance is modelled on that draft bill only. Majorly, the Ordinance follows the draft bill in letters and spirit; however, at some places it makes the Ordinance stricter when compared to the draft bill.

The draft bill does not talk anything about the offences under law being bailable/non-bailable or cognizable/non-cognizable, but the Ordinance makes the offences both cognizable and non-bailable⁸¹.

Also, the quantum of punishment for violation of section 3 has been made more severe. The draft bill prescribes a punishment of one to five years and with fine.⁸² No amount of fine is mentioned. However, the Ordinance prescribes the same punishment with a fine of not less than rupees fifteen thousand.⁸³ Also, punishment in cases of contravention against minor, women, SC/ST is maximum 7 years and fine by the draft bill.⁸⁴ But the Ordinance prescribes a maximum punishment of 10 years and fine not less than rupees twenty five thousand in such violations.⁸⁵ Further, specific punishment for mass conversion⁸⁶ is prescribed which is not in the draft bill. Further, additional provision for compensation to the victim by the accused up to rupees five lakh is made⁸⁷ and severe punishment is prescribed for repeat offenders⁸⁸ which are not in the draft bill.

⁷⁹ *Supra* note 36.

⁸⁰ Draft Bill The Uttar Pradesh Freedom of Religion Act, 2019, “Chapter XV of the Eighth Report on Freedom of Religion” (November, 2019), *available at*: <http://upslc.upsdc.gov.in/MediaGallery/8thReport.pdf> (last visited on Jan. 10, 2021).

⁸¹ *Supra* note 3, s. 7.

⁸² *Supra* note 82, s. 5.

⁸³ *Supra* note 3, s. 5.

⁸⁴ *Supra* note 82, s. 5.

⁸⁵ *Supra* note 3, s. 5.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

Under section 8 of the Ordinance, the time limit of sixty days is prescribed for giving declaration for pre-conversion⁸⁹, but the draft bill provides a time of one month in this aspect⁹⁰. Also, the punishment prescribed for violating pre-conversion norms is more severe in the Ordinance. For person getting converted, the draft bill prescribes a punishment of three months to one year and with fine⁹¹, while the Ordinance provides a punishment of six months to three years and fine not less than rupees ten thousand⁹². Further, punishment for religious converter is provided as six months to two years and fine by the draft bill⁹³ while the Ordinance punishes it with one year to five years and fine not less than rupees twenty five thousand⁹⁴. Also, time for post-conversion declaration is prescribed as one month in the draft⁹⁵ while the Ordinance provides a time of sixty days⁹⁶.

Thus, although the Ordinance provides a lenient time period for making pre and post conversion declaration, it is stricter than the draft bill in terms of quantum of punishment and making the offences under the law as cognizable and non-bailable.

Comparison of the Ordinance with the Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968 and Orissa Freedom of Religion Act, 1967 as upheld by the Supreme Court in Rev. Stainislaus case

The Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968⁹⁷ and the Orissa Freedom of Religion Act, 1967⁹⁸ (hereinafter referred to as ‘the Acts’) were enacted to deal with the increasing activities of Christian missionaries in the states of Madhya Pradesh and Orissa.⁹⁹ Both the Acts were made on similar lines and contain similar provisions. A comparison of the Uttar Pradesh Ordinance with the Acts shows that the Ordinance is significantly different from the previous legislations. The Ordinance provides for new provisions such as that of

⁸⁹ *Supra* note 3, s.8.

⁹⁰ *Supra* note 82, s.8.

⁹¹ *Supra* note 82, s.8.

⁹² *Supra* note 3, s.8.

⁹³ *Supra* note 82, s.8.

⁹⁴ *Supra* note 3, s.8.

⁹⁵ *Supra* note 82, s.9.

⁹⁶ *Supra* note 3, s.9.

⁹⁷ The M.P. Dharma Swatantrya Adhiniyam, 1968 (Act No. 27 of 1968).

⁹⁸ The Orissa Freedom of Religion Act, 1967 (Orissa Act 2 of 1968).

⁹⁹ Saumya Saxena, “Anti-Conversion Laws See Love as a Hate Crime”, *The Wire*, Nov. 29, 2020, available at: <https://thewire.in/rights/anti-conversion-laws-love-hate-crime-right-wing> (last visited on Jan. 01, 2020).

conversion for the purpose of marriage or vice versa has been prohibited¹⁰⁰, an FIR against conversion can be lodged by not only a person who is aggrieved but also the parents, brother/sister and people related with blood, marriage and adoption¹⁰¹, also, the burden of proof to show the conversion is legal is upon the person who caused the conversion¹⁰². Further, the Ordinance makes the process of conversion more prolonged by making a provision for pre-conversion declaration to the magistrate and subsequent police enquiry¹⁰³, also, the post-conversion declaration is made public by affixing the declaration of conversion in District Magistrate’s office notice board¹⁰⁴. The new Ordinance is stricter in sense that the quantum of punishment is more and the offence is non-bailable¹⁰⁵ in comparison to the Acts of Madhya Pradesh and Orissa. The following table encapsulates the difference between the Ordinance and the Acts of Madhya Pradesh and Orissa:¹⁰⁶

| Provision | Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968 | Orissa Freedom of Religion Act, 1967 | Uttar Pradesh Prohibition of Unlawful Conversion Ordinance, 2020 |
|------------------------|--|--|---|
| Bail | Bailable | Bailable | Non-Bailable |
| Police Inquiry | No police inquiry. | No police inquiry. | Police inquiry at pre-conversion stage. |
| Conversion by marriage | Does not cover marriage by conversion explicitly, but conversion by fraudulent means is made punishable. | Does not cover marriage by conversion explicitly, but conversion by fraudulent means is made punishable. | Conversion for marriage or vice-versa is made punishable explicitly. |
| Pre-Conversion | No pre-conversion declaration. | No pre-conversion declaration. | Pre-conversion declaration to the District Magistrate |

¹⁰⁰ *Supra* note 3, s.6.

¹⁰¹ *Id.*, s.4.

¹⁰² *Id.*, s.12.

¹⁰³ *Id.*, s.8.

¹⁰⁴ *Id.*, s.9.

¹⁰⁵ *Id.*, s.7.

¹⁰⁶ The table has been prepared by comparing the The M.P. Dharma Swatantrya Adhiniyam, 1968 (Act No. 27 of 1968); The Orissa Freedom of Religion Act, 1967 (Orissa Act 2 of 1968) and the Uttar Pradesh Prohibition of Unlawful Conversion Ordinance, 2020 (Ordinance No 21 of 2020).

| | | | |
|---|---|---|---|
| Declaration | | | |
| Quantum of punishment for unlawful conversion | One years or five thousand rupees fine or both and in cases of offence against minor, women SC's/ST's two years or ten thousand rupees or both. | One years or five thousand rupees fine or both and in cases of offence against minor, women SC's/ST's two years or ten thousand rupees or both. | Not less than one year and upto five years and fine not less than rupees fifteen thousand. In cases of offence against minor, women SC's/ST's not less than 3 years and upto 10 years and fine not less than rupees fifty thousand. |
| Burden of proof | On the prosecution | On the prosecution | On the person who caused such conversion |
| Effect of violation | Punishment but conversion valid | Punishment but conversion valid | Punishment and conversion is void and illegal |
| Who is made liable | Only converter | Only converter | Person who gets converted as well as the converter. |
| Reconversion | Not allowed and will have same effect as there was conversion | Not allowed and will have same effect as there was conversion | Allowed. An exemption has been carved for reconversion. |
| Prior Sanction for prosecution | Prior sanction of District Magistrate for prosecution | Prior sanction of District Magistrate for prosecution | No prior sanction. |

Thus, we see that the UP Ordinance is significantly different in way of being wider, stricter and makes the process of conversion lengthier by adopting more procedures to be followed.

IV. Conclusion

The UP Ordinance, 2020 have had its share of controversies. Some are rightly placed and some are misguided. There is no doubt that the Ordinance subjects the people converting to other religion under several rigours, but does it amounts to regulation or unnecessary intrusion in the life's of people is a question still to be decided by the courts. Further, the

provisions of the Ordinance has to be seen in light of the triple test as laid down in the *Puttaswamy case*¹⁰⁷ that for any law to have effect on the Right to Privacy it has to satisfy that it is legal, it is needed and it is proportional. Also, the effect of the Ordinance on the freedom of religion enshrined under article 25 to 28 of the Constitution has to be seen that whether it violates that freedom or merely regulates it. Further, the Ordinance appears to be in confrontation to several Supreme Court judgements¹⁰⁸ stating that right to choose one's partner is a fundamental right protected under article 21 of the Constitution. Though the Ordinance prohibits and punishes when conversion and marriage lacks free consent, the procedural requirement to inform the administration attracts article 21. The law, however, does not apply to those couples married under the Special Marriage Act, 1954 since it has its own procedure to verify the circumstances. People of different faiths wanting to marry each other can follow the procedure laid down by the Special Marriage Act, 1954 and that does not involve any pre-marriage enquiry by the district magistrate.¹⁰⁹ If the couple marry under the Special Marriage Act, 1954¹¹⁰, they just have to inform the marriage officer about the same, who shall get it published at any conspicuous place in his office and if no objection is received, the marriage can be solemnize at the end of thirty days period.¹¹¹ But, the recent decision of High Court of Allahabad has made the mandatory public notice of marriage under the Special Marriage Act, 1954 as directory *i.e.* only if the couple wants to make a public notice of marriage, then only the Marriage Officer can do the same. The judgment is certain to be appealed and the decision of Supreme Court is awaited in this regard.

On the other hand, the UP government has placed its reliance on the judgment of *Rev Stanislaus v. State of MP*¹¹² wherein the Apex Court ruled that there was no fundamental right to convert and the fundamental right to profess, practice and propagate a religion can be reasonably restricted on the grounds of public order, morality, health and other provisions of Part III¹¹³. The judgement also mentions that unlawful conversion can create law and order problems. The Ordinance is the culmination of the same reasonable restriction on the ground of public order. Furthermore, the Ordinance is not the first law to regulate conversion; same

¹⁰⁷ *Supra* note 10.

¹⁰⁸ *Lata Singh v. State of Uttar Pradesh*, (2006) 5 SCC 475; *Soni Gerry v. Gerry Douglas*, (2018) 2 SCC 197; *Shafin Jahan v. Ashokan K.M.*, (2018) 16 SCC 368).

¹⁰⁹ Subramaniam Swami, "Not just UP, other states too have 'love jihad' laws", *Sunday Guardian*, Dec. 5, 2020, available at: <https://www.sundayguardianlive.com/news/not-just-states-love-jihad-laws> (last visited on Jan. 08, 2021).

¹¹⁰ *Supra* note 80.

¹¹¹ *Id.*, s.7(2).

¹¹² *Supra* note 10.

¹¹³ The Constitution of India, art.25.

has already been done in many states.¹¹⁴ In a recent interview¹¹⁵, the present Chief Minister of UP said that nowhere in the law it is mentioned that it only applies to Hindus or Muslims. If a Hindu man marries a Muslim woman, then also the law will be the same, he stressed. Further, he stated that the law was brought to provide security to women across the state, adding nobody can misuse the law. The UP government seems to be confident about the Ordinance and is mulling over a law to govern religious places in the state of Uttar Pradesh. In fact, the State Law Commission has already started its work over it.¹¹⁶

Although, the Ordinance on the face seems to be against several fundamental principles of law and judicial precedents, but that alone does not make it to be unconstitutional. It will be seen in light of the reasonable restrictions which it tries to impose. It has already been witnessed before, when the law made by states of Odisha and Madhya Pradesh were challenged very boisterously to be invalid, the Supreme Court upheld their validity.¹¹⁷ But, the present ordinance is a considerable advancement over these laws. Moreover these laws were declared constitutional in the light of article 25. UP ordinance will have to pass the test of article 14 and article 21 as well. The precedent of *Stanislaus*¹¹⁸ can be useful but it cannot be a binding precedent. Moreover, the decision of Allahabad High Court¹¹⁹ is a jolt to the validity of Ordinance in sense that it has declared the procedure of public notice of marriage under the Special Marriage Act, 1954 as being not in line with rights of liberty and privacy. A similar, in fact, a more advanced provision is there under the Ordinance. Though the judgement is of High Court and will not be binding, but it will have a considerable persuasive value as it comes from the same state as that of the UP Ordinance.

¹¹⁴ *Supra* note 11.

¹¹⁵ India Tv News Desk, "UP Love-Jihad Law: It's not about Hindus or Muslims only, says CM Yogi Adityanath", *India TV*, Dec. 23, 2020, available at: <https://www.indiatvnews.com/news/india/up-love-jihad-law-unlawful-religion-conversion-bill-hindus-muslims-yogi-adityanath-exclusive-673505> (last visited on Dec. 30, 2020).

¹¹⁶ Atul Chandra, "SC Rebuke has its Effect: UP Mulls Law to Regulate Religious Places", *The Leaflet*, Jan. 9, 2021, available at: <https://www.theleaflet.in/sc-rebuke-has-its-effect-up-mulls-law-to-regulate-religious-places/#> (last visited on Jan. 10, 2021).

¹¹⁷ *Supra* note 10.

¹¹⁸ *Ibid.*

¹¹⁹ *Smt. Safiya Sultana v. State of UP*, HABEAS CORPUS No. - 16907 of 2020.