



## CRIMINALISATION OF CONVERSION FOR INTER FAITH MARRIAGES

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### Introduction:

A crime is essentially a wrongdoing against the society at large and not the individual alone, hence the victim alone cannot absolve the accused from his criminal liability and therefore comes the significant role of the State. The State regulates the conduct of the individuals to maintain social order and any wrong committed by any person having the potential of impacting the society adversely, it invites sanctions which are penal in nature, irrespective of the extent of the harm caused. To implement this penal policy of punishing the wrongdoer and deter the potential future offenders, the State has to strike a balance between the personal liberty of the offender on one hand and the interest of the society on the other hand.

Let us understand the term criminalization of an act. The State only has the power to criminalize any sort of behavior which is adversely affecting the society at large. The state can intervene in the freedom of an individual when an act has been made an offence by the way of criminalization. For eg, triple talaq, which was until the passing of ‘The Muslim Women (Protection of Rights on Marriage) Act, 2019’ was merely an act of an autonomous person and between the husband and wife but after this Act coming into force, it became a criminal Act. The Act was brought by the Government/ State to criminalize the act of the autonomous person as such act was not only affecting his wife but the society at large. The criminalization of any act has to be based upon valid reasons and backed by some guiding principles of criminalization.

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*Lacey states that “criminalisation charts human freedom, determining what people are not allowed to do, it affects justice, equality, legitimacy and monetary resources.” Similarly, Antony Duff, too, proffers, “criminalization is an account of the principles and values that should guide decisions about what to criminalize and about how to define offenses.”<sup>1</sup>*

In order to criminalize an act, thereby regulating and limiting the liberty of an individual, the State is guided by the four main “liberty-limiting principles” which are the following:

1. The harm principle
2. The principle of legal paternalism
3. The principle of legal moralism
4. The offense principle

### **The Harm Principle:**

This is a widely accepted principle and supported by JS Mill. According to him, *“the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others.”*

This principle basically means that State can intervene only to regulate the conduct which has the potential to cause harm or risk of harm to others in the society.

### **The Principle of Legal Paternalism:**

The idea of this principle is to criminalize self-inflicted harms. For ex- punishing for not wearing seat belt while driving etc. Because the state often knows the interests of individual people better than the persons themselves, legal paternalism appears to apply, with the state acting as a permanent protector of those interests in loco parentis.<sup>2</sup>

JS mill rejects this theory for limiting the liberty of an individual by the State.

### **The Principle of Legal Moralism:**

The essence of this principle is to criminalize the acts which are not as per the collective judgment of the society moral. For example- laws against prostitution are made as the act of prostitution is not considered moral as per the collective judgment of the society. In other words, it may be said that this principle favours the judgment of the majority and can lead to tyranny of the majority. HLA Hart, P Devlin have contributed in to this literature.

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<sup>1</sup> Prof. G.S. Bajpai, The ‘criminalization’ test, available at <https://www.deccanherald.com/opinion/main-article/the-criminalisation-test-762361.html> Accessed on 12th March 2022.

<sup>2</sup> Feinberg, Joel. “Legal Paternalism.” *Canadian Journal of Philosophy*, vol. 1, no. 1, 1971, pp. 105–124. *JSTOR*, www.jstor.org/stable/40230341. Accessed on 15th March 2022.

### **The Offence Principle:**

J. Feinburg has been the supporter of this principle and according to him, offense principle can be applied to those acts which are violating rights of other individuals and offense to them. For example- nuisance, by causing nuisance, the offender has not only caused disturbed mental state to the victim but that can be attributed to the conduct of the accused.

### **Criminalization of conversion for Inter Faith Marriages:**

Numerous definitions of religion have been provided before and still being provided, however, there is consensus that religion is a matter of personal preference, faith, or sets of beliefs. Furthermore, religion is defined by Webster's Comprehensive Dictionary as "a belief that binds man's spiritual essence to a supernatural being as involving a sense of dependency and obligation, as well as the feelings and activities that naturally result from such a belief.". Often religion is linked with history of one culture, nation thus it becomes essential to protect its salient features. India is diverse country with people of various class, creed and religion. Recently, a prominent Constitutional Scholar, Madhav Khosla wrote in his new book 'India's Founding Moment: The Constitution of a Most Surprising Democracy' that *"the challenge before the founders was to draft a charter that would capture and nurture the democratic impulse and forge a social contract that would tap into the genius of Indians and India."* Our constitution aptly covered this question of religion. It allowed its citizens to freedom to profess, practice and propagate any religion to all persons. Religious Conversion is a heated issue in India for long especially after its drafting committee president Dr Ambedkar himself converted to Buddhism with his 3 Lakh followers. Conversion in simple words means adoption of any other religion or of a set of beliefs by the exclusion of other i.e. renouncing one religion and adopting another. But there are various kinds of practices in regard to conversion, which include Voluntary Conversion, Forced Conversion, Conversion for marriage etc. It's worth noting that the word 'propagate' appeared in the final text with the suggestions of the Sub-Committee on Minorities (M. Ruthnaswamy), which used 'propagate' instead of 'conversion,' leaving the question of whether the right to propagate encompassed conversion open for dispute. Earlier, the word conversion was used in Article 25 by the constituent assembly. It is one of the interpretation methods of the court where constituent assembly debates were evaluated to read a provision. Does replacement of 'conversion' with 'propagate' in the Article 25 show intention of its makers that conversion was not envisaged in the constitution of India or giving liberal interpretation to it, conversion within restrictive environment is permissible?

In **Stainislaus Rev. v. State of M.P**<sup>3</sup>, The Supreme Court held that the right to propagate one's religion includes the right to communicate a person's beliefs to another person or to expose the tenets of that faith, but not the right to 'convert' another person to the former's faith because the

<sup>3</sup> 1977 SCR (2) 611

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latter is "equally entitled to freedom of conscience," which words come before the word "propagate." As a result, no one has a basic right to convert someone's religion against their will. Furthermore, the Court determined that the term propagate does not imply the right to convert.

The Supreme Court maintained the constitutionality of The Orissa Dharma Swatantrya Adhiniyam, 1968 (the Orissa Freedom of Religion Act) in the above-mentioned case. And it was challenged on the grounds that the Act's expanded interpretation of the phrases 'force, fraud, and inducement' goes beyond the boundaries of the Indian Penal Code, 1860, and that the Act infringes on the basic right granted by article 25. The act penalised conversions that occurred as a result of coercion, fraud, or seduction.

Therefore, wider definition of these terms were accepted by the Supreme Court as it affects public morality. What is new in recently passed Ordinance by the state of Uttar Pradesh titled as "THE UTTAR PRADESH PROHIBITION OF UNLAWFUL CONVERSION OF RELIGION ORDINANCE, 2020" and bill passed by State of MP is that marriage has also been placed in radar of authorities to find out it as means to convert. Does marriage deserve intervention of judicial oversight or high handedness of police personal is arguable question but fails before higher public interest.

*"Marriage is the very foundation of the civilized society. The relation once formed, the law steps in and binds the parties to various obligations and liabilities thereunder. Marriage is an institution in the maintenance of which the public at large is deeply interested. It is the foundation of the family and in turn of the society without which no civilization can exist"* observed by the Supreme Court of India in Sarla Mudgal case.<sup>4</sup> Marriage as an institution carries immense force to affect society at large, thus it becomes essential to prevent it becoming a force to commit illegality.

Identity or link with religion also become important as India provides affirmative action in favor of certain communities, and to avail benefit of such affirmative actions, people have often been found misusing conversion. In the abovementioned Sarla Mudgal Case, the Apex Court invalidated the marriage under Muslim law to frustrate the first marriage in Hindu religion.

It is not the only point of view, thus if a conversion is made for an unlawful benefit, it will not be considered valid. In the case of Lily Thomas and others vs. Union of India & Ors.<sup>5</sup>, the same reasoning was used. In Faheem Ahmed vs. Maviya @ Luxmi,<sup>6</sup> the Respondent converted to Islam in order to become a member of the Jama Masjid library. The court ruled that the conversion was illegal since it was done solely for the purpose of obtaining a wrongful gain. As a result, any conversion made for the purpose of gaining an unfair advantage would be declared invalid.

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<sup>4</sup> Sarla Mudgal & Ors. v. Union of India AIR 1995 SC 1531

<sup>5</sup> Lily Thomas v. Union of India, (2000) 6 SCC 224

<sup>6</sup> 178 (2011) DLT 671

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235th Legislative Commission<sup>7</sup> According to the Report on Conversion/Reconversion to Another Religion, anyone can convert their religion in good faith. Conversion does not occur simply by making an oral or written declaration. It is required to provide credible evidence of the intention to convert, as well as certain overt activities to carry out that intention.

### **Legal Principle Justifying conversion:**

Based on the above discussions, it can be said that criminalization of conversion for interfaith marriages can be based upon legal moralism and the harm principle. Although, while passing the legislation in UP, the government did not support it with any statistics or data compelling the introduction of such penal policy but time and again it has been said the hon'ble Chief minister, that there have been ever increasing complaints from women that they are being converted to other religion by marriage and that is why "marriage" has been put in the category of force, fraud, misrepresentation etc. in section-3 of the Act. This means that marriage in itself has been made an offense if conversion occurs thereafter. This can be justified from the perspective of principle of legal moralism and the harm principle; society respects women and any act which is attacking the dignity of women or harming her in any way is considered to be morally wrong by the collective conscience and such act not only bring down her dignity but causes harm to her. An analogy can be drawn between this Act and The Muslim Women (Protection of Rights on Marriage) Act, 2019. The latter was criminalized to protect women from tyranny of their husbands, similarly, the Act (in discussion) has been made to protect women from being compelled to renounce their own religion under the garb of marriage which ultimately causes harassment to the women.

### **Criticism of Criminalization of the conversion for Inter Faith Marriage:**

In *Shafin Jahan v Asokan KM*<sup>8</sup>, the Apex Court observed "*non-acceptance of her choice would simply mean creating discomfort to the constitutional right by a Constitutional Court which is meant to be the protector of fundamental rights. Such a situation cannot remotely be conceived. The duty of the Court is to uphold the right and not to abridge the sphere of the right unless there is a valid authority of law. Sans lawful sanction, the centripetal value of liberty should allow an individual to write his/her script.....*

Recently, in *Ramya v. State of Karnataka*<sup>9</sup>, the High Court held that "*It is well settled that a right of any major individual to marry the person of his or her choice is a fundamental right enshrined in the Constitution of India and the said liberty regarding the personal relationships of two individuals cannot be encroached by anybody irrespective of caste or religion*".

<sup>7</sup> Conversion/reconversion to another religion - mode of proof, Law Commission of India, Government of India, Report no. 235, dated December 2010

<sup>8</sup> *Shafin Jahan v. Asokan K.M.*, 2018 SCC OnLine SC 201

<sup>9</sup> *Dr. Ramya vs State Of Karnataka* on 16 November, 2017 CRL.P. NO. 9401/2016

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The Allahabad High Court recently in *Salamat Ansari And 3 Others vs State Of U.P. And 3 Others*<sup>10</sup> on 11 November, 2020, while quoting the abovementioned Hadiya judgment overruled the 2014 decision in *Noor Jahan Begum @ Anjali Mishra and Another vs. State of U.P. and Others*<sup>11</sup>, which was followed in *Priyanshi @ Km. Shamren and others Vs. State of U.P. and Another* in September 2020<sup>12</sup>.

Based upon few of the judgments referred above, criminalization of conversion for inter faith marriages can be challenged on the ground of autonomy. An individual has the fundamental right to marry a person of his/ her choice without interference from the state. The argument of legal moralism seems to be weak here as we can take example of homosexuality which still is considered to be immoral as per the large section of the society but the same has been decriminalized by the Apex court on the ground of Article-21 of the Constitution which provides right to life and liberty. More so, the marriage being a very personal affair has been kept away from the realms of criminal law barring few offences arising out of matrimonial disputes. Also, example of adultery can be taken which has been decriminalized and has been made a ground to seek compensation apart from being a ground to seek divorce. The intervention by the state in such an intimate affair is nothing but encroachment upon right to privacy of the individuals, which after the *Puttuswamy case*<sup>13</sup>, landmark judgment of the Apex Court has been made a fundamental right under Article-21 of the Constitution. Moreover, there is no such data or report substantiating the claim made by the different state governments which have either made the law or have passed the bill or contemplating the same. It would be pertinent to mention here that recently, the abovementioned case of *Priyanshi @ Km. Shamren and others Vs. State of U.P. and Another* was referred by the Hon'ble Chief Minister of Uttar Pradesh to support the legislation criminalizing conversion for inter faith marriages but soon thereafter, the High Court of Allahabad followed the Hadiya case and overruled that judgment in *Salamat Ansari case* stating that the earlier Judgment did not consider the facet of Article-21.

Marriage and religion, both are personal affairs of an individual and the individuals must have full autonomy over it. Not only such legislation is attacking the autonomy of an individual but also creating a dent in multicultural spirit of our country. India is the biggest democracy in the world and having right to freedom of expression is its essence.



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<sup>10</sup> CrI. Mis. Writ Petition No-11367 of 2020

<sup>11</sup> Writ C No. 57068 of 2014 (*Smt Noor Jahan Begum @ Anjali Mishra and Another vs. State of U.P. and others*) decided on 16.12.2014

<sup>12</sup> Writ C No. 14288 of 2020 (*Priyanshi @ Km. Shamren and others Vs. State of U.P. and Another*) decided on 23.09.2020.

<sup>13</sup> *K.S. Puttaswamy v. Union of India* (2017) 10 SCC 1