

**RELATIONSHIP BETWEEN THE FOUR 'LIBERTY LIMITING PRINCIPLES OF CRIMINALIZATION' AND THE PENAL POLICY OF THE STATE TO CRIMINALISE THE CONVERSION FOR INTER-FAITH MARRIAGES**

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**ABSTRACT**

*The socio-cultural milieu of Indic civilization has always been one steeped in diverse religious beliefs and practices. The drafters of the Constitution have made it a point to insert religious freedom as a cornerstone of Indian jurisprudence vide Article 25 which specifically provides for the freedom of conscience and the free profession, practice and propagation of religion 'equally' to all persons in India; and this principle branches out to varying degrees in terms of aspects such as freedoms to manage religious affairs, to pay taxes for the promotion of any particular religion, and the liberty to participate educational institutions imparting religious education or attend religious instruction in such an institution. The question that then arises is where do anti-conversion laws fit into such a constitutionally mandated landscape and further, can the criminalization of conversion for inter-faith marriages be considered an ordinance in consonance with S.R. Bommai case and the overarching spirit of Article 25 to Article 28 enshrined under Part-III of the Indian Constitution.*

**INTRODUCTION**

The socio-cultural milieu of Indic civilization has always been one steeped in diverse religious beliefs and practices. In fact, even though India has a majorly Hindu populace, there is enough historical and empirical data that suggests that while the country is indeed the birthplace of four prominent religions of the world namely, Hinduism, Buddhism, Sikhism and Jainism<sup>1</sup>, it is no way, in shape or form constrained into housing only those religions insofar as apart from Hindus, 13% Muslims, 0.8% Buddhists, 0.4% Jains and 2.3% Christians<sup>2</sup>, as well as other minor religions together constitute the Indian demographic. However, it is little to no question that much of today's Indic perspective is one that is adamantly rooted in the claim of a deep-seated Hindu identity. This notion has become increasingly egregious and absurd to the point where many even consider India as a Hindu nation state.

What is even more intriguing is the fact that such a formalist notion of needing to protect the fundamental Indian Hindu identity dates back to British colonial tactics in their policy of divide and rule. In fact, it was way back in 1930s and 1940s itself<sup>3</sup> that the British introduced laws restricting religious conversions in the Princely States as a safeguard against conversion by missionaries of the English Church<sup>4</sup>. That said, it may also be argued with perfect utility that drafters of the Constitution of independent India have made it a point to insert religious freedom as a cornerstone of Indian jurisprudence vide Article 25 which specifically provides for the freedom of conscience and

<sup>1</sup>Religion: 2001 Census Data, Office of the Registrar General & Census Commissioner, India, [http://censusindia.gov.in/Census\\_And\\_You/religion.aspx](http://censusindia.gov.in/Census_And_You/religion.aspx)

<sup>2</sup>World Population Review – India. Accessible at: <https://worldpopulationreview.com/countries/india-population>

<sup>3</sup>Jennifer R. Coleman, Authoring (In)Authenticity, Regulating Religious Tolerance: The Legal and Political Implications of Anti-Conversion Legislation for Indian Secularism 23 (Paper Presented to Penn Program on Democracy, Citizenship, and Constitutionalism Graduate Workshop, Sept. 13, 2007–08), <https://www.sas.upenn.edu/dcc/sites/www.sas.upenn.edu.dcc/files/uploads/Coleman.pdf>

<sup>4</sup>James Andrew Huff, Note, Religious Freedom in India and Analysis of the Constitutionality of Anti-Conversion Laws, 10(2) Rutgers J. L. & Religion 1, 4 (2009), <http://www.lawandreligion.com/sites/lawandreligion.com/files/A10S-6Huff.pdf>

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the free profession, practice and propagation of religion 'equally' to all persons in India; and this principle branches out to varying degrees in terms of aspects such as freedoms to manage religious affairs, to pay taxes for the promotion of any particular religion, and to attend religious instruction or religious worship in certain educational institutions. Therefore, Article 25 to Article 28 gives a distinct 'secular' color to the Constitution of India, and this principle of secularism is an integral part of the doctrine of basic structure of the constitution which, in *Kesavananda Bharati Sripadagalvaru & Ors. v. State of Kerala & Anr.*<sup>5</sup>, was held to be that which provides stability to the Constitution of India. It is blatantly evident, both statutorily and by sheer reasoning, that the spirit of Article 25 extends to the question of conversion as well. This was also a tenet of secularism that was specifically shielded from the mala fide actions of external political forces when, in *S. R. Bommai v. Union of India*<sup>6</sup>, the nine-judge bench of the Hon'ble Supreme Court of India held that secularism being a basic feature of the Constitution of India. It is quite pertinent to note that religion and politics, very often, cannot go hand in hand. What this entails is should the State follow unsecular policies or take courses of action that acts contrary to the constitutional mandate, then the State is functioning *ultra vires* to the Indian Constitution, because people of all faiths are equal under the Constitution and religion has no place in the matters of the State.

The question that then arises is where do anti-conversion laws fit into such a constitutionally mandated landscape and further, can the criminalization of conversion for inter-faith marriages be considered an ordinance in consonance with the aforementioned S.R. Bommai case and the overarching spirit of Article 25 to Article 28 enshrined under Part-III of the Indian Constitution?

The researcher has undertaken doctrinal study of various Legislations and Case Laws to derive a conclusion and to ascertain answers to the proposed research questions.

### RESEARCH QUESTIONS

1. Which principle of criminalization buttresses the criminalization of religious conversions as regards inter-faith marriages the most?
  2. Can ordinances such as the Uttar Pradesh Prohibition of Unlawful Religious Conversion Act, 2021 be justified under the spirit of the Constitution of India and its ancillary enactments as well as overall Indian jurisprudence?
1. Which Principle of Criminalization Buttresses the Criminalization of Religious Conversions as Regards Inter-Faith Marriages the Most?

In order to address question raised above, one must first clarify the four guiding principles of criminalization that have occupied a vital space in Indian jurisprudence, namely: Harm, Legal Moralism, Offense and paternalism.

#### a. Harm:

The most common interpretation of 'harm' as an element in dispute resolution is as a moral and legal concept, in that it is often defined as the loss of or an injury to a person's right, property, or physical or mental well-being<sup>7</sup>. However, this definition of 'harm' is grossly lacking jurisprudentially since it is far too superficial in its very conception. The concept of harm should instead be interpreted along the lines of the 'Harm Principle' postulated by John Stuart Mill in *On Liberty and Utilitarianism*<sup>8</sup>, wherein it was argued that since the ultimate aim is to maximize utility and happiness, the state must not infringe on an individual's freedoms as long as such enjoyment does not harm or interfere with another person's enjoyment of their freedoms. When applied in a rights-oriented

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<sup>5</sup>(1983) 4 SCC 225

<sup>6</sup>1994 SCC (3)

<sup>7</sup>"Harm", FindLaw Legal Dictionary; accessible at:

<https://dictionary.findlaw.com/definition/harm.html#:~:text=harm%20n,%3A%20injury>

<sup>8</sup> Mill, John S, Alan M. Dershowitz, and John S. Mill. *On Liberty: And Utilitarianism.*, 2008. Print.

approach as prescribed under Article 25 of the constitution of India, there are two ways in which the harm principle may be construed. On the one hand, it can be argued, quite obviously, that the act of criminalizing conversions is a violation on the part of the state where it is clearly infringing on an individual's freedom and enjoyment of the rights attributed to her or him under Article 25 to Article 28, which allows for the free profession, practice and propagation of religion. However, the language employed in Article 25 constitutes a conditional statement wherein it is explicitly provided that the rights and freedoms enshrined in the article may only be enjoyed subject to public order, morality, health, and other provisions of Part-III, i.e., the fundamental rights. This automatically justifies criminalization on the grounds that forced conversion or manipulative conversion for the sake of inter-faith marriages, mostly under duress, is not only an affront to public order and morality but also a violation of the harm principle insofar as it involves the prevention of an individual to enjoy her or his rights under Article 25. Therefore, the harm principle may be considered a paradox in and of itself in the present context of religious conversions.

**b. Legal Moralism:**

The fundamental tenet of the principle of legal moralism in the context of criminalization is that it involves laws that the acceptable and unacceptable behavior is largely based on society's cumulative judgment of whether those actions are moral or immoral. It essentially prohibits what is considered to be offensive to the majority of a community, or actions seen as tainting, delegitimizing, or destroying the very fabric of a society.

The most noteworthy example of legal moralism in the Indian context is undoubtedly the erstwhile criminalization of homosexuality under Section 377 of the Indian Penal Code, 1860 which explicitly rendered it illegal as it was "against the order of nature"<sup>9</sup>. However, this was overturned vide the ruling in *Navtej Singh Johar & Ors. v. Union of India through. Secretary Ministry of Law and Justice*<sup>10</sup> which read down and decriminalized the consensual sexual intercourse among consenting adults.

**In the present context of religious conversions, the application of the principle is two-fold:**

On the one hand, there is a strong impression that most, if not all, conversions are forced and often at the cost of the woman's autonomy. This is evident in the public's conception of misnomers such as 'love jihad' campaigns that are essentially mere propaganda tools employed to promote extreme Hindu politics in order to feed the public psyche with this notion that the fundamental Hindu identity is currently endangered. What is even more worrisome is the fact that the consensus around such notions seems to be steadily increasing right at the grass-roots level as was evident by the adverse reaction to the recent *Tanishq* advertisement<sup>11</sup> that attempted to promote the idea of interfaith couples. What may clearly be inferred from the extreme backlash that the company received as a consequence to posting that advertisement is a growing intolerant public sense of morality, especially targeting the Islamic populace of the country.

On the other hand, there is the issue of collectivizing the decision to convert in the first place which is an extension of the archaic notion that the decision to marry and whom to marry belongs not only to the individual but also that individual's family; as well as the notion that such a collectivized decision must be made in adherence to existing social norms and values, thereby fostering almost a legally moralistic mandate or obligation on the concerned individuals to make very personal decisions in a manner that is coherent with a society's morals; thereby stripping that individual of all morality, which is further exacerbated by the overarching patriarchal nature of such social values.

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<sup>9</sup>Section 377, Indian Penal Code, 1860.

<sup>10</sup>W. P. (CrI.) No. 76 of 2016

<sup>11</sup>Lakshmi Lingam, "How the Tanishq Advertisement Controversy Shows That We Live in Post-Truth Times", The Leaflet, October, 2020. Accessible at: <https://www.theleaflet.in/how-the-tanishq-advertisement-controversy-shows-that-we-live-in-post-truth-times/#>

**C. OFFENSE:**

The offense principle occupies a lower rung in the causal framework of a crime in that it is often argued that offending someone is less serious than harming someone, and therefore, the penalties imposed must be less grave than that which is imposed for causing harm. However, it is also the case that offence is somewhat of an amalgamation of principles guiding criminalization in that, while not definitively defined in broad legal terminology, it is often regarded as an “effect” of the commission or omission of an action that contribute persuasively to the criminalizing of such action or omission. It does this by demanding a moral or legal ground for enshrining an actor's behavior, and is in this regard an extension of legal moralism; whereby principle suggests a criminal prohibition would provide for an effective mechanism to restrict the commission of serious offences to a person who is not the actor, and it is likely a requisite element in ensuring that the moral convictions of a community or a society are efficiently safeguarded<sup>12</sup>. This principle, as ancillary to legal moralism, squarely justifies the criminalization of religious conversion in the present context by claiming that the sheer pervasiveness of supposed forced conversions for the sake of marriages is one that grossly offends community sensibilities as well as the larger social moral landscape. This principle of offence further vitiates relationships between civic individuals and fosters a rabid environment of hate speech and intolerance.

**D. PATERNALISM:**

Derived from the Latin word “*pater*” which means father and expressed via the Latin adjective “*paternalis*” which means fatherly<sup>13</sup>, Paternalism is a principle that involves policy prescriptions or practices that infringe on the personal freedoms and autonomy of a person (or class of persons, as the case may be) with a beneficent or protective intent<sup>14</sup>, often without that person’s consent, much like parents treat their children. While the intention might *prima facie* be benevolent, the means employed are nothing short of coercive. It is important to note that when applied to general civic contexts such as laws mandating helmets while riding motorcycles, seatbelts while drive automobiles, prohibiting swimming in the absence of a lifeguard, prohibition on drugs considered to be harmful, preventing minors from entering into contracts, allowing persons to get blood transfusions even if their religions prohibit them etc., state sponsored paternalism does yield positive results and can therefore be acknowledged as necessary in order to civilly commit people if they are a danger to themselves<sup>15</sup>. However, when applied to matters involving personal sovereignty such as sexuality, religion, and marriage for instance, the nature of such laws and the resulting effects of their application therein can be called into question. With regard to anti-conversion laws, it is a clear-cut infringement on personal freedoms and liberty under the guise of “knows what is better” rhetoric by the State machinery. This holier-than-thou attitude by the State is often justified under the pretext of protecting unassuming individuals from the clutches of religious fanatics who seek to forcefully proselytize their religion and forced it on the rest of the population. In fact, the scare tactics revolving around the “*love jihad*”<sup>16</sup> campaign is precisely an expression of such a pretext, while the “*ghar wapsi*”<sup>17</sup> campaign is the paternalistic redressal to such an alleged danger.

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<sup>12</sup>“Offence Principle, Law and Legal Definition”, US Legal Dictionary. Accessible at: <https://definitions.uslegal.com/o/offence-principle/#:~:text=The%20offence%20principle%20refers%20to,for%20enshrining%20an%20actor's%20behavior.&text=Additionally%2C%20the%20principle%20support%20that,be%20higher%20for%20causing%20harm.>

<sup>13</sup>Gerald Dworkin. "Paternalism". Stanford Encyclopedia of Philosophy.

<sup>14</sup>“Paternalism” Britannica. Accessible at: <https://www.britannica.com/topic/paternalism>

<sup>15</sup>“Paternalism”, Stanford Encyclopedia of Philosophy. Accessible at:

<https://plato.stanford.edu/entries/paternalism/>

<sup>16</sup>Gupta, Charu. “Hindu Women, Muslim Men: Love Jihad and Conversions.” Economic and Political Weekly, vol. 44, no. 51, 2009, pp. 13–15. JSTOR, [www.jstor.org/stable/25663907](http://www.jstor.org/stable/25663907).

Therefore, when considering which among the aforementioned principles is most perniciously employed in justifying and defending anti-conversion laws, the author suggests a term called “*Moralistic Paternalism*”<sup>18</sup>, which suggests a blend of Feinberg's social philosophy where he pointed to the excesses of state power over the individual<sup>19</sup> from a legal moralism point of view, as well as David Richard's presentation of criminalization<sup>20</sup> from a paternalistic perspective; and the resulting approach as employed by States in this regard is one where Paternalism and Legal Moralism are linked and each involves questions about the extent of individual liberty.

**Therefore, the principle that is most employed when criminalization policies are developed and invoked is an amalgamation of paternalism and legal moralism, or simply, *Moralistic Paternalism*.**

2. Can ordinances such as the Uttar Pradesh Prohibition of Unlawful Religious Conversion Ordinance, 2020 be justified under the spirit of the constitution of India and its ancillary enactments as well as overall Indian jurisprudence?

With what can be referred to as somewhat of a ‘*sarkari honour crime*’<sup>21</sup> the Uttar Pradesh Prohibition of Unlawful Religious Conversion Act, 2021 is a draconian piece of legislation against inter-faith relationships that completely violates the spirit of Article 25 of the constitution of India. While employing the aforementioned paternalism and legal moralism principles in order to dress such legislation in a pretty gown, the undeniable truth of the matter is that it is an assault against the autonomy of a woman.

The prominent arguments made in favor of such an ordinance are often arguments of effect, whereby it is opined that the ordinance does not effects and punishes inter-faith love marriages per-se, rather it is aimed at criminalizing and punishing forced conversions and marriages in the pretext of love marriages. However, this argument is baseless when tested on two grounds: one, if the intention was to genuinely protect the woman from victim to forced conversion, then why does the Ordinance allow the parents, brother, sister, or any other relation by blood, marriage, or adoption to lodge an FIR and not exclude the right to file an FIR to the woman alone<sup>22</sup>; and two, as for marriage or cohabitation based on a false identity, Indian law expressly provides, “*Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*”<sup>23</sup> Therefore, why does a new Ordinance of this nature needs to be introduced when the Indian legal machinery is already well-equipped to deal with such issues?

Moreover, any marriage in which the consent is because of coercion would be declared as void under various marriage laws as well, as the free consent of the parties is essential to constitute a valid marriage. A similar

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<sup>17</sup>Hafeez, Mahwish. “The Anatomy of the Modi Phenomenon – How Should Pakistan Deal with It?” *Strategic Studies*, vol. 35, no. 4, 2015, pp. 61–79. JSTOR, [www.jstor.org/stable/48536000](http://www.jstor.org/stable/48536000).

<sup>18</sup>As defined by Gerald Dworkin.

<sup>19</sup>Dworkin, Gerald & Feinberg, Joel. (1989). *Harm to Others: The Moral Limits of the Criminal Law*, Vol. I. *The Philosophical Review*. 98. 239. 10.2307/2185284.

<sup>20</sup>Galloway, Donald. *The University of Toronto Law Journal*, vol. 34, no. 1, 1984, pp. 100–115. JSTOR, [www.jstor.org/stable/825450](http://www.jstor.org/stable/825450).

<sup>21</sup>Kavita Krishnan, “UP’s “Love Jihad” Ordinance – A Sarkari Honour Crime”, *The Leaflet*, December, 2020. Accessible at: <https://www.theleaflet.in/ups-love-jihad-ordinance-a-sarkari-honour-crime/#>

<sup>22</sup>*Ibid.*

<sup>23</sup>Section 493, *The Indian Penal Code*, 1860.

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contention would apply in the cases where consent is sought under false pretenses. Also, for any situation where a person enters into marriage with false identity attracts the penal provisions of *cheating* and *impersonation*.<sup>24</sup>

Such an ordinance does nothing but incentivize the infliction of legally-protected violence against inter-faith couples and, more specifically, against the Hindu women who are in a relationship and willing to marry Muslim men. It is important to note that such an ordinance is not only a transgression of Article 25 of the constitution of India but also of the right to privacy enshrined under Article 21, the protection of the right to life and personal liberty; as upheld by the Hon'ble Supreme Court of India in *Justice K. S. Puttaswamy (Retd.) v. Union of India*<sup>25</sup>. The privacy judgment held that the fundamental right to privacy inculcates in itself the right to marry and also, the right to decisional autonomy. Furthermore, in the recent case of *Shafin Jahan v. Ashokan K.M. & Ors.*<sup>26</sup> the Hon'ble Supreme Court remarked that the only consideration which was relevant in the case was that whether Hadiya took the decision to convert and to marry voluntarily.

- **The Racial Code of Virginia: Loving v. Virginia**<sup>27</sup>:

The Text of Virginia Code, Sections 20-59, incorporated detailed provisions prohibiting inter-racial marriages irrespective of the consent of the parties. In 1967, when Richard Loving challenged the ban on inter-racial marriages in the United States of Supreme Court. The US Supreme Court eventually struck down the Virginia's law upholding the strong jurisprudence of personal liberty against intrusive state intervention. These laws to prohibit marriages between blacks and whites (inter-racial marriages) in the United States ('anti-miscegenation') were based on the foundation of racial discrimination.

- **Evangelical Fellowship of India & Anr. v. State of Himachal Pradesh & Anr.**<sup>28</sup>:

The Hon'ble High Court of Himachal Pradesh had struck down a similar provision of The Freedom of Religion Act which required that a person should notify of a religious conversion to the concerned Magistrate 30 days in advance and struck down Section 4 of Himachal Pradesh Freedom of Religion Act, 2006 and Rule-3 of Himachal Pradesh Freedom of Religion Rules, 2007 as being violative of Article-14 of the Indian Constitution. The 2-judge bench relied on the decisions in *Rev. Stanislaus v. State of Madhya Pradesh*<sup>29</sup> and *Satya Ranjan Manjhi & Anr. v. State of Orissa & Ors.*<sup>30</sup>

- **Salamat Ansari & Ors. v. State of U.P. & Ors.**<sup>31</sup>:

Recently, a 2 judge-bench of the Hon'ble Allahabad High Court specifically held in context of inter-faith marriages that:

*"Right to live with a person of his/her choice irrespective of religion professed by them, is intrinsic to right to life and personal liberty."*

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<sup>24</sup>Section 416, The Indian Penal Code, 1860

<sup>25</sup>(2017) 10 SCC 1

<sup>26</sup>2018 SCC Online SC 343

<sup>27</sup>388 U.S. 1 (1967)

<sup>28</sup>Decided on 30/08/2012, High Court of Himachal Pradesh

<sup>29</sup>1977 SCR (2) 611

<sup>30</sup>AIR 2003 Ori 163

<sup>31</sup>Crl. Mis. Writ Petition No-11367 of 2020, delivered on 11<sup>th</sup> Nov' 2020.

**CONCLUSION**

Locke's Social Contract Theory<sup>32</sup> posits that the only right that people surrender in order to enter into civil society and reap its benefits is the right to punish people for violating their own or others' rights<sup>33</sup>. What this essentially means is that barring the right to be a vigilante in the above-mentioned context, all other rights and freedoms are completely enjoyed by an individual as a member of a civil society. What is more pertinent to note is that even when the right to punish violations of their own or others' rights is concerned, the same is ceded to the government only based on two conditions: one, it cannot take away from us any rights we would have in the state of nature; and two, the government can only punish for things that deserve punishment<sup>34</sup>. This means that the government owes a contractual obligation to its people to ensure that their rights are protected. Thus, any such law will jeopardize the decision making of the consenting adults, in particular the women, and will definitely be an uncalled intrusion in the private sphere of the individual. It will give the State an unfettering power to intrude into the private space of any consenting couple in garb of such laws. It will lead to unnecessary harassment of inter-faith couples. It is pertinent to note that neither the family, nor any so called public spirited agency, nor the State and not even the Courts should interfere in the private sphere of decisional autonomy of consenting adults as long as there is no coercion.

In the present context, it is clear that the enactment of such anti-conversion laws is a clear violation of the social contract theory between the government and its people; whereby the government is not only violating personal rights and liberties granted by the state of nature but also punishing inter-faith couples who do not deserve to be punished by passing draconian legislations.

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<sup>32</sup>Locke, John, 1632-1704. *The Second Treatise of Civil Government and A Letter Concerning Toleration*. Oxford: B. Blackwell, 1948.

<sup>33</sup>Miles Kimball, "The Social Contract According to John Locke" *CONFESSIONS OF A SUPPLY-SIDE LIBERAL* Blog, June, 2018. Accessible at: <https://blog.supplysideliberal.com/post/2018/6/17/the-social-contract-according-to-john-locke#:~:text=John%20Locke's%20version%20of%20social,right%20to%20be%20a%20vigilante.>

<sup>34</sup>*Ibid.*